

**TOWARDS JUSTICE FOR SELF-REPRESENTED ACCUSED PERSONS IN
GHANA**

BY

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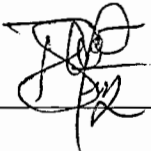
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DECLARATION

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ABSTRACT

Self-representation in adversarial criminal proceedings raises concerns relating to procedural equality, fair trial and ultimately justice. The practice of self-representation is recognised as a legitimate means of accessing the court and is liberally allowed in countries adherent to the adversarial philosophy of adjudication. Generally, it operates as a liberty-right allowing accused persons to opt to represent themselves, if they so desire. Beyond this right-theory, it is also a procedural phenomenon influenced by socio-economic factors.

By its operational design, the adversarial criminal trial envisages a legal contest, which fundamentally relies on legal representation and assistance to realise fully its values of procedural equality and fair trial. The governing legal framework of criminal prosecutions designed under international law and implemented in the Ghanaian domestic legal regime is chiefly premised on the assumption that the parties will be legally represented. Sparse attention is given to the suitability of the procedural and evidentiary frameworks of the adversarial criminal trial to proceedings involving self-represented accused persons. In practice, accused persons unskilled in the law are procedurally disadvantaged in adversarial proceedings, especially when compelled to navigate the complex and unfamiliar laws and procedures governing the trial, without legal assistance.

This analytical research examines the concept and practice of self-representation in adversarial criminal proceedings in Ghana and assesses the legal system's disposition, to guarantee fair trial and access to justice for unrepresented accused persons. As a normative legal study, it evaluates the legal rules, principles and legal doctrines on self-representation within the framework of adversarial criminal proceedings. It also explores and develops legal prescriptions in addressing the practical procedural problems associated with trials without defence counsel. The findings of the study conclude that securing justice for self-represented accused persons in adversarial proceedings requires adapting the procedural legal framework to the values of procedural equality and trial fairness. This procedure in turn requires a number of legislative, judicial, institutional and policy interventions with the aim to safeguard the beneficial interests and rights generally enjoyed by accused persons acting with the assistance of counsel, for self-represented accused persons.

Keywords: Adversarial system, Accused person, Self-representation, Criminal procedure, Procedural equality, Fair trial

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DEDICATION

To my parents, my better half, Ernestina Tufuor, and my children, Teneisha C. Tufuor and Sheryl A. Tufuor.



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LIST OF ACRONYMS AND ABBREVIATIONS

ABA	American Bar Association
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
BNI	Bureau of National Investigations
CACS	Court-Assigned Counsel Scheme
CBO	Community-Based Organisations
CID	Criminal Investigative Department
COA	Criminal Offences Act
COOPA	Criminal and other Offences (Procedure) Act
DPP	Director of Public Prosecutions
E.I	Executive Instruments
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECsHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EOCO	Economic and Organised Crimes Office
FIC	Financial Intelligence Centre
GBA	Ghana Bar Association
GCP	Ghana Code for Prosecutors
GPS	Ghana Police Service
GLAS	Ghana Legal Aid Scheme
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for former Yugoslavia
IMT	International Military Tribunal
J	Justice of the High Court
JA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
MOJAGD	Ministry of Justice and Attorney-General's Department
NGO	Non-Governmental Organisations
PCA	Prisoner's Counsel Act
SCSL	Special Court for Sierra Leone
TTA	Treason Trials Act
UN	United Nations
UNBPRL	United Nations Basic Principles on the Role of Lawyers
UNDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
USIP	United States Institute for Peace
WWW	World Wide Web



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CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The plight of self-represented accused persons in Ghana raises significant questions about the universal guarantee of trial fairness in an adversarial system of criminal adjudication. In every modern liberal democracy, the guarantee of delivering justice on the basis of equality of all persons appearing before the court accounts not only for the fairness of its proceedings but also for the public confidence reposed in the judiciary.¹ All democracies literally grant parties to legal proceedings, full access to the courts, either by themselves or through legal representation. In criminal matters, human rights law guarantees to all accused persons the right to defend themselves in person or through legal representation of their own choosing.² The Constitution of the Republic of Ghana³ enacts both the right to counsel and the right to self-representation in criminal cases. It provides guarantees as one of the minimum guarantees of fair trial 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.”⁴

In all criminal trials, the aforementioned guarantees constitute the two alternatives but not exclusive modes of accessing the courts in defence of criminal charges.⁵ One procedural reality is however associated with criminal prosecutions in the adversarial system: wilfully choosing to represent oneself, or suffering the fate of having to represent oneself before the court due to one’s inability to secure counsel, is deemed as taking a suicidal path in presenting a defence to a criminal charge.⁶ Reason being that, built on the design of a contest between equals,⁷ the

¹ Tyler “Procedural Justice and the Courts” 2007 *Court Review* 26 26.

² See International Covenant on Civil and Political Rights (ICCPR), *General Assembly Resolution 2200A (XXI)* (1966), art 14(3) (d).

³ Ghana Constitution (1992).

⁴ *Id.*, art 19(2) (f).

⁵ Human Rights Committee (HRC) *General Comment 32 CCPR/C/GC/32* (2007) para 37.

⁶ See Decker “The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta” 1996 *Seton Hall Const. L.J.* 483 487, 498; see also Johnson “The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer Inflicted Indignity” 2004-2005 *Ky. L. J.* 39 41, 61 arguing that “nearly all decisions should be committed to the discretion of lawyers” because the trials of *pro se* defendants “undermine the sound function of the adversary process by pitting a professional prosecutor against a lay defendant, likely to do himself more harm than good.” quoting *Falkner v. State* 1984 462 So.2d 1040 1042.

⁷ McLaughlin “An Extension of the Right of Access: The *Pro Se* Litigant’s Right to Notification of the Requirements of the Summary Judgment Rule” 1987 *Fordham. L. Rev.* 1109 1121-1122, 1132-1133.

adversarial system of criminal adjudication appears to have little room for the protection of, and guarantee of, fair trial and justice for self-represented accused persons.

The adversarial system operates on the assumption that justice is best attained through partisan advocacy,⁸ in a legal contest that involves opposing parties.⁹ Characteristically therefore, 'adversarialism' invites the parties and their representation, preferably legal, to contest matters in court before an ordinarily disinterested judicial officer. The duty of the judge is to determine the cases before him/her according to the strengths of the convincing arguments made by the contending parties.¹⁰ Adversarial criminal trials are structured along a clear distribution of roles among the criminal justice actors. The Prosecution, the Defence and the judicial officer each play a peculiar role.¹¹ The parties bear the burden of proof, both evidentiary and persuasive, in the presentation of their respective arguments, evidence and legal submissions. The role of the judicial officer is in substance, and particularly limited to an objective and neutral consideration of the rival cases as put forth and argued by the parties. It only extends to providing adequate supervision of the processes and systems that guide the proceedings, and to ensuring that the trial is conducted in an appropriate manner.¹² The legal systems of countries designed on the Anglo-American trial model, which is founded on principles of the common law, are identified by this adversarial ideology of adjudication.¹³ Ghana operates an adversarial model of criminal justice built on the blueprint of the English system from which it draws its foundation.¹⁴ International criminal tribunals and courts, as well as a number of countries from continental Europe and Latin America, have all adopted facets of the adversarial trial model.¹⁵

⁸ Silbert & Doufekisas "Under the Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" 2006 *Am. Crim. L. Rev.* 1225 1225; see also *Herring v. New York* 1975 422 US 853 862.

⁹ Goodpaster "On the Theory of American Adversary Criminal Trial" 1987-1988 *J. Crim. L. & Criminology* 118 119. See also Asimow "Popular Culture and the Adversarial System" 2007 *Loy. L. A. L. Rev.* 653 655; Pizzi *Trials without Truth* (1999) 117 139-140.

¹⁰ Hale *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* (2004) 31.

¹¹ Zuckerman "No justice Without Lawyers – The Myth of an Inquisitorial Solution" 2014 *C. J. Q.* 355 357.

¹² *Ibid.*

¹³ See Marcus "Above the Fray or into the Breach? The Judge's Role in New York's Adversarial System of Criminal Justice" 1992 *Brook L. Rev.* 1193 1193 stating that "[t]he adversarial model, exemplified by the American and British Systems, assumes that justice is best served by giving the prosecutor and defence counsel primary responsibility for the development and presentation of their own cases. In this model the judge is a neutral and detached magistrate whose function is to mediate and resolve the opposing parties' inevitable conflicts."

¹⁴ Ghana has practiced the adversarial system since the very inception of the court system in the Gold Coast, as it then was and inherited the English common law tradition upon attaining independence, with the necessary modifications to reflect the aspirations and values of the Ghanaian people. See Ebbe & Abotchie *Ghana (Post-traditional Nation-State) in Crime and Crime Control: A Global View* (2000) 59. See also Essien "Research Ghanaian Law". <http://www.nyulawglobal.org/globalex/Ghana1.htm>. (Accessed 24-05-2015).

¹⁵ Caianiello "Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models" 2011 *N.C.J. Int'l. & Com. Reg.* 287; also, Ogg "Adversary and Adversity: Converging Adversarial and

A fundamental concern underlying the adversarial model of criminal adjudication is how to ensure the fairness of its processes and procedures, and particularly how to achieve a balance in the respective strengths of the parties at play in the legal contest. The competencies and strengths of the parties are crucial to the attainment of justice in the adversarial criminal trial because this model of adjudication is party-centred.¹⁶ In other words, the foundational element of justice within the adversarial system is built on the effective execution of the roles and responsibilities assigned to the parties and their respective advocates. On the one side, there is the trained and professional public prosecutor for the State. While on the other side, the accused person acts either for himself/herself or with the assistance of counsel. It is when the two sides are evenly matched that the impartial and relatively passive judicial officer can be assisted and guided in the exercise of his/her adjudicatory functions. This organisation of the adversarial trial also determines the fairness and justness of the judgments and rulings emanating from the trial.¹⁷ As a result, the importance of the intellectual competence of the parties and their knowledge of procedural rules and substantive legal theories in the adversarial trial cannot be overemphasised.

Self-representation in adversarial criminal trials remains a common phenomenon for two main reasons. Firstly, it is a matter of right recognised under modern international law and guaranteed in most constitutional democracies, to allow individuals to represent themselves in all criminal proceedings if they so wish.¹⁸ Secondly, the concept of self-representation emanates from the parameters of application of the right to state-funded counsel or legal aid, both under international law and as implemented in domestic criminal jurisdictions. The obligation of states to provide indigent accused persons with counsel at their own cost imposes a corresponding right for every indigent accused person to state-funded counsel. The implementation of this obligation is widely measured and curtailed by circumstances determining the interest of justice.¹⁹ Consequently, this subjective approach to granting legal

Inquisitorial systems of Justice- a case study of the Italian Criminal Trials Reforms" 2013 *Int. J. Comp Appl. Crim. Justice* 31; Cavise "The Transition from Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate" 2007 *Wayne L. Rev.* 785 785-787.

¹⁶ See Bekker "The Right to Legal Representation including effective Assistance, for an Accused in the Criminal Justice System of South Africa" 2004 *CILSA* 173 174.

¹⁷ See, e.g., Colbert "Coming soon to a court near you- Convicting the Unrepresented at Bail Stage: An Autopsy of a State's High Court *Sua Sponte* Rejection of Indigent Defendants' right to counsel" 2006 *Seton Hall L. Rev.* 653 961.

¹⁸ See, e.g., ICCPR, art 14(3) (d). It provides in material part that "[i]n 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..."

¹⁹ *Ibid.*

aid does not guarantee state-funded counsel for all accused persons in all cases.²⁰ In such cases, self-representation derives from a denial of the right to counsel. In practice, realising the mandate to provide counsel for deserving indigent accused persons remains a difficult assignment for even the most developed states of the world.²¹ Even though there seems to be a consensus on the invaluable role of legal representation in ensuring the fairness of the adversary criminal trial, the pragmatic realisation of this lauded right has been problematic. The need to enhance access to the court and justice for all manner of persons based on equality, and most especially for the poor, in adversary criminal trials, seems to be a continuing struggle in the quest for justice. In that context, it is clear that achieving “absolute equality is utopian and unlikely to be achieved in any society, due to scarce resources and the need to achieve efficient allocation thereof”.²² This reality, coupled with the lack of public will to set aside resources to fund legal aid to support indigent accused persons²³ remains a major factor in the crystallisation of self-representation in adversarial criminal trials as a normal event.²⁴

It is undeniable that adversarial criminal proceedings are primarily a contest of intellect, wits and legal knowledge. In that sense, only parties professionally endowed with the competencies to manoeuvre the substantive and procedural regimes of a trial can be pitted together for a fair contest. Thus, the inequality in the balance of contest as between the parties, in cases where an

²⁰ See HRC *General Comment* 32 para 10: “States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so”. *Id.*, para 38: “[Article 14(3) (d) of ICCPR] guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned ‘in the interest of justice’ as is the existence of some objective chance of success at the appeals stage. In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.”; see also African Commission on Human and Peoples’ Rights (African Commission) *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2014), art 8(3)(d): “State legal assistance should be provided if the detainee does not have sufficient means or if the interests of justice so require, for example given the gravity, urgency or complexity of the case, the severity of the potential penalty, and/or the status of the detainee as vulnerable or otherwise protected (...)”; See African Commission *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, (2003) para H(b): The accused has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused if he or she does not have sufficient means to pay for it. The interests of justice should be determined by considering i) the seriousness of the offence; ii) the severity of the sentence.

²¹ Kempinen “Ethics of the Prosecutor Contact with the Unrepresented Defendant” 2006 *Geo. J. Legal Ethics* 1147 1148, referring to Adam Liptak “Country Says It’s Too Poor To Defend the Poor” *N.Y Times* 2003 A1; Andrew Harris “Constitutional Crisis: Oregon Can’t Afford Indigents’ Right to Counsel” 2003 A7; Douglas McCollam, “The Ghost of Gideon” 2003 *AM. Law* 63.

²² Chan “The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia” 2007 *AsJCL* 1 1.

²³ Kempinen 2006 *Geo. J. Legal Ethics* 1149.

²⁴ “[T]he absence of public funding for those too impoverished to pay for their own legal representation potentially creates three major problems: first the denial of legal services and of assistance in drafting legal documents, second and most obvious the denial of professional advocacy in the court room, third the denial of ability to bring to a court, a professional witness whose fees for attending are beyond the ability of the litigant to pay.” *Per* Sir James Munby in *Q v. Q* 2014 EWCF 31.

accused person is unrepresented by counsel, is one that has been flagged as constituting an affront to the fair operation of the adversarial criminal trial.²⁵ Because self-representation remains a stark legal phenomenon in adversarial criminal trials, it is important to address the question of how to ensure justice in adversarial proceedings involving self-represented accused persons.

1.2 STATEMENT OF THE PROBLEM

The trial of self-represented accused persons within the adversarial system of criminal adjudication raises a number of procedural issues that affect the legal system's ability to deliver fair trial and justice. It is believed that "the core goal of the judicial system is to provide people with a forum in which they can obtain justice as it is defined by the framework of the law".²⁶ However, this aim of the criminal justice system is limited in cases where the accused is self-represented. Indeed, it is irrefutable that many self-represented accused persons are unjustly tried and unfairly convicted of criminal offences, in the absence of counsel to defend their cause. Many scholarly writings and judicial decisions have already built a connection between self-representation and wrongful convictions in adversarial criminal trials.²⁷

The fundamental and conceptual problem lies at the foundation of the adversarial system of criminal trials, which Zuckerman rightly argues is developed on the premise that the parties to the trial will be represented by counsel and not otherwise.²⁸ Consequently, the operational structures of the adversarial system allow very little room to address the procedural concerns associated with self-representation. There is therefore, a field of contradiction in practice between the adversarial criminal justice system's devotion to the cause of justice and its ability to fairly treat self-represented accused persons and guarantee their protection at trial. Lack of

²⁵ Bekker "The Undefended Accused/Defendant: A Brief Overview of the Development of the American, American Indian and South African Positions" 1991 *CILSA* 151 154-155. He states that "it has long been recognised that mere access to the court house doors does not by itself assure a proper functioning of the adversarial process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defence"; *Ake v. Oklahoma* 1985 470 U.S. 68, 105 S Ct 1087 84 L Ed 2d 53.

²⁶ Tyler 2007 *Court Review* 26.

²⁷ Backus and Marcus "The Right to Counsel in Criminal Cases, A national crisis" 2006 *Hastings L.J* 1031 1036; also Lefstein "In Search for Gideon's Promise: Lessons from England and the Need for Federal Help" 2004 *Hastings L.J* 835; *Powell v. Alabama* 1932 284 US 45.

²⁸ See, e.g., Zuckerman 2014 *C. J. Q.* 356, referring to Lord Wolf *Access to Justice –Interim report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 119; also Sorabji "Thinker v. Elliott: Promptly setting aside a Judgment Given in a Party's Absence" 2013 *C. J. Q.* 9.

representation and self-representation erode not only the interests of accused persons but also their rights at the trial.

Without effective assistance of counsel, it is generally common to find accused persons crushed under the uneven balance of play of the criminal justice and prosecutorial machinery. Issues of procedural inequalities emerge from the disparity in the levels of skills and aptitude between the accused person and the Prosecution, which strip the trial of its fairness and affect the integrity of the entire criminal justice system. The substantive and procedural safeguards as well as the protections afforded to accused persons lose their essence when they stand unrepresented by counsel.²⁹

Furthermore, the trial of self-represented accused persons raises issues of efficiency. The adversarial system places the primary responsibility to develop the factual and legal issues for adjudication on the parties to the case and their lawyers. Thus, where a party appears technically and functionally incapacitated because of absence of counsel, the system loses its ability to operate and function within the design of its unique structures.³⁰ Usually, trials of self-represented accused persons appear “more time consuming and less productive and final decisions may be less informed”.³¹ It is also worth noting that self-representation generally results in violation of the rule of law³² and implicitly imposes additional burdens on judicial officers and prosecutors, who at the same time remain ineffective in fairly delivering on their defined duties. Kempinen, while referring to the roles of the Prosecution and judges in the adversary criminal trial of self-represented accused persons, expressed the procedural impasse that these actors in the legal system face when dealing with self-represented accused persons. As he explained:

[If] they act as if defence counsel were present, they increase risks of unfairness or inefficiency. At the same time, expecting the prosecutor and trial judge to compensate for the absence of counsel risks compromising the central features of their roles, without providing a truly adequate remedy.³³

A more pathetic situation arises with indigent accused persons who are compelled to represent themselves in criminal proceedings. Not even the strict legislative interventions and judicial pronouncements on state obligation to secure counsel for indigent self-represented accused

²⁹ Kempinen 2006 *Geo. J. Legal Ethics* 1149.

³⁰ *Id* at 1150.

³¹ *Ibid.*

³² *Ibid.*

³³ Kempinen 2006 *Geo. J. Legal Ethics* 1151.

persons have successfully compelled adversarial states to fully execute this responsibility.³⁴ In developing countries with generally weaker institutions and acute funding challenges, the problem does not present any better picture. The quest to fulfil states' obligation to secure counsel by way of legal aid for even deserving unrepresented and indigent accused persons has longer stretches of administrative and financial hurdles to overcome. As Evans and Murray rightly note, "in the African context, it is unrealistic to expect that every criminal case could include the representation of the defendant by a fully qualified and admitted lawyer".³⁵

In Ghana, criminal defence by self-representation is not unusual.³⁶ Similar to many other adversarial jurisdictions, self-represented persons suffer great injustices under the prosecutorial and judicial systems at the pre-trial, trial and post-trial stages of criminal proceedings. In addition to accessing the courts without legal representation, non-participation and intellectual absence from proceedings, violation of procedural rights, long pre-trial detention terms and sometimes abandonment of trial resulting in indefinite incarcerations and unduly excessive sentences remain common.³⁷ Nevertheless, the various statutory and institutional interventions to assist self-represented accused persons in criminal trials in Ghana have been inadequate. These include limited statutory obligations of judges to assist self-represented accused persons and the limited ethical duties of prosecutors imposed for the benefit of such accused persons. The assistance of civil society organisations in that vein, though laudable, has not achieved much in the face of the enormity of the problem. These concerns leave a lot to be desired about the fate of self-represented accused persons, who are for the most part indigent, and who continue to be at the mercy of the state prosecutorial and judicial powers.

³⁴ See Colbert 2006 *Seton Hall L. Rev.* 714 stating that "the spectacle of poor and typically uneducated people defending their liberty and right to fair trial is no different today that the one-sided courtroom experience that Clarence Earl Gideon faced forty years ago."

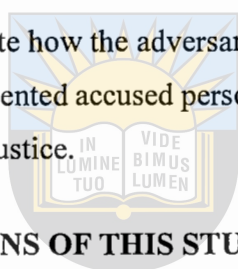
³⁵ Evans & Murray *The African Charter on Human and People's Rights, The System in Practice*, 1986-2006 (2008) 203.

³⁶ "Ghana's justice system does not guarantee free legal services for the poor and less-privileged persons who are unable to hire counsel to represent them. A state-funded legal aid scheme is woefully under-funded and ill equipped to make any impact and there is no effective private alternative. Consequently, accused persons who cannot afford the services of counsel mostly end up in jail (...). Because indigent accused persons are not represented in court they are invariably jailed, though many may be innocent. As a result, there is terrible congestion in Ghana's prisons". These are remarks from Mr. Delanyo Eric Alifo, a Human Rights Advocate in the area of criminal justice in Ghana, Executive Director of HelpLaw Ghana. <http://www.globalgiving.org/projects/provision-of-legal-aid-for-indigents-in-ghana>. (Accessed 03-05-2015). See also the following online news feature on the problem of congestion of Ghanaian prisons in Ghana, stating the level of congestion to 358 % as of January 2014. <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=298552>. (Accessed 03-05-2015).

³⁷ See, e.g., Commonwealth Human Rights Initiative Africa Office, UNDP & the Open Society Justice Initiative *The Global Campaign for Pre-Trial Justice. Improving Pre-Trial Justice in Ghana: The Socio-Economic Impact of Pre-Trial Detention in Ghana* (2013).

The inefficiencies of the adversarial trial model in dealing with self-representation are heightened by the fact that no real strategy holistically addresses the aforementioned issues. All registered efforts are reactive. They are made to imperfectly adapt the adversarial system to the needs of the self-represented accused rather than devising a system that proactively suits the needs of self-represented accused persons.³⁸

To this end, justice for self-represented accused persons in adversarial criminal proceedings is essentially evasive.³⁹ However, since the adversarial system of criminal justice does not bar trials of self-represented accused persons, and international human rights law continues to recognise and validate such trials, “the system will continue to operate and defendants will continue to be arrested, charged and convicted and sentenced whether they have counsel or not”.⁴⁰ There is thus a need to investigate how the adversarial system of criminal adjudication can accommodate the trial of self-represented accused persons fairly and efficiently, within the tenets of the principles of fairness and justice.



1.3 CENTRAL AIM AND QUESTIONS OF THIS STUDY

This research examines the challenges of applying the adversarial model of adjudication to criminal proceedings involving self-represented accused persons in Ghana. It seeks to suggest ways in which the adversarial system of criminal adjudication in Ghana can better accommodate the peculiarities of self-representation for purposes of achieving trial fairness and justice. The central question is how the adversarial system of criminal adjudication can effectively guarantee fair trial and access to justice for self-represented accused persons in Ghana.

The attainment of the aforementioned aim requires consideration of the following specific sub-questions:

- i. To what extent does the concept of self-representation fit within the adversarial model of criminal adjudication?
- ii. How has human rights law rationalised self-representation both as a right and as a practice in modern adversarial criminal proceedings in Ghana?

³⁸ See, e.g., Zuckerman 2014 *C. J. Q.* 356.

³⁹ *Id* at 355-356.

⁴⁰ Kempinen 2006 *Geo. J. Legal Ethics* 1151, referring to Mr. Justice Nienaber, in *S v. Davids* 1989 4 SA 172 (N) stating: “But in the meantime the trial, I fear I must proceed, affording proof of yet another of the iniquities of poverty.”

- iii. How does the criminal adjudicatory system of Ghana deal with the peculiarity of self-representation of accused persons in criminal proceedings?
- iv. To what extent do the peculiarities of self-representation in the context of criminal prosecutions in Ghana require procedural and structural adjustments for purposes of effective and fair adjudication?

These sub-questions set the key objectives of the research as follows:

- i. To ascertain whether the operational design of the adversarial system of criminal adjudication fully absorbs the concept of self-representation.
- ii. To determine how human rights law conceptualises self-representation in modern criminal trials, and in Ghana.
- iii. To investigate the strategies adopted by the Ghana legal system to deal with the issues associated with trials of self-represented accused persons.
- iv. To determine the key remedial measures that may reinforce the legal system's ability to deliver fair trial and just results in trials of self-represented accused persons in Ghana.

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1.4 SCOPE AND LIMITATIONS OF THE STUDY

This study analyses the pre-trial and trial phases of criminal proceedings involving self-represented accused persons. The scope of this research is limited to the practice of self-representation in the District Courts, Circuit Courts and the High Court, in Ghana. This study therefore does not consider criminal appeal processes initiated by self-represented accused persons. It is organised around three key considerations of the adversarial criminal trial, being an assessment of the legal framework of criminal prosecutions, an evaluation of the status of self-represented accused persons, as well as the involvement and roles of the Prosecution and the courts in ensuring fair trial where accused persons are unrepresented.

1.5 RATIONALE AND SIGNIFICANCE OF THE STUDY

This study intends to establish the ideological mutations and procedures of the adversarial system that can best suit proceedings involving self-represented accused persons. Most of the analyses done regarding self-representation in the adversarial system have simply described the inappropriateness of the adversarial adjudicatory set-up as far as proceedings involving self-represented accused persons are concerned. Existing studies are confined to countries such

as the United States and South Africa, with sparse scholarly work on the subject in Ghana. Therefore, the question of how to accommodate the concept of self-representation into the working framework of the adversarial criminal trial provides the opportunity to add to existing knowledge.

Ensuring that the criminal adjudicatory process provides justice for all accused persons, irrespective of their status of representation, is vital to reinforcing the integrity of the judiciary, as well as building public confidence in its procedures. All efforts must be made to infuse the legal system with this indispensable attribute. Thus, research endeavoured towards finding appropriate and equitable approaches to dealing with the procedural disadvantages of self-represented accused persons in adversarial criminal proceedings, is vital. The formal recognition of self-representation as a valid procedural status in criminal proceedings imposes an obligation on the criminal justice system in general to properly suit it within its procedural framework and put it on par with legal representation. Consequently, this study is consistent with a call for a conceptual shift from the classical ideologies of the adversarial system towards a mild system of adversarialism, imbued with values of procedural fairness in proceedings involving self-represented accused persons.

The findings of this study expose the various procedural, ideological and operational challenges associated with the trials of self-represented accused persons in the adversarial system of Ghana. The findings also suggest remedial measures at each stage of the proceedings. This study serves as a guide to policymakers, lawmakers and judicial actors in assessing the suitability of the adversarial processes of adjudication to criminal cases conducted without defence counsel. Finally, these findings may instigate reforms towards instituting a more viable procedural system for fair prosecutions of self-represented accused persons.

1.6 OPERATIONAL DEFINITIONS OF TERMS

1.6.1 Self-represented accused persons

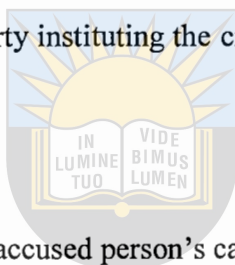
The term 'self-representation' is used in a restricted sense, to refer to the status of an accused person or a criminal suspect who is involved in any form of criminal proceedings without legal assistance. Therefore, throughout this study, the expression 'self-represented accused person' is used interchangeably with 'unrepresented accused person' to refer to an accused person acting without the assistance of a lawyer.

1.6.2 Criminal proceedings

Criminal proceedings refer to actions and processes taken in order to institute criminal prosecution against an accused person. In this study, the expression is broadly considered to include pre-trial proceedings and the trial itself. It begins from the period of arrest of a suspect of a crime to the last stage of the proceedings declaring the conviction or acquittal and/or discharge of the accused person.

1.6.3 ‘Prosecution’ and ‘prosecution’

The term ‘prosecution’ is used to refer to the process of instituting and conducting legal proceedings against a person regarding a criminal charge. Where the term is used to refer to the prosecutorial authority being the party instituting the criminal action, it is capitalised as a formal name.



1.6.4 ‘Defence’ and ‘defence’

The term defence is used to refer to the accused person’s case against the charges instituted by the Prosecution. Where the term is used to refer to the accused person and/or his/her counsel as an entity opposing the Prosecution, it is capitalized as a formal name.

1.6.5 Justice

Justice is a philosophical concept and not easily defined.⁴¹ In a wide sense, it embodies values of “fairness, equality, morality and ability to be an active participant in society”.⁴² In a sense, which embodies the general purpose of this study, justice appears because of a “steady application of a fair and simple set of rules to people in similar circumstances that produces consistent results for all people”.⁴³ More specifically, the concept of justice is used as a derivative of fair trial. The idea of fair trial largely adopts a strict interpretation, which in modern jurisprudence of criminal justice, revolves around the concept of ‘procedural fairness.’ The concept, in that sense, implies a trial procedure validated upon compliance with fundamental rights of trial of accused persons.⁴⁴ Fair trial in this context also involves the idea

⁴¹ Kelsen *Justice, Law and Politics in the Mirror of Science* (1957) 1.

⁴² Farrow “What is Access to Justice?” 2014 *Osgoode Hall L.J* 957 968.

⁴³ Sobel “What is Justice?” 2002 *Judicature* 170 170.

⁴⁴ Langford “Fair Trial: The History of an Idea” 2009 *JHR* 37 38.

of 'equality of arms', which forms an inherent element of the due process of law in all proceedings.⁴⁵ As argued in scholarly writing:

Justice cannot be fully realised nor understood unless it is analysed in its purest form as an action or series of actions... Words alone cannot do justice; instead justice is the implementation of those words for the betterment of those whom the words seek to serve.⁴⁶

In this functional context, justice entails any positive acts, processes and procedures that ensure that self-represented accused persons are not disadvantaged during trial.

The concept of justice is also defined within the context of social and distributive justice, and thus beyond the intended scope of the theory of adversarial criminal justice adopted for the purposes of this study. John Rawls postulates an intriguing definition of justice using a variant of the theory of social contract. He conceives the fundamental idea of the concept of justice as fairness.⁴⁷ Refuting the traditional philosophy of utilitarianism, he argues, "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."⁴⁸ This theory promotes the idea that the freedom of a person cannot be sacrificed for the purposes of achieving the greater good of society. Every just society therefore rests on an equal protection of the liberties of every citizen.

Essentially, Rawls adopts a liberalist view of social and distributive justice based on social arrangements of the distribution of benefits and liabilities for purposes of social cooperation.⁴⁹ He thus advances two sets of principles of justice. The first principle establishes the premise that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others".⁵⁰ The second principle postulates that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all."⁵¹ In considering the question of distributive shares as a matter of procedural justice, Rawls alludes to the criminal procedural regime of trial as being imperfect; one which though designed to ensure that only guilty accused persons are convicted, is open to lapses, resulting in some cases, in miscarriages of justice.⁵²

⁴⁵ Negri "The Principle of 'equality of arms' and the Evolving Law of International Criminal Procedure" 2005 *Int'l Crim. L. Rev.* 513 513.

⁴⁶ Lopez "What is Justice?" 1999 *B.Y.U.L.J Rev.* 933 933.

⁴⁷ Rawls *A Theory of Justice* (1999) 3.

⁴⁸ *Ibid.*

⁴⁹ Rawls *A Theory of Justice* 4.

⁵⁰ *Id* at 52.

⁵¹ *Id* at 52.

⁵² *Id* at 74-75.

1.6.6 Adversarial system

This is a procedural system of adjudication generally governing the legal system of countries adherent to the Anglo-American common law tradition. It alludes to the system of trial, which “puts faith in the assumption that partisan advocacy and manipulation of evidentiary materials, coupled with equality of arms, can put a neutral adjudicator in the position to determine the truth”.⁵³ Chapter 2 contains a full analysis of the concept of adversarial system.⁵⁴

1.7 METHODOLOGY

This study essentially adopts a doctrinal and normative approach to analysing the concept of self-representation in the adversarial criminal trial in Ghana.⁵⁵ Doctrinal legal research is “concerned with the formulation of legal ‘doctrines’ through the analysis of legal rules”.⁵⁶ In this study, it involves a process of analysing legal rules, principles and doctrines of law in order to develop normative legal prescriptions to address the problems of self-representation in adversarial criminal proceedings in Ghana.

This study begins with the historical perspectives of the concept of self-representation and the social context of its application in the Ghana legal system and progresses in character from a pure normative doctrinal research to an interdisciplinary legal research.⁵⁷ Its epistemological nature therefore moves beyond an internal enquiry into the law, to an enquiry into the effectiveness of the adversarial criminal trial procedure in dealing with self-represented accused persons. It takes the form of applied legal research, which has the aim of facilitating reform, both in legal theory and practice.⁵⁸

This study involves desk research and is analytical in character. It examines facts and information available to make a critical evaluation of the law on, and practice of, self-representation in criminal proceedings in Ghana.⁵⁹ This research is placed in perspective through a desk review of the legal philosophies and synthesis of the literature on the adversarial system and the adversarial criminal trial. The legal history and origins of the concept of self-

⁵³ Roodt “A Historical Perspective on the Accusatory and Inquisitorial systems” 2004 *Fundamina* 137 139.

⁵⁴ See discussion *infra*, Ch.2, text at 2.5 & 2.6.

⁵⁵ Chynoweth *Legal Research* in Knight & Ruddock (eds) *Advanced Research Methods in the Built Environment* (2009) 29-30 stating that doctrinal research is concerned with the analysis of legal rules and with the discovery and development of legal doctrines, generally in address of the question ‘what the law is?’ in particular contexts.

⁵⁶ *Id* at 29.

⁵⁷ Chynoweth *Legal Research* 30.

⁵⁸ *Ibid*.

⁵⁹ Kothari *Research Methodology. Methods and Techniques* (2004) 3.

representation as it developed in Anglo-American legal history and its implantation in Ghana are examined. Similarly, self-representation is discussed, both in the broad framework of international human rights law and of the law of Ghana. This is because the conceptual sources of self-representation in criminal trials date back to the early criminal practices in England, while in contemporary times self-representation has assumed a human rights dimension in criminal justice under both international and domestic law.

From the analysis of self-representation within the general operational assumptions of the adversarial system, this research then turns to the evaluation of the institutional and procedural framework that guides and informs the trial of self-represented accused persons in Ghana. It takes into consideration the contextual features, institutional goals and procedural values of the legal system. The focus is foremost on the theoretical assumptions of this archetypical adversarial system, and on the practical application and challenges of self-representation at the pre-trial and trial stages of criminal proceedings in Ghana.

The methods of this study include analysis of primary legal texts such as international treaties and declarations, and constitutional and statutory texts. It also uses secondary data in the nature of scholarly writings including published and peer-reviewed articles and journals, textbooks and other published works, essays and intellectual works, online and other digital resources, as well as institutional records on self-representation in the adversarial system. It also examines legal commentaries of human rights bodies such as the Human Rights Committee (HRC) and the African Commission. Similarly, this study relies on jurisprudential analysis of decided and reported cases involving self-represented accused persons in Ghana. The selection of relevant cases and court decisions proceeded by way of identifying and analysing judicial principles on the values and implications of self-representation in adversarial trials. Other case law materials, not directly on self-representation in criminal trials were also utilised based on their importance in providing a thorough understanding of self-representation in the adversarial forum.

After the selection of the relevant text materials and case law on self-representation in the adversarial system, a preliminary analysis of documents was made and the research themes to be investigated were determined. As each theme covers a number of pertinent issues, a selection was made based on the relevancy to the conceptual framework of the adversarial system, criminal procedural rules, and rights of self-represented accused persons. The analysis was carried out using the technique of content analysis of the legal texts, scholarly writings and case law. Although a strict comparative analysis and approach was not undertaken, it was used

to draw from other jurisdictional perspectives when found to be necessary. The aim of the comparative analysis in this study was to rely on the American and South African jurisdictions that have fairly addressed the problem of self-representation, as persuasive authorities in order to enhance the domestic legal regime of Ghana.

1.8 STRUCTURE OF THE RESEARCH

This study is principally organised into four main parts.

The first part deals with the adversarial criminal trial in Ghana and the operational assumptions underlying the adversarial model of trial. It contains Chapters 2 and 3, which provide a conceptual evaluation of self-representation within the adversarial procedural model. Chapter 2 examines the historical development of the adversarial system and its practice in the Anglo-American legal history. It also includes an analysis of Ghana's inheritance of the adversarial system of trial. Chapter 3 presents the values of party-autonomy, procedural equality and legal representation, which constitute the core foundational precepts regulating the participation of contending parties in the adversarial trial. It also contains an analysis of the principle of equality of arms in criminal proceedings involving self-represented accused persons in Ghana.

Whereas one notion of equality of arms is connected with the effective functioning of the adversarial system in theory, achieving meaningful equality between the Prosecution and an accused person presents substantial challenges in the absence of a defence counsel. The general conception of the remedial mechanism in normative legal theory involves the provision of a defence counsel. Following this presumption, an enquiry is made into the underlying theoretical values and policy considerations of self-representation, which are relevant for achieving the overarching procedural right to a fair trial.

The second part examines the concept of self-representation both under common law and from a human rights perspective. Chapter 4 discusses the common law practices of self-representation, as well as how they influence its modern practice in contemporary legal systems. It exposes the incongruous link between the common law antecedents of self-representation and its practice in modern adversarial trials. Chapter 5 analyses self-representation both under international law and in the domestic legal context of Ghana as a guaranteed right of the accused. Chapter 6 examines the concept of self-representation as a default mechanism of representation arising in cases of indigence. The analyses in Chapters 5 and 6 proceed from a human rights perspective and focus on the normative considerations given

to the status of self-represented accused persons for securing trial fairness in the absence of a defence counsel. Both the first and second parts provide the analytical framework of the research. Together, they lay the foundation for evaluating the practice of self-representation in adversarial criminal trials in Ghana.

The third part contains the evaluation of the criminal procedural system as it applies to proceedings involving self-represented accused persons in Ghana. It assesses the practicality of self-representation in criminal proceedings in Ghana. It examines the roles and involvement of the accused, the Prosecution and the courts in proceedings conducted without defence counsel at the pre-trial and trial stages of the proceedings. It consists of Chapters 7 to 10. Chapter 7 examines the procedural scheme and assesses its effectiveness in securing the realisation of the pre-trial rights of self-represented accused persons. Chapter 8 discusses the duties and obligations of the Prosecution in dealing with self-represented accused persons in criminal trials. It calls for an expansion of the scope of the Prosecution's institutional obligations to ensure that self-represented accused persons are not disadvantaged during the trial. Chapters 9 and 10 discuss the concept of judicial engagement and examine the concept of judicial enabling in trials of self-represented accused persons in Ghana. Chapter 9 evaluates the various statutory interventions designed by way of judicial assistance to self-represented accused persons during proceedings. Chapter 10 presents internal judicial measures adopted by the courts to assist self-represented accused persons in order to ensure fair trial. It promotes the concept of judicial enabling as a mechanism to ensure effective assistance to self-represented accused persons.

The fourth part discusses the findings of the study and suggests recommendations to address the problems associated with self-representation in adversarial criminal proceedings in Ghana. It argues that the adversarial system of criminal adjudication in Ghana does not fully accommodate the peculiar circumstances of self-represented accused persons. It suggests that the criminal justice system must conceptualise the values of procedural equality and fairness into the concept of self-representation. It must take account of the inherent disadvantaged position of self-represented accused persons in a core adversarial framework. Finally, it must also adopt a number of policy, legislative, judicial, as well as institutional reforms.

Overall, the chosen themes are based on issues that are considered most intriguing and challenging in the criminal adjudication process in the absence of a defence counsel, and which particularly have the potential to defeat the ends of criminal justice. Largely, these themes

present a thorough analysis and evaluation of self-representation in the adversarial criminal adjudication in Ghana. This discourse of how to effectively ensure the fairness of the trial, and thereby guarantee justice for self-represented accused persons is what makes a significant contribution that enriches the existing Ghanaian literature on the subject.



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PART 1

THE ADVERSARIAL CRIMINAL TRIAL IN GHANA AND OPERATIONAL ASSUMPTIONS UNDERLYING THE ADVERSARIAL SYSTEM OF TRIAL



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CHAPTER 2

AN ADVERSARIAL CRIMINAL TRIAL IN GHANA'S LEGAL SYSTEM

2.1 INTRODUCTION

The adversarial trial model dominates Ghana's system of criminal justice.¹ By definition, an adversarial system refers to a "network of laws, rules and procedures characterised by opposing parties who contend against each other for a result favourable to themselves".² Generally, the common law system and the civil law system constitute the two leading legal systems in the world. The common law system, which thrives on adversarial principles originated from England and informs the administration of justice in Anglophone countries, including Canada, the USA and Ghana. The civil law system of Continental Europe rather thrives on inquisitorial principles. The civil law system informs the administration of justice in all the former Continental European countries, including Latin America. A few countries, including South Africa and Japan blend the two systems to administer justice in their respective jurisdictions.

Formal adjudicatory procedures in Ghana assign the control of the proceedings to the parties to the dispute. The judge and the jury are neutral and relatively passive umpires, as far as the investigation of facts and presentation of evidence in the case are concerned.³ Indeed, the Ghana legal system is a progeny of colonial inheritance.⁴ Criminal adjudication exhibits a profound sense of assimilation of the British colonial idea of criminal law and justice, which

¹ Ebbe "World Factbook of Criminal Justice Systems: Ghana" <https://www.bjs.gov/content/pub/pdf/wfbcjs.pdf> (accessed 20-08-2015). This fact is more commonly affirmed in judicial decisions. See, e.g., *Republic v. Adu Boahen* 1993-1994 2 GLR 324 341, *per* Kpegah JSC, stating, "our criminal justice system is adversary"; *Ababio v. Mensah* 1989-1990 1 GLR 560 565, stating that "[t]he jurisprudence which informs our concept of justice is founded on the common law adversary system"; Amissah "The Police and the Courts" 1969 RGL 31 (electronic Copy).

² Garner *Black's Law Dictionary* 5ed (1979) 49; see also definition of 'Adversary' in *Webster's Third New International Dictionary of the English Language Unabridged* (1961) 31, defined as "the Anglo-American system of procedure for conducting trials under strict rules of evidence with the right of cross-examination and argument, one party with his witnesses striving to prove the facts essential to his case and the other party striving to disprove those facts or to establish an affirmative defence."

³ See, e.g., *Sasu v. Amuah-Sekyi* 1987-1988 1 GLR 294 296 stating that "[i]n our adversary system, the contest is always between the parties to the action. The court itself is never a party (...) That way lies the understanding of court administration of justice."

⁴ Asante "Over a Hundred Years of National Legal System in Ghana. A Review and Critique" 1987 *J. Afr. L.* 70 70. It has been argued in that vein that the Gold Coast Supreme Court Ordinance, 1876, Cap. 4 ushered in the modern legal system of Ghana.

is adversarial in nature.⁵ This chapter analyses the legal origins, nature, and ideologies of the adversarial system of criminal adjudication in Ghana. It also aims to provide a general context for the study on 'adversarialism'.

Part 2 is a brief presentation of the geography, population and political organisation of Ghana. Part 3 examines the historical evolution of the Ghana legal system up to the first half of the twentieth century. It justifies the adversarial character of Ghana's legal system. Part 4 gives an overview of the criminal law and practice in Ghana, while Part 5 analyses the nature of the adversarial criminal trial itself. Part 6 follows, which examines the adversarial theory of justice, with a focus on its features and theoretical values.

2.2 GHANA: GEOGRAPHY, GOVERNMENT AND POPULATION

Present day Ghana was formally known as 'The Gold Coast' due to its gold resources.⁶ It was renamed after gaining independence in 1957.⁷ The country is located on the coast of West Africa and covers a total area of about 238 533 km².⁸ It is bordered by Burkina Faso in the North, Togo in the East, Ivory Coast in the West and the Gulf of Guinea and the Atlantic Ocean in the South.⁹ Ghana was officially formed from a merger of the British Crown Colony known as the Gold Coast and the Togoland Trust Territories. On March 6, 1957, it became the first sub-Saharan country in colonial Africa to declare its independence from the United Kingdom of Great Britain and Northern Ireland.¹⁰ On July 1, 1960, Ghana attained the status of a Republic within the Commonwealth of Nations under the presidency of Dr Kwame Nkrumah. Since its independence from British colonial government, the country has had a rather chequered constitutional and political evolution characterised by a mixture of civilian and

⁵ Quashigah "The Historical Development of the Legal System of Ghana: An Example of Co-existence of Two Systems of Law" 2008 *Fundamina* 95 101; Afreh *Ghana in Allott (ed) Judicial and Legal Systems in Africa* (1970) 25.

⁶ See, Miller, Vandome & McBrewster (eds) *History of Ghana* (2009) 1.

⁷ Fuller *From Cowries to Coins: Money and Colonialism in the Gold Coast and British West Africa in the Early 20th Century* in Eagleton, Fuller & Perkins (eds) *Money in Africa* (2009) 54.

⁸ See "The World Factbook" <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed 15-12-2015).

⁹ "Geography of Ghana" <http://geography.about.com/od/ghanamaps/a/ghanageography.htm> (Accessed 18-12-2015).

¹⁰ "The World Factbook" <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 15-12-2015).

military governments.¹¹ Ghana is presently a sovereign unitary constitutional presidential democracy operating under its Fourth Republican Constitution of 1992.¹²

The current population of Ghana is estimated at close to 27 million, with over half of the people living in urban areas.¹³ The major ethnic groups in the country include Akan 47.5%, Mole-Dagbon 16.6%, Ewe 13.9%, Ga-Dangme 7.4%, Gurma 5.7%, Guan 3.7%, Grusi 2.5%, Mande-Busanga 1.1% and others 1.6%.¹⁴ The official language is English and is spoken by 67.1 % of the population.¹⁵ The literacy rate varies across various regions of the country, with a national average ratio of 58%.¹⁶ Presently, 24.2% of the total Ghanaian population live below the poverty line.¹⁷

2.3 THE NATURE AND BRIEF HISTORICAL EVOLUTION OF GHANA'S ADVERSARIAL LEGAL SYSTEM

Ghana's legal and judicial systems are founded on structures designed on principles of Anglo-Saxon common law and statutory laws, which the country inherited from England through colonialism.¹⁸ Post-independence legal developments have substantially maintained these historical roots and have consistently kept the main features of the inherited British juridical structures and ideologies. This close connection with the classical adversarial English legal regime is the basis for the characterisation of Ghana's legal system as adversarial in nature.¹⁹

¹¹ In an unprecedented military *coup d'état* led by the National Liberation Council on February 24, 1966, the First Republican Constitution of 1960 was abrogated. The end of the first military rule came in 1969 with the restoration of a civilian rule and the adoption of the Second Republican Constitution. This was however toppled in another military *coup* on January 3, 1972 by the National Redemption Council. The Third Republican Constitution was adopted with the return to civilian rule on September 24, 1979. This was however to be the most short-lived Constitution, as it was abrogated in another *coup* on December 31, 1981 by the Provisional National Defence Council. The country returned to democratic rule in 1992.

¹² Frosini Ghana: The Complements of Successful Centralization: Checks, Balances and Informal Accommodation in Kuperman ed. *Constitutions and Conflicts Management in Africa. Preventing Civil War through Constitutional Design* (2015) 119. Of note, the Constitution came into force on January 7, 1993.

¹³ The rural population is estimated at 54%. See, "The World Factbook", note 10 above. <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 15-12-2015).

¹⁴ *Ibid*, Statistics as per 2010 census.

¹⁵ "Ghana: Factbook" <http://www.indexmundi.com/ghana/> (Accessed on 18-12-2015).

¹⁶ See Worldreader "Literacy in Ghana" <http://www.worldreader.org/wp-content/uploads/2015/07/Ghana-Literacy.pdf> 1 (Accessed 21-12-2015). Some sources fix a higher literacy rate. See, e.g., "The World Factbook" quoting 76.6%. <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 21-12-2015). Literacy in this context simply refers to ability to read and write.

¹⁷ "The World Factbook" <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 15-12-2015).

¹⁸ See, e.g., Quashigah 2008 *Fundamina* 95.

¹⁹ See, e.g., *Emmanuel Kwame Debrah v. Daniel Afara Larbi* Suit No. E1/35/04 [30/07/2008], per Dei Ofei J stating that "[the Ghana] legal system which is patterned on the English legal system is adversary."

Ghana's legal system is also pluralistic. It operates a body of formal rules that emerged from English law, statutes and common law, parallel to customary law.²⁰ The harmonisation and consolidation of the modern legal system of Ghana is a product of years of colonial interaction, marked by an initial co-existence, and then gradual integration of the inherited British laws and African customary laws. In its operation as a single system of law, the overarching influence of the British legal order on the Ghana legal system is notable to-date.²¹ The nature and development of the criminal adjudicatory system of Ghana is tied to with the history and evolution of the country's adversarial legal system in general.

2.3.1 Formal Introduction of English Law to Ghana: The Bond of 1844

Britain's first contact with the natives of the Gold Coast dates back to the seventeenth century.²² This period marked the beginning of the territorial and political consolidation of the Gold Coast, which after centuries of colonial administration by the British colonial regime gave birth to present day Ghana. The British imperialistic ideology towards the implantation of an adversarial model of adjudication in Ghana officially began with, what later became famously known as, the 'Bond of 1844'. This was an agreement entered into between the British colonial authorities and local coastal chiefs of the Gold Coast on March 6, 1844.²³ The object was to define the relationship between the natives of the Gold Coast and the British colonialists.²⁴ The Bond was a significant landmark in the inception of the colonisation process in the Gold Coast. It signified acceptance of British influence and began the expansion and reinforcement of British hegemony in the native communities of the Gold Coast. More importantly, it also laid the legal foundation for the eventual colonisation of the Gold Coast by the British.²⁵

The Bond had a number of imports. Firstly, the Bond gave official recognition to the application of English laws and to the exercise of British judicial authority within the Gold Coast.²⁶ Secondly, the British authority was assigned jurisdiction over capital offences and felonies. These crimes were tried by the Queen's judicial officers, presiding with native chiefs. The legal procedure for trial was a blend of indigenous customs of the communities and general

²⁰ It is specifically mix of Ghanaian indigenous and customary laws, and British common law, juristic principles of Equity and statutes as applicable in Ghana by 1874. Quashigah 2008 *Fundamina* 114; Asante 1987 *J. Afr. L.* 70.

²¹ See generally Asante 1987 *J. Afr. L.* 70.

²² Frimpong "Ghana's Contribution to Legal Development in Botswana" 2005-2007 *U. Ghana L. J.* 93 95.

²³ Padmore *Gold Coast Revolution* (1953) 30.

²⁴ *Ibid.*

²⁵ Miller, Vandome, McBrewster (eds.) *History of Ghana* (2009) 3.

²⁶ Padmore *Gold Coast Revolution* 30. British political authority under the Bond extended specifically to the native territories surrounding the British forts and settlements.

principles of English law.²⁷ The jurisdiction of the indigenous chiefs in criminal matters was therefore limited to trials of lesser offences only.²⁸ Finally, through the Bond, the traditional chiefs and underwriting communities undertook to eschew all forms of judicial practices adjudged 'barbarous' by the British Crown.²⁹ The real concern was with the modes of punishment under the native criminal jurisdictions, which for the most part were found to be harsh, cruel and inhuman. Eventually, in trials of lesser crimes, which fell under their exclusive jurisdiction, traditional courts ceded their power to sentence convicted accused persons to the British Crown.³⁰ The Queen's judicial officers in the forts were mandated to impose sentences regarding such offences upon conviction.³¹ A traditional court could pass a sentence in criminal proceedings only under the supervision of the British local courts established in the forts. This procedural restriction was to ensure that punishment was imposed in accordance with principles of humanity and dignity, and the practices of civilised nations.³²

2.3.2 The Supreme Court Ordinance of 1876

In 1876, the British Parliament passed a Supreme Court Ordinance.³³ Its purpose was to make the entire body of English Common Law, principles of the law of Equity, and statutes of general application in force in England as of July 24, 1874,³⁴ applicable to the native jurisdiction of the Gold Coast colony.³⁵ The Ordinance established the Supreme Court of Judicature and imposed the Westminster system of judicial administration on the Gold Coast. In the full sense of the term, an accusatorial system pitched antagonists against each other in a legal contest before a non-participatory judge.³⁶ With the exception of admiralty cases, the Supreme Court was given the same jurisdiction as that of a then High Court in England. It consisted of a Chief Justice and a maximum of four puisne judges. It also comprised a Full Court with appellate jurisdiction sitting in Accra (Ghana) and Lagos (in Nigeria), Divisional Courts sitting in each of the

²⁷ Bond of 1844, para 3. See Kimble *Political History of Ghana 1850-1928* (1963) 194.

²⁸ Acquah "Customary Offences and the Courts" 1991-1992 RGL 36.

²⁹ Bennion *Constitutional Law of Ghana* (1962) 8.

³⁰ Sarbah *Fanti National Constitution* (1906) 99; Appiahene-Gyamfi *Alternatives to Imprisonment in Ghana: A Focus on Ghana's Criminal Justice System* (Masters – Thesis, SFU, 1995) 15.

³¹ *Ibid.*

³² Appiahene-Gyamfi *Alternatives* 15, referring to Seidman *Ghana Prison System: A historical Perspective* in Alan Milner ed. *African Penal Systems* (1969) 434; Daniels *The Common Law in West Africa* (1964); Ward *A History of the Gold Coast* (1963); Martin *The Gold Coast Legislative Council* (1963).

³³ Cap. 4.

³⁴ They refer to statutes as were "applicable to the circumstances of the colony itself." See Redwar *Comments on some Ordinances of the Gold Coast Colony* (1909) 8; Quashigah 2008 *Fundamina* 102.

³⁵ Supreme Court Ordinance of 1876, s 14. "The Common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court."

³⁶ See, e.g., Appiahene-Gyamfi *Alternatives* 6.

provinces, and District Magistrates Courts presided over by District Commissioners.³⁷ The Supreme Court Ordinance of 1876 therefore began the consolidation of the legal system of Ghana along the defining features and model of the English legal system. With its advent, the substantive and procedural rules of the English legal system were wholly implanted into the sprouting colonial legal and judicial systems of the Gold Coast.³⁸ The Ordinance also provided the general framework within which the modern legal and judicial systems of Ghana would develop.³⁹

English law generally affected the native legal jurisdictions in two main ways. Firstly, it shaped and moulded the application of indigenous customary law. Secondly and more importantly, it played the creative role of filling in the gaps and supplying the deficiencies of indigenous law and usage.⁴⁰ One of such legal interventions is the introduction of English criminal law as well as its administration and adversarial procedures of trials into the legal system of Ghana.⁴¹

The colonial laws currently constitute an important aspect of the modern legal system of Ghana. The current Republican Constitution of 1992 recognises English Common Law and doctrines of Equity as a source of law in Ghana.⁴² The foundational legal structures introduced by the colonial regime have also remained the pillars of the nationalised legal system to date.⁴³ The assertion that Ghana's legal system is adversarial in nature is firmly ingrained in these historical antecedents.

2.4 OVERVIEW OF GHANA'S CRIMINAL LAW AND PRACTICE

2.4.1 Post-Independence Legal Evolution of the Regime of Criminal Adjudication

With the introduction of the Supreme Court Ordinance of 1876, criminal law in the Gold Coast operated within a mixed legal system: customary criminal law and its procedures on the one hand, and the English criminal law and its procedures on the other.⁴⁴ Over time, the

³⁷ Bennion *Constitutional Law* 19; see Supreme Court Ordinance of 1876, ss 7, 22-24.

³⁸ Frimpong 2005-2007 *U. Ghana L. J.* 95.

³⁹ See Quashigah 2008 *Fundamina* 101, referring to Afreh *Ghana* in Allott (ed.) *Judicial and Legal Systems in Africa* (1970) 25.

⁴⁰ Amankwah "Ghanaian Law: Its Evolution and Interaction with English Law" 1970 *Cornell Int'l L. J.* 37 56.

⁴¹ Asante 1987 *J. Afr. L.* 71.

⁴² See Ghana Constitution, art 11(2), establishing common law, equity and other received laws as sources of law in Ghana.

⁴³ Asante 1987 *J. Afr. L.* 70.

⁴⁴ The Ordinance enjoined the established courts to apply English law in the colony only "so far as local circumstances permit, and subject to any existing or future ordinances of the colonial legislature". See Supreme Court Ordinance of 1876, s 17. Again customary would be in force so far as it was not "repugnant to natural

overreaching influence of British law and judicial practices eventually absorbed the entire operation of criminal law in Ghana.⁴⁵ The final stage of consolidation of the criminal adjudicatory system is a post-independence phenomenon.

When Ghana attained the status of a Republic in 1960, the first Republican Parliament began the process of consolidating a national legal system built on a single procedure of adjudication. The criminal jurisdiction of traditional courts was extinguished and subsumed under the jurisdiction of the regular courts in 1966.⁴⁶ All criminal offences have since then been established by one uniform code, and tried under one set of procedural rules designed along the features of English law. By design, the propagated legal system was to provide the foundation for subsequent development of a nationalistic legal and judicial system for Ghana. Half a century ago, Read reported that the criminal law and criminal trial procedures of countries colonised by England had undergone very little evolution in terms of substance in the post-independence period.⁴⁷ This observation remains very much apposite today. After decades of self-administration as an independent country, the evolution and growth of the Ghana legal system, especially in the area of criminal adjudication, has been relatively marginal. The current adherence to the colonial principles of law and practice unearths the lack of Ghanaian identity in the character of the prevailing legal system. The question asked decades ago by the erudite Ghanaian scholar, Professor Asante, as to whether the legal system of Ghana has a 'peculiar Ghanaian legal tradition', remains relevant today.⁴⁸

2.4.2 The Courts System

The Constitution of Ghana provides the legal and institutional frameworks guiding the operations of the judicial arm of government.⁴⁹ The Chief Justice of Ghana is the head of the Judiciary and is responsible for its administration and supervision.⁵⁰ The structure of the courts in Ghana is determined by the Constitution, which also vests final judicial power in all matters of criminal and civil adjudication in the courts.⁵¹ Chapter 11 of the Constitution, as

justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the colonial legislature. See *id.* s 19.

⁴⁵ See, generally, Bennion *Constitutional Law*; Quashigah 2008 *Fundamina* 95; Amankwah 1970 *Cornell Int'l L. J.* 37; Acquah 1991-1992 *RGL* 36.

⁴⁶ This followed the enactment of the Courts Decree, 1966 (N.L.C.D 84).

⁴⁷ Read "Criminal Law in the Africa of Today and Tomorrow" 1963 *Afr. L. J.* 5 5.

⁴⁸ Asante 1987 *J. Afr. L.* 70.

⁴⁹ See, Ghana Constitution, Chap 11.

⁵⁰ *Id.*, art 125(4).

⁵¹ *Id.*, art 125(3).

supplemented by the Courts Act,⁵² establishes the hierarchy and jurisdiction of the Ghanaian courts in criminal and civil matters.⁵³ Throughout the various national constitutions adopted in Ghana since independence, the judicial structure as adapted to the Westminster courts under the colonial Ordinance of 1876 has been maintained.⁵⁴

The courts of Ghana are hierarchically defined at two broad levels: the Superior Courts of Judicature and the lower courts.⁵⁵ The Superior Courts, as established by the Constitution itself, consist of, in order of authority, the Supreme Court, the Court of Appeal, the High Court, and Regional Tribunals.⁵⁶ The lower courts and tribunals are principally a creation of legislation. The Constitution has vested the Parliament of Ghana with the authority to set up a system of lower courts.⁵⁷ In executing this constitutional mandate, Parliament enacted the present Courts Act in 1993.⁵⁸ For purposes of criminal adjudication, the lower courts' system under the Act includes the Circuit Courts and the District Courts, in order of authority.⁵⁹

2.4.3 Criminal Jurisdiction of Ghanaian Courts

The jurisdiction of courts in criminal matters refers to their authority to try criminal offenders. The focus of this study is on subject-matter jurisdiction, which determines the extent and power of the courts to deal with particular criminal offences.⁶⁰ The specific jurisdictions and powers of the superior courts are conferred by the Constitution. The criminal jurisdiction of lower courts is however determined by the Courts Act.⁶¹ The legal system in practice operates a broad-based trial regime within the lower courts, which substantially narrows down the final appellate authority to the Supreme Court. The hierarchy of the courts, in ascending order, commences with the District Courts, followed by the Circuit Courts, the High Court and Regional Tribunals, the Court of Appeal, and the Supreme Court respectively.

⁵² Act 459 of 1993.

⁵³ Ghana Constitution, art 125(3).

⁵⁴ Monarchical Constitution of 1957 and the 1960, 1969, 1979 and 1992 Republican Constitutions of Ghana.

⁵⁵ Ghana Constitution, art 126(1).

⁵⁶ *Ibid.*

⁵⁷ *Id.*, art 126(1)(b).

⁵⁸ The Courts Act (Act 459 of 1993) has undergone various amendments over the years. Some of these are brought about by the Courts (Amendment) Act (Act 464 of 1993); Courts (Amendment) Act (Act 620 of 2002); Courts (Amendment) Act (Act 674 of 2004).

⁵⁹ Courts Act, s 39. As amended by the Courts (Amendment) Act, (Act 620 of 2002).

⁶⁰ Brobbey *Practice and Procedure in the trial courts and Tribunals of Ghana* (2011) 31.

⁶¹ As amended by the Courts (Amendment) Act (Act 620 of 2002).

2.4.3.1 District Courts

District Courts account for the largest number of courts in Ghana with establishments in each of the 216 districts of the country.⁶² Presided over by District Magistrates, they have summary criminal jurisdiction over offences committed within their respective Districts.⁶³ Certain District Courts are assigned special jurisdictions for purposes of administrative expediency.⁶⁴ These include the specialised Motor Courts with jurisdiction over motor offences and traffic regulations. In the general exercise of their powers, the criminal jurisdiction of District Courts extends to trials of offences such as attempt, abetment or conspiracy to commit offences, punishable by a fine not exceeding five hundred penalty units, or imprisonment for a term not exceeding 2 years, or both,⁶⁵ and which are suitable to be tried summarily only.⁶⁶ All appeals in criminal matters from decisions of the District Court lie with the High Court.⁶⁷

2.4.3.2 Circuit Courts

Circuit Courts exercise a much broader criminal jurisdiction than District Courts. They are presided over by judges and they operate in such areas designated by the Chief Justice in the various regions of the country.⁶⁸ Every Circuit Court has original jurisdiction in all criminal matters, except in serious offences such as treason and offences punishable by death.⁶⁹ Appeals from decisions of the Circuit Court in criminal trials lie with the High Court.⁷⁰

2.4.3.3 High Court

The High Court, as established in all ten administrative regions of Ghana, has unlimited original jurisdiction in all criminal matters.⁷¹ The Court is duly constituted by a single Justice who sits alone in summary trials,⁷² unless otherwise sitting with assessors or jurors in the trial

⁶² Courts Act, s 45(1). There are presently 10 administrative regions in Ghana subdivided into 216 districts. See also the Lower Courts and Tribunals Instruments (L.I 1574 of 1993).

⁶³ See Criminal and other Offences Procedure Act (Act 30 of 1960) (COOPA) s 30. Summary criminal jurisdiction is discussed below. See text at 2.4.4.3.

⁶⁴ Courts Act, ss 45(1) & (3) give the Chief Justice the power to determine the creation of District Courts and to specify the area of their jurisdictions.

⁶⁵ A penalty unit is GH¢12 (equivalent of approximately \$3) according to the Fines (Penalty Units) (Amendment) Instrument (L.I 1813 of 2005).

⁶⁶ Courts Act, s 48.

⁶⁷ *Id*, s 21.

⁶⁸ *Id*, s 40(1). See also the Lower Courts and Tribunals Instruments (L.I 1574 of 1993)

⁶⁹ *Id*, s 43.

⁷⁰ *Id*, s 21.

⁷¹ *Id*, s 15 as amended by Courts (Amendment) Act (Act 620 of 2002), s 2.

⁷² See definition at notes 120-123 below.

of capital offences and first-degree felonies.⁷³ In trials of treasonable offences however, the High Court is constituted by three judges sitting at the same time.⁷⁴ The High Court exercises appellate jurisdiction regarding decisions rendered by Circuit and District Courts in criminal matters.⁷⁵

2.4.3.4 Regional Tribunals

Regional Tribunals are constituted by the Chief Justice in each of the ten administrative regions of Ghana.⁷⁶ They have concurrent jurisdiction with the High Court in criminal matters falling under their specific jurisdiction. Their jurisdiction in criminal matters is more particularly described to include trials of offences such as causing loss, injury or damage to state property; importation of explosives into the Republic; and corruption and abuse of public office.⁷⁷ The Tribunals also have criminal jurisdiction regarding offences arising under the Customs, Excise and Preventive Management Law of Ghana;⁷⁸ narcotic offences;⁷⁹ as well as any other offences involving serious economic fraud, loss of state funds or property.⁸⁰ Unlike the High Court, Regional Tribunals have no jurisdiction to try cases requiring the use of assessors or a jury.⁸¹ They have no appellate jurisdiction. All appeals from decisions of Regional Tribunals lie with the Court of Appeal.⁸²

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2.4.3.5 The Court of Appeal

The Court of Appeal is essentially a court of appellate jurisdiction only, and is duly constituted by a panel of three judges.⁸³ It is vested with the authority to hear criminal appeals from decisions of the Regional Tribunals and the High Court, except appeals emanating from trials of treasonable offences, which lie directly with the Supreme Court.⁸⁴

⁷³ See notes 106, 111-112 below.

⁷⁴ Ghana Constitution, art 139(2); Courts Act, s 14(2).

⁷⁵ Courts Act, s 21, as amended by Courts (Amendment) Act (Act 620 of 2002), s 3.

⁷⁶ See Ghana Constitution, art 142(1).

⁷⁷ See Criminal and other Offences Act (No. 29 of 1960) (COA), s. 179 A-D

⁷⁸ PNDCL 330 of 1993.

⁷⁹ Narcotics Drugs (Control, Enforcement and Sanctions) Law (PNDCL 236 of 1990)

⁸⁰ Courts Act, s 24(1).

⁸¹ *Id*, s 24(2).

⁸² *Id*, s 26(3).

⁸³ *Id*, s 10(2); Ghana Constitution, art 136(2).

⁸⁴ Treason and High Treason. Courts Act, ss 11 & 26(3); Ghana Constitution, art 13(1).

2.4.3.6 The Supreme Court

The Supreme Court is the highest court of the land and the final court of appeal in all criminal matters. It is duly constituted by a panel of five judges.⁸⁵ It hears appeals from decisions of the Court of Appeal in criminal matters.⁸⁶ The Supreme Court also has appellate criminal jurisdiction from decisions of the High Court in trials for the offence of treason.⁸⁷

The criminal jurisdiction of both the Supreme Court and the Court of Appeal remains appellate in nature. The Circuit Courts and District Courts conversely retain clearly limited original criminal jurisdiction only. The High Court however exercises a mixture of both original and appellate jurisdictions in criminal matters. The criminal jurisdiction of the Circuit Courts and the District Courts is geographical. Both Courts attend to cases falling within their respective circuits and districts only.⁸⁸ Only the High Court has original jurisdiction to try all criminal offences committed anywhere in the country. Criminal prosecutions are not time barred. They may be instituted at any time after the commission of an offence. The Limitation Decree of Ghana⁸⁹, which is the main statute of limitation, does not apply to criminal proceedings.

2.4.4 Criminal Offences and Trial Procedures in Ghana

2.4.4.1 Brief Drafting History of the Criminal Offences Act (COA)⁹⁰ and the Criminal and Other Offences (Procedure) Act (COOPA)⁹¹

The criminal law and criminal trial procedures of Ghana, as previously stated, are largely drawn from English criminal law.⁹² These laws are substantially codified following the British legal tradition and practice among its former colonies.⁹³ The process of codifying criminal laws in Ghana began in the late nineteenth century. Today, criminal law and criminal procedure have undergone certain developments in various respects. Their jurisprudential growth however remains anchored on the models and values of colonial criminal laws, applied since the country became a Republic.

⁸⁵ Courts Act, s 1(2); Ghana Constitution, art 128(2).

⁸⁶ Ghana Constitution, arts 129(1) & 131.

⁸⁷ *Id.*, art 131(3); Courts Act, s 4(3).

⁸⁸ COOPA, ss 41- 49 and the Lower Courts and Tribunals Instruments, (L.I 1574 of 1993).

⁸⁹ NRCD 54 of 1972.

⁹⁰ Act 29 of 1960.

⁹¹ Act 30 of 1960.

⁹² Read 1963 *Afr. L. J.* 5

⁹³ *Ibid.*

Sir Joseph Hutchinson, Chief Justice of the Gold Coast during the period of 1889–1895, drafted the Gold Coast Ordinance⁹⁴ and the Criminal Procedure Ordinance, which consolidated the substantive criminal law and criminal procedure respectively.⁹⁵ These Ordinances were carved on the model of an earlier code drafted by one Chief Justice Carrington for St. Lucia in 1889. The model draft was itself derived from an earlier criminal code drafted by Mr R. S. Wright (as he then was)⁹⁶ for Jamaica, but was never adopted and therefore never came into force.⁹⁷ The Criminal Ordinance and the Procedure Code were later re-enacted in 1935.⁹⁸ Under the 1951 edition of the Laws of the Gold Coast, these laws became popularly known as the Criminal Code and the Criminal Procedure Code of the Gold Coast.⁹⁹ They were repealed when Ghana became a Republic during the process of nationalisation. With the establishment of the first Republican Parliament, the first ever post-independence Criminal Code of substantive criminal law in Ghana was consolidated and enacted in 1960.¹⁰⁰ The procedure rules of criminal trials were also simultaneously re-enacted as the Criminal (Procedure) Code of Ghana.¹⁰¹ The two statutes are currently in force following a series of amendments and a key revision, subsequent to which they were renamed as the ‘Criminal Offences Act’ (COA) and the ‘Criminal and other Offences (Procedure) Act’ (COOPA) respectively.¹⁰² They constitute the major sources of Criminal Law and Criminal Procedure in Ghana. There have been no major reforms of the procedural rules since the adoption and coming into force of the COOPA on February 1, 1961.

2.4.4.2 Criminal Offences in Ghana

The substantive criminal law of Ghana derives from three main sources. The Constitution also prescribes a number of offences and lays down a comprehensive set of due process rights for persons accused or suspected of having committed a criminal offence.¹⁰³ The most authoritative and largest source of criminal law in Ghana is penal statutes. The bulk of substantive criminal offences are enacted in the COA. Regulations and executive by-laws made under powers

⁹⁴ No. 2 of 1892.

⁹⁵ See Read “Ghana: The Criminal Code, 1960” 1962 *ICLQ* 272 272.

⁹⁶ Later Mr. Justice R. S. Wright.

⁹⁷ Read 1962 *ICLQ* 272; also Read 1963 *J. Afr. L.* 5.

⁹⁸ Criminal Code (1935 Rev.) Cap 9 and Criminal Procedure Code (1935 Rev.) Cap.10.

⁹⁹ Criminal Code (1951 Rev.) Cap 9 and Criminal Procedure Code (1951 Rev.) Cap. 10.

¹⁰⁰ See note above 90. It came into force on February 1, 1961. See COA, s 319.

¹⁰¹ See note above 91. It also came into force on February 1, 196. See COOPA, s 416.

¹⁰² See Laws of Ghana (Revised Edition) Act (Act 562 of 1998).

¹⁰³ It creates offences such as high treason (art 3), high crime (art 2). The due process rights are enumerated in art 19.

conferred on district, municipal and metropolitan authorities by the Constitution constitute a source of criminal law in Ghana.¹⁰⁴ Contrary to the practice in countries such as South Africa, the United Kingdom and some state-jurisdictions in the United States of America, common law is expressly excluded as a source of criminal law in Ghana.¹⁰⁵

Penal statutes categorise offences as: (i) capital offences, which attract the death penalty; (ii) first-degree felonies, which carry a sentence up to life imprisonment; (iii) second-degree felonies that attract a maximum punishment of up to 10 years imprisonment; (iv) misdemeanours, which are offences punishable by a term of imprisonment not exceeding 3 years; and (v) offences simply punishable by fines.¹⁰⁶ The aforementioned categories determine the specific procedure of trial applicable, whether summary trial or trial on indictment.

2.4.4.3 Criminal Trial Procedures in Ghana: Summary Trial and Trial on Indictment

All criminal proceedings in Ghana are conducted in a highly legalistic setting governed by an intricate set of rules. Landsman refers to this feature of the adversarial system as a 'highly structured forensic procedure.'¹⁰⁷ The Ghana criminal procedural regime exhibits a substantially regulated system aimed at ensuring an effective and fair operation of its pre-trial, trial and post-trial processes. The COOPA prescribes mandatory trial procedures for all criminal offences committed under the COA and other criminal statutes.¹⁰⁸ It is an exhaustive code of trial procedure and makes room for no other procedures.¹⁰⁹ It details and outlines the mode of commencement of criminal proceedings, how they are conducted, as well as the roles played by the contending parties and the decision-makers. It prescribes (i) the procedure for the apprehension of suspected criminal offenders; (ii) modes of inquiries and investigations (pre-trial); (iii) modes of proof and procedure for establishing guilt and innocence (trial); and (iv) the punishment for convicted accused persons (post-trial). Such matters regarding the order of proceedings (examination, cross-examination and discovery of evidence, the assignment and satisfaction of the burden of proving guilt beyond reasonable doubt, as well as compliance issues with substantive and procedural due process rights) fall within the functional scope of the rules governing adversarial criminal proceedings in Ghana.

¹⁰⁴ Ghana Constitution, art 11(1) (c).

¹⁰⁵ COA, s 8, stating that no one shall be punished for a crime at common law.

¹⁰⁶ See generally, COOPA, s 296.

¹⁰⁷ Landsman "A Brief Survey of the Development of the Adversary System" 1983 *Ohio State L. J.* 713 716.

¹⁰⁸ COOPA, s 1.

¹⁰⁹ The only exception refers to trials of juveniles for which the Juvenile Justice Act of Ghana (Act 653 of 2003).

The COOPA prescribes two models of trials, commonly known as summary trials and trials on indictment. These are loosely defined based on the gravity of the crimes, and the severity of the applicable punishments. Each of the aforementioned procedures has distinct processes and characteristics. Trials on indictment are highly formalised trial procedures usually applicable to proceedings involving serious offences. These are conducted by a judge, with the assistance of a jury or assessors.¹¹⁰ The jury in Ghana is a body of seven ordinary men and women who decide the guilt or innocence of an accused person in a case tried on indictment, subject to the directions of the judge in respect of the law.¹¹¹ Assessors on the other hand are a body of three or more laypersons who merely assist the judge with their opinions on the question of guilt.¹¹² The ultimate responsibility for deciding guilt or otherwise, rests with the judge alone.¹¹³ All first-degree felonies and capital offences in Ghana are tried on indictment.¹¹⁴ In addition, the Attorney-General may decide to try on indictment any offence for which the mode of trial is not specifically prescribed by the enacting statute.¹¹⁵ Particularly, all capital offences and offences punishable by life imprisonment are tried with a jury.¹¹⁶ All other first-degree felonies, not mandated to be tried by a jury, are to be tried with assessors.¹¹⁷ Trials on indictment are conducted by the High Court or the Circuit Court.¹¹⁸ They involve a preliminary hearing known as committal proceedings held before a District Magistrate. The committal operates as the equivalent of the Grand Jury in the American criminal trial system. Its purpose is to determine whether the Prosecution has a case for which the accused person must stand trial. The duty of the judge at that stage of the procedure is to determine whether the offence charged can be maintained against the accused person. Where affirmatively determined, the Court must commit him/her for full trial before the Circuit Court or High Court.¹¹⁹

A summary trial, on the other hand, is generally referred to as a less formal trial procedure conducted more expeditiously.¹²⁰ This procedure is generally adopted for trials of less serious offences, as well as some serious offences for which the enacting laws prescribe a summary

¹¹⁰ See COOPA, s 204; ss 242-262.

¹¹¹ *Id*, s 244; Amissah *Criminal Procedure in Ghana* (1982) 119. Subject to a number of exemptions under COOPA, s 207, any person between the ages of twenty-five and sixty years who is resident in Ghana and understands English is liable to serve as a juror. See COOPA, s 205.

¹¹² *Id*, s 260; Amissah *Criminal Procedure* 147.

¹¹³ Amissah *Criminal Procedure* 118.

¹¹⁴ COOPA, s 2(2); Brobbey *Practice & Procedure* 70.

¹¹⁵ COOPA, s 2(3).

¹¹⁶ *Id*, s 245, modified by Ghana Constitution, art. 19(2) (a).

¹¹⁷ *Id*, ss 242-243.

¹¹⁸ *Id*, s 2(4).

¹¹⁹ *Id*, s 184 (4).

¹²⁰ Amissah *Criminal Procedure* 154.

trial procedure.¹²¹ The procedure vests the trial judge with authority to hear and dispose of cases without the assistance of a jury or assessors. The judge or magistrate solely conducts the entire trial and decides all questions of both facts and law.¹²² S/he determines the guilt or non-culpability of the accused, and eventually passes the sentence of the accused in case of conviction.¹²³ Even though loosely defined as a less formal trial, summary trials are in essence as formal as trials on indictment.¹²⁴

There is no substantial difference between the procedures followed in either model of trial. Differences do exist in the nature of the procedures but the methods and criteria of proof are similar in many respects. Both modes of trial are fairly detailed and governed by a plethora of procedural and evidentiary rules. Parties to the proceedings, in either case, are generally subject to the same standards of compliance with the evidentiary and procedural requirements. Some of these rules have very compelling effects, such as setting aside of the entire proceedings in case of non-compliance. Both modes of trial exhibit the same methods of proof, involving examination-in-chief, cross-examination and orality in proof of facts, and evidence. All criminal trials are adversarial and portray a resolution by 'party-contest'. They pitch public prosecutors against accused persons acting in a private capacity before a neutral, impartial and relatively passive judge, in a highly structured judicial contest.

2.5 NATURE OF THE ADVERSARIAL CRIMINAL TRIAL

An understanding of the nature and basic philosophical underpinnings of the adversarial criminal trial in general, and also as it applies in Ghana, is best achieved through an exposition of its historical development.¹²⁵ The origins of the adversarial criminal trial are deeply rooted in Anglo-American common law history. The adversarial criminal trial is considered a relatively unified concept of interconnecting procedures that developed over centuries in English legal and judicial history.¹²⁶ The modern adversarial criminal trial, which is contextually described as the 'lawyer-dominated' system of trial, fully developed in the period

¹²¹ COOPA, s 2(1).

¹²² Amissah Criminal Procedure 90. See also Brobbey Practice & Procedure 70.

¹²³ Amissah Criminal Procedure 90.

¹²⁴ See, e.g., Gardner *A Dictionary of Modern Legal Usage* (2001) 853, referring to Glanville Williams *Textbook of Criminal Law* (1978) 10, arguing that "[t]he procedure of magistrates courts is supposed in general to be as careful and formal as trial by a jury."

¹²⁵ For a thorough analysis of the history of the adversary criminal trial, see Langbein *The Origins of the Adversary Criminal Trial* (2003); Landsman 1983 *Ohio St. L. Rev.* 713; Landsman "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" 1990 75 *Cornell L. Rev.* 497.

¹²⁶ See, Plouffe, Jr. *Adversarial Justice* in R. Miller *The History of Crime and Punishment in America: An Encyclopedia*. (2012) 18-19; Landsman 1983 *Ohio St. L. Rev.* 717.

beginning from the late seventeenth century to the third decade of the nineteenth century in England.¹²⁷

2.5.1 Early Beginnings and the Jury Trials

Ancient adversarial ideas in English juridical practice are traceable to Roman origins in the era of the Principate.¹²⁸ As Roman rule extended to Britain after its invasion by Julius Caesar in the year 55 BC, England encountered the pristine adversarial principle of trials for the first time. However, this Roman influence eventually waned off with the fall of the Western Roman Empire.¹²⁹ The very rudimentary structures marking the early beginnings of the adversarial system, as it is known today in English legal history, are traced to the Middle Ages in England.¹³⁰ Its origins have sometimes been associated with the eleventh century English judicial history and practice.¹³¹ Judicial proceedings and modes of proofs at the time were based on irrational evidentiary procedures. Proof of guilt took the form of a non-empirical enquiry built into religious abstractions.¹³²

With the decline of the medieval modes of proof during the thirteenth century, the concept of jury trials in English courts emerged.¹³³ The jury practice began with the institution of an inquest whereby the sheriff summoned individuals from within the locality or immediate neighbourhood of the occurrence of the event to sit as jurors and decide on the matters of controversy between the opposing parties.¹³⁴ Jurors were selected either based on their personal and actual knowledge of the events surrounding the matter, or upon being tasked to inquire into the facts of a dispute and decide on the controversy between litigants.¹³⁵ The jury was thus self-

¹²⁷ See Langbein *The Origins* 1. Again the period referred to specifically begins from the 1690s to the 1830s. It is characterised by the enactment of the Treason Trials Act of 1696, which first granted the right to legal representation in treason trials. Then followed the enactment of the Prisoner's Counsel Act of 1836, which extended the right to full legal representation in all felony trials in England. See Langbein *The Origins* generally.

¹²⁸ Roodt "A Historical Perspective on the Accusatorial and Inquisitorial Systems" 2004 *Fundamina* 137 141, referring to Ullmann *Jurisprudence in the Middle-Ages* XI (1980) 28 and Eismein *History of Continental Criminal Procedure* (1968) 4-7.

¹²⁹ *Id* at 148.

¹³⁰ *Id* at 142.

¹³¹ Landsman 1983 *Ohio State L. J.* 717.

¹³² Here we refer to the three (3) medieval modes of proof being the trial by combat, wager of law and trial by ordeal. See Landsman 1983 *Ohio State L. J.* 717-718; Sward "Values, Ideology and the Evolution of the Adversary System" 1989 *Ind. L. J.* 301 320. Discussed *infra*, Ch. 4, text at 4.2.

¹³³ Landsman 1983 *Ohio State L. J.* 720. Also Sward *Id* at 321-322.

¹³⁴ Landsman 1983 *Ohio State L. J.* 722.

¹³⁵ With the development of jury trial, jurors were allowed two weeks' notice of trial with the sole purpose of allowing them to 'certify themselves' of the material facts by direct contact and communication with the litigants and by making their private enquiries as regards the matters in contention. See Landsman, *Ibid*; Pollock & Maitland *The History of English Law Before the Time of Edward I* (1898) 622-628.

informing and primarily chosen because of their likelihood to be duly informed of the facts of the controversy.¹³⁶ Drawing jurors based on this 'vicinage requirement'¹³⁷ ensured that they were people who already knew the facts or whose communal relations would enable them to personally discover the facts.¹³⁸ Their practice in civil and criminal matters developed along separate but related procedures in their formative periods.¹³⁹

The jury trial procedure was not operationally adversarial. It displayed a more inquisitorial approach to the development of the facts and evidence at the trial.¹⁴⁰ Members of the jury personally investigated the events leading to the dispute in order to discover the real facts of the controversy.¹⁴¹ Obviously, the purpose was to ensure that the jurors delivered reasoned decisions based on properly and personally informed facts.¹⁴² Partisan control of proceedings was therefore limited by the jury's fact-finding role.¹⁴³

Beginning with the oft-cited Black Death plague in the fourteenth century, which affected the English population in medieval England, the vicinage requirement for the selection of jurors broke down. This resulted from the drastic drop in and dislocation of the English population.¹⁴⁴ During the fourteenth and fifteenth centuries, jurors were therefore recruited from around the entire country. They resultantly lost their proximity to the events and the ability to secure personal knowledge of the facts. Consequently, jurors lost control of the fact-finding and truth discovery processes of the adjudicatory system and the 'juror-inquest' withered away.¹⁴⁵ Beginning from this period, jurors relied on the facts and evidence as reported and pleaded by

¹³⁶ Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898) 90, cited by Langbein *The Origins* 64, arguing that that "jurors were men chosen as being likely to be already informed".

¹³⁷ Coined by Langbein to refer to the selection of jurors from the locality or immediate neighbourhood of the occurrence of the event. See *The Origins* 64.

¹³⁸ *Ibid.*

¹³⁹ Landsman 1983 *Ohio State L. J.* 720. He fixes the period of the rise and development of the jury concept from the twelfth to the middle of the fifteenth centuries.

¹⁴⁰ *Id* at 722; also, Langbein *The Origins* 64.

¹⁴¹ Landsman 1983 *Ohio State L. J.* 720.

¹⁴² *Id* at 721-722. Also, Sward 1989 *Ind. L. J.* 321-322.

¹⁴³ Note that because jurors were lay persons and inexperienced in law and bore no responsibilities for the consequences of their decisions, they commonly acted under the guidance and oversight of the trial judge to mitigate errors and even biases in their decisions. Judges played a crucial and more dictating role in the merits of the verdict of the jury. They directed the jury on the merits of the case both on questions of law as they also expressed their opinions as to the facts. Judges retained the power to fine jurors for returning a verdict that were contrary to the judge's view or stood against the weight of the evidence. However, in 1670 an English court held in *Bushell's Case* 1670 Vaugh 135, 124 Eng. Rep. 1006 that jurors were free to reject the evidence presented in court and base their decision on private knowledge. In the eighteenth century however, judicial control of the jury however dwindled as judicial directions to the jury excluded any judicial opinion as to the merits of the case. Juries thus decided on matters of facts based on their own views and convictions and judicial comment on the evidence did not bind the jury. See Langbein *The Origins* 321-323; Landsman 1983 *Ohio State L.J.* 722.

¹⁴⁴ Langbein *The Origins* 64.

¹⁴⁵ *Ibid.*

the parties to the dispute and they became passive triers. Criminal trials from the sixteenth century pitched the parties directly against one another in the development and presentation of facts and evidence. The jury transformed into a more neutral and passive adjudicator.¹⁴⁶ Jury trials thus became a form of instructional proceedings where parties briefed the jury about the controverted facts. The jury then relied on the stories of the parties to make a judicial determination.¹⁴⁷

The development of the modern adversarial system's concept of partisan control of facts and evidence is technically linked to the collapse of the self-informing jury.¹⁴⁸ Legal representation was an unusual occurrence in the English common law practice of the time.¹⁴⁹ Criminal trials were a private contest. The office of public prosecution was inexistent. The accuser bore not only the duty of establishing the facts and evidence in support of the charge to the jury, but also assumed the task of personally prosecuting the case.¹⁵⁰ Indictment was made in the name of the King, but the prosecution was between two private individuals, being the accuser and the accused.¹⁵¹

2.5.2 The Rise of Public Criminal Prosecutions and Development of the Contemporary Adversarial Criminal Trial

The Marian Committal Statute of 1555 ushered in the Marian procedure of investigation, which changed the face of the early system of private prosecution.¹⁵² The Marian Committal Statute was enacted to regulate the office of Justices of Peace. It provided institutional assistance to

¹⁴⁶ By the middle of the 1300s, prospective jurors could be challenged by the parties and potentially biased jurors removed from the panel. Toward the end of the 1300s or in the early part of the 1400s, contacts between litigants and jurors after the submission of a case were significantly curtailed, reducing the possibility of prejudice. From the fifteenth century, jurors merely considered evidence presented in court by the parties, the basis for their decision; see also Landsman 1983 *Ohio State L.J.* 722-723.

¹⁴⁷ Langbein *The Origins* 64. See also Landsman 1983 *Ohio State L.J.* 722, stating that it was not until 1705 in civil cases and 1826 in criminal cases that jurors could be drawn from places other than the immediate locality in which the dispute arose.

¹⁴⁸ Landsman 1983 *Ohio State L.J.* 722-723; Langbein *The Origins* 64. Note also that the transfer of the function of the development of facts from the jury to the parties to the dispute occurred in the late Middle Ages and the seventeenth century. Langbein refers to the period as the 'early modern period.'

¹⁴⁹ Langbein *The Origins* 2. He states that "the lawyer conducted criminal trial appeared late in English legal history." He fixes the period in decades in the eighteenth century.

¹⁵⁰ *Id* at 12, 13.

¹⁵¹ Langbein *The Origins* 11. Blackstone *Commentaries on the law of England* 1765-1769 300: "indictments...are preferred in the name of the kin, but at the suit of any private prosecutor..."

¹⁵² 2 & 3 Phil & Mar. c. 10. The Statute mainly regulated the office of the Justices of Peace with regards to prosecution of felonies in England.

private accusers in the prosecution of criminal charges.¹⁵³ The statute established a pre-trial procedure system to assist accusers in the prosecution of felonies in England.¹⁵⁴ It vested local Magistrates and Justices of Peace with power to conduct pre-trial examination of witnesses and investigations, committal proceedings, as well as to detain accused persons.¹⁵⁵ Their role as public officers was limited to assisting accusers build their case by gathering the necessary evidence. They were not neutral investigators seeking the objective truth. Their involvement in the trial did not, in any way liken to the function of the self-informing jury.¹⁵⁶ Their participation was lopsided and did not promote neutral adjudication.¹⁵⁷ The truth, if any, was expected to emerge from the altercation between the accuser acting with the assistance of the Justices of Peace and the accused person.¹⁵⁸

This one-sidedness of the Marian system powerfully shaped the role of the state in criminal investigations, as it is known today.¹⁵⁹ Over time, the state assumed control over criminal prosecutions from the private accuser in the public interest. The quest to even out the partisanship of the state arose, as far as the investigation of facts and presentation of the case were concerned. The solution however did not lie in the adoption of internal measures to enhance the neutrality of the investigation process. On the contrary, the Treason Trials Act of 1696¹⁶⁰ ushered in a regime of defence counsel in criminal trials, a concept, which deepened the partisanship and privatisation of factual investigations and of the general conduct of the trial.¹⁶¹

¹⁵³ Ma "Exploring the Origins of Public Prosecution" 2008 *Int'l Crim. Just. Rev.* 190 193-194, arguing that Justices of the Peace first appeared in the fourteenth century. They were residents of the community appointed by the King to serve as keepers of the peace. They were given the power to inquire into crimes committed in the local community and to present the accused before the grand jury. The power assigned to the constable and Justices of Peace was not designed to replace private prosecution. The constable and Justices of the Peace stepped in only when private individuals were not interested in pursuing the matter. They were widely known as the Tudor Justices of Peace.

¹⁵⁴ Roodt 2004 *Fundamina* 150. She refers to an earlier point in time where the practice developed. As early as 1360, leading local gentry were appointed as justices of the peace by Royal Commission. See also, Langbein "The Origins of Public Prosecution at Common Law" 1973 *Am. J. Legal Hist.* 313 318-320.

¹⁵⁵ Langbein 1973 *Am. J. Legal Hist.* 322.

¹⁵⁶ Langbein *The Origins* 46-47.

¹⁵⁷ Roodt 2004 *Fundamina* 150.

¹⁵⁸ Langbein *The Origins* 47.

¹⁵⁹ Stuntz "The Substantive Origins of the Criminal Procedure" 1995 *105 Yale L. J.* 393 417. Talking about the English practice in the eighteenth century, he argues that "[m]agisterial questioning functioned as police interrogation does today; it offered the government an opportunity to get whatever information it could from an uncounselled, and frequently frightened and confused defendants."

¹⁶⁰ 7 Will 3, c.3. Later complemented by the Prisoner's Counsel Act of 1836, which granted right to full assistance of counsel in all criminal cases.

¹⁶¹ Langbein *Origins* 64.

As Langbein argues, the advent of defence counsel eventually marked the final stage of development of the adversarial criminal trial.¹⁶² The trial became one that primarily relied on defence counsel to contest the case of the Prosecution that represented the state. Its primary purpose is to provide an opportunity for defence counsel to probe and test the Prosecution's case.¹⁶³ Consequently, a reference to the adversarial criminal trial generally implies the presence of advocates acting on behalf of the Prosecution and the Defence in the adjudicatory contest. The essence of the trial, as established from its historical evolution, lies in the fairness of the procedure, established through a balance of legal representation between the Prosecution and the accused.

2.6 THE ADVERSARIAL MODEL OF JUSTICE

Adversarial trial technically connotes a contest between two presumably equal opponents under the supervision of the court.¹⁶⁴ As a form of judicial ideology, it essentially refers to a justice procedure, according to which neutral and passive judicial officers resolve legal disputes through formal adjudicatory proceedings, primarily based on evidence presented by contending parties.¹⁶⁵

2.6.1 Adversarial System *vis-à-vis* Inquisitorial System

The adversarial system of trial is generally rivalled by the inquisitorial system and the two systems are usually contrasted to expose their unique characteristics. The structure of each theoretical model is an embodiment of its underlying ideologies and values. While the adversarial system is modelled on the principles and values of the Anglo-American common law tradition, the inquisitorial system follows a paradigm shaped in Continental European legal philosophy and is adopted by civil law countries.¹⁶⁶ The two systems are built on very distinct operational and epistemic assumptions regarding the nature and mode of discovery of the truth,

¹⁶² See Langbein *Origins* generally.

¹⁶³ *Id* at 253, 271.

¹⁶⁴ Roodt 2004 *Fundamina* 137 138.

¹⁶⁵ Landsman 1983 *Ohio St. L.J.* 714; Sward "Values, Ideology and the Evolution of the Adversary System" 1989 *64 Ind. L. J.* 301 302; Thornburg "Metaphors Matter: How images of Battle, Sports and Sex shape the Adversary System" 1995 *10 Wis. Women's L. J.* 225 225, citing Landsman *Readings on Adversarial Justice: The American Approach to Adjudication* (1988) 1.

¹⁶⁶ Bekker "The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa" 2004 *CILSA* 173 173; also, Bekker "The Undefended Accused/Defendant "A Brief Overview of the Development of the American, American Indian and South African Positions" 1991 *CILSA* 151 151.

as well as the roles of the contending parties and judges in criminal adjudication.¹⁶⁷ The most fundamental feature of the adversarial ideology of justice, which in essence distinguishes it from the inquisitorial system, is its idea of partisan investigation and presentation of facts and evidence. Van Caenegem lucidly emphasises the point as follows:

It is rather the structure and organization of the forensic process or investigative method, than the adversarial nature of proceedings that distinguishes the two systems. In an adversarial system, the parties acting independently and in a partisan fashion are responsible for uncovering and presenting evidence before a passive and neutral trial judge or jury. In an inquisitorial system, the ultimate responsibility for finding the truth lies with an official body that acts with judicial authority, and gathers evidence both for and against the accused.¹⁶⁸

The use of the terms ‘adversarial’ and ‘inquisitorial’ to characterise legal processes in the Anglo-American common law and Continental European legal systems respectively, has often been the subject of controversy, especially among scholars of comparative law. Within the two regimes, different meanings have been attached to the two concepts.¹⁶⁹ Damaška, for example, has highlighted the inherent difficulty in determining whether a system is adversarial or inquisitorial by simply referring to ‘Anglo-American’ and ‘Continental’ legal traditions. The meaning and scope of these terms in contemporary legal thinking lack certainty and definition.¹⁷⁰

A more certain approach to distinguishing between the two systems is to analyse the manner in which the trial is structured.¹⁷¹ This is done by identifying a series of ideal-type features that

¹⁶⁷ Roodt 2004 *Fundamina* 137. She establishes the differences specifically in terms of the role of the judge in the fact-finding phase of the trial and the priority accorded to effective truth finding. See also Marcus “Above the Fray or into the Breach: The Judge’s role in New York’s Adversary System of Criminal Justice” 1992 *Brook L. Rev.* 1193 1194, stating that “the different approaches of the two models are most striking in the context of a trial.” On the distinctions between the inquisitorial and adversarial paradigms, see Goldstein & Marcus “The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy and Germany” 1977 *Yale L.J.* 240 242-243.

¹⁶⁸ Van Caenegem 1999 “Advantages and Disadvantages of the Adversarial System in Criminal Proceedings” http://epublications.bond.edu.au/law_pubs/224 1999 69 70 (Accessed 15-04-2016). For general discussions on the distinctions between the two systems, see Jackson “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” 2005 *Mod. L. Rev.* 737 742; see also, Grunewald “Comparing Injustices: Truth, Justice and the System” 2014 *Alb. L. Rev.* 1139 1156-1158; Freedman “Our Constitutionalized Adversary System” 1998 *Chap. L. Rev.* 58 74.

¹⁶⁹ Jackson 2005 *Mod. L. Rev.* 740. See also Damaška “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study” 1973 *121 U. Pa. L. Rev.* 506; Nijboer “Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective” 1993 *41 AJCL* 299; 305 Damaška “Models of Criminal Procedure” 2001 *Zbornik* 477 485; Posner “An Economic Approach to the Law of Evidence” 1999 *51 Stan. L. R* 1477 1500.

¹⁷⁰ Jackson 2005 *Mod. L. Rev.* 147; Damaška *Adversary System* in 1 *Encyclopedia of Crime and Justice* S.H. Kadish ed. (1983) 24; Damaška *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986) 4-6; Damaška 2001 *Zbornik* 478-482; Goodpaster “On the Theory of the American Adversary Criminal Trial” 1987-1988 *J. Crim. L. & Criminology* 118 119 stating that “[a]dversariness of itself has little concrete meaning.”

¹⁷¹ See Goodpaster 1987-1988 *J. Crim. L. & Criminology* 119.

depict patterns that can be found within the generality of each procedure.¹⁷² These features in turn typify the respective physiological and substantive traits of the legal processes of each of the two systems. They effectively assist in the classification of a procedural legal system as being adversarial or inquisitorial.¹⁷³

2.6.1.1 Features of the Adversarial System

The central premise of the adversarial trial system is that truth and justice derive from a highly regulated contest of evidence and laws, pitching the parties to the litigation against one another before a neutral and relatively passive judicial officer.¹⁷⁴ The judicial officer decides which side wins or which side loses in accordance with the law.¹⁷⁵ There is no generic type of adversarial system because different jurisdictions use different versions of adversarialism.¹⁷⁶ The manner in which the adversarial contest is organised varies from one country to another.¹⁷⁷ An archetypal representation of conventional adversary criminal proceedings however, projects the trial in a scheme founded on a clear distribution of roles between the Prosecution, the Defence and the adjudicator in a strictly regulated environment and contest.¹⁷⁸ The entire adversarial system is conceived as a unified concept that works with the use of interconnected procedures, each of which assumes great importance to the process as a whole.¹⁷⁹ The system

¹⁷² Jackson 2005 *Mod. L. Rev.* 741.

¹⁷³ *Id* at 742.

¹⁷⁴ See Landsman 1983 *Ohio State L. J.* 714; also, Landsman "Are the Federal Rules of Evidence Dynamite?" 2015 *B.U. Int'l. L. J.* 101 104-105, stating that "[t]he central premise of the adversarial system is that confronting adversaries in open court is likely to produce a wide range of information from which a neutral decision maker may fashion a decision and effectively resolve the dispute that the parties have framed." See also Sward 1989 *Ind. L. J.* 302.

¹⁷⁵ Freedman 1998 *Chap. L. Rev.* 158 58; Sward, *ibid.*, stating that "the Adversary System is characterized by party control of the investigation and presentation of evidence and arguments, and by a passive decision-maker who merely listens to both sides and renders a decision based on what she heard."; also Freedman *Understanding Lawyers' Ethics* (1990) 13: "[A]n Adversary System is one in which disputes are resolved by having the parties present their conflicting views of fact and law before an impartial and relatively passive judge and/or jury, who decides which sides wins what".

¹⁷⁶ Goodpaster 1987-1988 *J. Crim. L. & Criminology* 119; Jackson 2005 *Mod. L. Rev.* 741. He argues, "certain American commentators have taken such a pure view of adversarial procedures that they have been unwilling to consider that even common law countries such as England truly belong to the adversarial camp."; Asimow "Popular Culture and the Adversarial System". 2007 *Loy. L. A. L. Rev.* 651 651, referring to Maximo "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure" 2004 *Harv. Int'l. L. J.* 1-26, discussing different approaches to the adversarial and inquisitorial systems; Posner "An Economic Approach to the Law of Evidence" 1999 *51 Stan. L. Rev.* 1477 1500.

¹⁷⁷ Goodpaster 1987-1988 *J. Crim. L. & Criminology* 119.

¹⁷⁸ Zuckerman "No Justice without Lawyers – The Myth of an Inquisitorial Solution" 2014 *Civ. Justice Q.* 355 357.

¹⁷⁹ Landsman 1983 *Ohio State L. J.* 714.

relies on the parties' autonomy and competence in presenting their evidence and arguments before the court, in a highly structured forensic setting.¹⁸⁰

Despite the varying versions of the adversarial system in domestic jurisdictions, one principle that perambulates them all is the very notion that the trial is a contest.¹⁸¹ The adversarial system inherently projects its dispute resolution process as a 'contest' between two contending parties.¹⁸² The presentation of facts and evidence is conducted through a dialectic process of persuasion by the contending parties and their lawyers.¹⁸³ The adversarial theory is rooted in the epistemic assumption that knowledge emerges from "competitive presentations of relevant factual and legal considerations" and "through a dialectic of conjecture and refutation".¹⁸⁴ In that sense, the conventional adversarial procedure today still parallels the combative feature of its early developments in the medieval times.¹⁸⁵

The adversarial system proceeds on the premise that the contending parties are largely and roughly equal. The parties are thus personally and solely responsible for developing their respective cases. The involvement of the neutral decision-maker is to decide the outcome of the case based on the submissions of the parties.¹⁸⁶ In criminal trials founded on this 'contest' model, the conventional procedure is for the state to lead the prosecution. It prepares the case by conducting its investigations. It then brings a criminal charge against the accused person and assumes the responsibility of presenting the necessary facts and evidence in order to substantiate and prove the offence charged against the accused. In defence, the accused person may rebut the charge through the presentation of adverse evidence and arguments against the Prosecution's case. The judge does not actively take part in the presentation of the facts and evidence.¹⁸⁷ S/he does not direct the nature of the evidence and proof to adduce at trial.¹⁸⁸ The adversarial system assumes that the judge must "[view] the case from the peak of an Olympian

¹⁸⁰ *Ibid*; see also Milani & Smith "Playing God: A Critical Look at *Sua Sponte* Decisions in Appellate Courts" 2002 *Tenn. L. Rev.* 1 28. They identified the two main features to be the neutral and passive decision makers and party control of proceedings.

¹⁸¹ See, e.g., Jackson 2005 *Mod. L. Rev.* 741.

¹⁸² Parisi "Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared" 2002 *Int'l. Rev. L. & Econ.* 193 197.

¹⁸³ See Bekker 1991 *CILSA* 152, stating that "[b]ecause the adversarial system is party-centered, lawyers for both the state and defence play a dominant role in the pursuit of procedural justice."; see also, Freedman 1998 *Chap. L. Rev.* 74.

¹⁸⁴ Rhode "Ethical Perspectives on Legal Practice" 1985 *Stan. L. Rev.* 589 595.

¹⁸⁵ Discussed *infra*, Ch. 4, text at 4.2

¹⁸⁶ See, e.g., Goldstein "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure" 1974 *Stan. L. Rev.* 1009.

¹⁸⁷ Jackson 2005 *Mod. L. Rev.* 742.

¹⁸⁸ Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 339.

ignorance”.¹⁸⁹ S/he must be ‘ignorant’ of the facts of the case and avoid any contact with the evidence before the trial.¹⁹⁰

Within the core adversarial tradition of the Anglo-American common law, the principle as enunciated by Lord Greene is that justice is done by a judge who holds “the balance between the contending parties without himself taking part in their disputes”.¹⁹¹ Under this adjudicative ideology, judicial participation in a trial is constrained by the procedural requirements of neutrality and passivity. The remit of the judge is limited to ensuring that the rules of trial are complied with.¹⁹² Several theories have been advanced to justify the insulated role of the judge in an adversarial trial. The most prominent rationalisation is the apprehension that a trial judge who intervenes on behalf of a party to the proceedings risks undermining his/her procedural obligation to remain impartial and neutral.¹⁹³

The foundations of the concepts of judicial neutrality and impartiality are in effect theoretically grounded in the field of cognitive psychology. Research in this field supports the belief that judicial involvement in the development of facts and evidence of a case may affect the integrity of the fact-finding process. It holds strongly on to the notion that a judge who becomes involved in the investigation of the disputed facts is open to forming an unconscious bias in favour of a party.¹⁹⁴ In an oft-quoted *dictum* usually advanced in defence of the adversarial theory, Fuller and Randall rationalise the circumscription of the judicial duty in the adversarial operational setup. In their opinion, removing the judge from the development of facts and evidence in a dispute is “the only effective means for combating th[e] natural tendency to judge too swiftly

¹⁸⁹ Frankel “The Search for Truth: An Umpireal View” 1975 *U. Pa. L. Rev.* 1031 1042.

¹⁹⁰ *Ibid.*

¹⁹¹ *Yuill v. Yuill* 1945 2 All ER 183. See, also Lord Denning who emphasises the role of the judicial officer as a neutral arbiter and umpire who sits between the opposing parties and merely considers the information as provided by them and acts on the submissions they make. *Jones v. National Coal Board* 1957 2 QB 55 63, followed in *Hadi Jemaldeen v. A-Z Law Solicitors* 2012 EWCA Civ. 1431.

¹⁹² Roodt 2004 *Fundamina* 139; Zuckerman 2014 33 *Civ. Justice Q.* 357; Goldschmidt “The *Pro se* Litigant Struggle for Access to Justice: Meeting the Challenge of the Bench and the Bar Resistance” 2002 *Fam. Court Rev.* 36 39. This is compared to the Inquisitorial system of trial where the judge takes an active role in both the fact-finding process and conduct of the trial and decides the case on its merits. See Damaška *Evidence Law Adrift* (1997) 80; Findley “Adversarial Inquisitions: Rethinking the Search for the Truth” 2011-2001 *N.Y.L. Sch. Rev.* 911 913, fn 5: “In an inquisitorial system, a neutral magistrate, rather than the parties themselves, undertakes the task of managing the investigation and developing and presenting the evidence, motivated solely by an interest in finding the truth, the parties play a less direct role in the process...”; Roodt 2004 *Fundamina* 140 stating that “the inquisitorial system is rather judge-centered. Every aspect of the process including the detection of offences, police questioning in the pre-trial phase of the prosecution and the direction and conclusion of the trial is determined by the independent research, instructions, supervision and authority of the investigating judge who acts in the public interest as agent of the State.”

¹⁹³ Landsman “Nothing for Something? Denying Legal Assistance to those Compelled to Participate in ADR Proceedings” 2010 *Fordham Urb. LJ* 273.

¹⁹⁴ Zuckerman 2014 *C. J. Q.* 372.

in terms of the familiar that which is not yet fully known”.¹⁹⁵ These characteristics of the adversarial trial define its operational ideologies and its conception of justice.

2.6.1.2 *The Inquisitorial System*

In contrast to the adversarial system, the inquisitorial procedure, which governs the trial system of civil law countries in Central and Eastern Europe, South America, as well as countries of the former Soviet Union, is essentially judge-centred.¹⁹⁶ The inquisitorial system rests on the ideology of official inquiry.¹⁹⁷ It involves a centralised and official system of investigation conducted by state officials into the factual basis of the alleged crime. The entire system relies on a relatively limited participation of the parties in the trial, while vesting the judge with a more active role in the pre-trial and trial processes and proceedings.¹⁹⁸ The judge investigates the facts and develops the evidence in a predominantly unilateral fashion.¹⁹⁹ At the trial, s/he relies on files compiled under judicial supervision at the investigative and pre-trial stages of the proceedings.²⁰⁰ The judge calls and questions all material and relevant witnesses in the controversy. Again, s/he controls the evidence, conducts the entire proceedings, and determines the outcome of the trial.²⁰¹ The participation of the Prosecution and Defence teams in the factual and evidentiary enquiries comes by way of limited assistance to the judge and remains purely secondary.²⁰²

2.6.1.3 *Convergence of Adversarial and Inquisitorial Procedures*

Pure adversarial or inquisitorial systems do not exist in practice. In other words, the adversarial and inquisitorial systems do not exist in isolation.²⁰³ There is a gradual convergence of both procedural traditions towards mixed solutions, arising as a product of modern-day

¹⁹⁵ Fuller & Randall “Professional Responsibility: Report of the Joint Conference” 1958 *ABA J* 1159 1159-1162, 1216-1218.

¹⁹⁶ Roodt 2004 *Fundamina* 138; Hodgson “Hierarchy, bureaucracy and Ideology in French Criminal Justice: Some Empirical Observations” 2002 *J.L.S* 227; Milani & Smith 2002 *Tenn. L. Rev.* 1 36.

¹⁹⁷ Damaška *The Faces of Justice and State Authority* 3.

¹⁹⁸ See Talen & Alhstrand “The Public Prosecutor, Its Role, Duties and Powers in the Pre-trial Stage of the Criminal Process – A comparative Study of the French and Swedish Legal Systems” 2011 *R Int DP* 523 523

¹⁹⁹ Freedman 1998 *Chap. L. Rev.* 74.

²⁰⁰ Marcus 1992 *Brook. L. Rev.* 1193 1194.

²⁰¹ See Adam Milani & Smith 2002 *Tenn. L. Rev.* 36; Bekker 2004 *CILSA* 174; Marcus 1992 *Brook. L. Rev.* 1194.

²⁰² Marcus 1992 *Brook. L. Rev.* 1194. He summarizes the contribution of the parties to the development of the facts and evidence through suggestions of additional questions and motions for additional evidence.

²⁰³ Dolores “Levelling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused persons Unrepresented by counsel” 2000 *Ethiopian L. Rev.* 27 39; Gélinas *et al. Foundations of Civil Justice – Towards a value-based Framework for Reform* 2015 65-72.

globalisation.²⁰⁴ From a strict analysis of the western prototypes of adjudication, as they apply in liberal and democratic states, there may be two distinct procedural ideal-types. The workable procedures do however settle for a *quasi-mixed* system.²⁰⁵ According to Kessler, all legal systems carry elements of both the adversarial and the inquisitorial system, and no legal system operates in extremism.²⁰⁶ The distinction between the two procedural models is slowly eroding, as legal reforms in each system refer to workable procedures in the other.²⁰⁷

A desire to retain a blind distinction between the two procedures is one factor that would inevitably hinder effective criminal justice reform. Inter-procedural consultations for structural remedies blur the stereotypical distinction between the adversarial and inquisitorial systems. The inquisitorial system rests on a state-centred conception of justice, where it is the responsibility of the state to “recreate what the parties do not say”²⁰⁸ and to counter-power imbalances.²⁰⁹ It becomes in practice a valuable resource for solutions to adversarial problems. In the adversarial system, this translates into adopting certain inquisitorial procedures to mitigate the excesses of the adversarial system. As Kessler argues, “adversarial procedure alone does not work and indeed, the more committed a legal system becomes to adversarial procedure, the more likely it is to embrace parallel non-adversarial alternatives”.²¹⁰ Consequently, adversarial jurisdictions, including Ghana, remain open to inquisitorial ideas to redress key procedural issues generally relating to fairness of the trial.

2.6.2 Values and Ideologies of the Adversarial System

The trial system in every society reflects certain key values that determine the goals of the adjudicatory system.²¹¹ The general architecture of the adversarial system is rooted in a number

²⁰⁴ See Kessler “Recalling Past Convergence: Equity Procedure and the United States’ Forgotten Inquisitorial Tradition” 2012 *Cuadernos de la Maestría en Derecho* 45, arguing that despite this assertion, it is also true that the convergence of the two procedures in effect predates modern-day globalisation; see also Kessler “Our Inquisitorial Tradition: Equity Procedure, Due Process and the search for an alternative to the adversarial” 2004-2005 *Cornell L. Rev.* 1181 1193, stating that historically, “[t]he Anglo-American courts of equity drew on the same Roman-canon tradition that underlies the continental European legal systems, and for this reason there were for centuries in many key respects inquisitorial.”

²⁰⁵ Jackson 2005 *MLR* 737 737-738.

²⁰⁶ Kessler 2004-2005 *Cornell L. Rev.* 1187, stating that “the models of adversarial and inquisitorial systems of justice are precisely that models to which no actual legal system precisely corresponds, since all legal systems combine both adversarial and inquisitorial elements.”

²⁰⁷ Gélinas *et al Foundations of Civil Justice* 65.

²⁰⁸ Micheal Block *et al* “An Experimental Comparison of the Adversarial System versus Inquisitorial Procedural Regimes” 2000 *AM. L. & Econ. Rev.* 170.

²⁰⁹ Gélinas *et al Foundations of Civil Justice* 66.

²¹⁰ Kessler 2004-2005 *Cornell L. Rev.* 1188.

²¹¹ Sward 1989 *Ind. L. J.* 312.

of social and cultural values and ideologies that go beyond the adjudicatory process itself.²¹² Each unit of the adversarial procedure works towards a specific objective and for the overall purpose of ensuring the fairness and efficiency of the trial. The values underlying the adversarial system are therefore, not strictly defined. A more orthodox discussion of the values and ideologies of the adversarial system usually highlights the following: voice, individualism and competition.

2.6.2.1 Voice

The strength of the adversarial theory of justice lies in the opportunity given to the parties to express themselves and to state their side of the story without any restrictions. The adversarial system relays the investigation of the facts and evidence to the adversaries in the case. It also ensures that all persons whose interests and rights are at stake personally and actively participate in the proceedings. In criminal trials, this principle lies in actively engaging accused persons to face their accusers and to legally refute guilt.²¹³ Each party who has a stake in the case is therefore guaranteed a greater and fairer opportunity to be heard on the merit of the case.²¹⁴ The rationale is to give due recognition to the dignity of the parties who are directly affected by the trial and to allow them to have a 'voice' in the legal process.²¹⁵ The presumption is that when given the opportunity to express their views and control the proceedings, parties directly affected by the trial are reassured in the belief that their 'voice' will affect the decision that will be made either for or against them.²¹⁶ Thus, through personal and active participation in the trial, parties affect the judicial outcome in a manner that not only reinforces the fairness of the trial procedure, but also the legitimacy of the adversary trial system and its courts.²¹⁷

²¹² *Id* at 310.

²¹³ Roodt 2004 *Fundamina* 138.

²¹⁴ Lind, Kanfer & Early "Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments" 1990 *J. Pers. Soc. Psychol.* 952-952; Fong 2014 *Wash. U. Jur. Rev.* 109, referring to Thibaut & Walker *Procedural Justice: A psychological Analysis* (1975) 38-39; Landsman "The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts" 1980 *Buff. L. Rev.* 487-526.

²¹⁵ Fong 2014 *Wash. U. Jur. Rev.* 109; See also Young, Pollets & Poreda *Operation of the Adversary System – Purpose of the Law of Evidence*, 19 *Mas. Practice: Evidence* § 102.1 (2008); Milani & Smith 2002 *Tenn. L. Rev.* 38; See also Sward 1989 *Ind. L. J* 310. This value of the adversarial system has been proved in various empirical studies in the psychology of procedural justice. See also, Thibaut & Walker *Procedural Justice* (1975); Thibaut & Walker "A Theory of Procedure" 1978 *Cal. L. Rev.* 541; Lind & Tyler *The Social Psychology of Procedural Justice* Lerner ed. (1988); Tyler "Psychological Perspectives on Legitimacy and Legitimation" 2006 57 *Ann. Rev. Psychol.* 375-382-83.

²¹⁶ Lind, Kanfer & Early Voice 1990 *J. Pers. Soc. Psychol.* 952.

²¹⁷ *Ibid*; see also, Tyler 2007 *Court Review* 26.

2.6.2.2 Individualism

The adversarial system is influenced by an individualistic pattern of thought, which connotes individual control and initiative, as well as confrontation.²¹⁸ The system is ingrained in values that imply a rejection of centralised authority and minimise state intervention in adjudicatory processes and prosecution of claims.²¹⁹ These values highlight the individualistic nature of the adversarial system of adjudication, which according to Freedman, connotes two distinct but related concepts. The first suggests an idea of individualised justice “in the sense of respect for the individual in the light of his or her particular circumstances”.²²⁰ The second, which remains more central to the adversarial philosophy of justice, relates aptly to the notion of individual autonomy.²²¹ The individualistic feature of the adversary trial system also thrives on engaging the parties themselves into a contest and confrontation in the resolution of disputes.²²²

The contending parties are entrusted with the task of defining and pursuing their respective cases and partisan interests.²²³ They are primarily responsible for the success or otherwise of their respective cases, as they also control the proceedings.²²⁴ By this configuration of the adversarial trial model, each party remains fully responsible for the protection of his/her interests and for the defence of his/her views and arguments.²²⁵ It is for the parties to determine when to proceed to court and where, as well as to determine the amount of resources to dedicate to the trial.²²⁶ They themselves fully handle and control their own destiny in the criminal trial.²²⁷ In this way, the “who else would care enough to do it well?” rationale for litigant activism in the adversarial trial best depicts the underlying individualistic nature of the adversarial system.²²⁸

²¹⁸ Sward 1989 *Ind. L. J.* 310-312.

²¹⁹ *Ibid*; also Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 338.

²²⁰ Freedman 1998 *Chap. L. Rev.* 87.

²²¹ *Ibid*.

²²² Sward 1989 *Ind. L. J.* 311, noting that this is opposed to the communitarian ideal which is built on the theory of “cooperation rather than confrontation in resolving society’s problems, including disputes among its members.”

²²³ *Id* at 310.

²²⁴ Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 332 338, 340.

²²⁵ *Id* at 338.

²²⁶ *Id* at 338-339.

²²⁷ *Id* at 332.

²²⁸ *Id* at 338.

2.6.2.3 Competition, Self-Motivation and the Ideology to Win

The adversarial system reflects highly individualistic values. It is steeped in the exaltation of the social idea of competition.²²⁹ The system is essentially a combative method of adjudication and rests on a presumption of parity of opportunities between the contending parties, to either win or lose the case.²³⁰ This philosophy of the system is based on the view that the adversarial adjudicatory process parallels the capitalist *laissez-faire* economic activity.²³¹ By this theory, parties vigorously apply themselves to achieving their respective and desired goals, whenever they are given the opportunity to pursue their own interests.²³²

The physiology of contemporary adversarial trial procedure is also moulded around the value of competition. The current adversarial system is, to that effect, described as a “part of human evolution from trial by real combat to modern ‘bloodless’ combat in the courtroom”.²³³ The context of the adversarial trial therefore remains conflictual. As Tuzet explains, the trial is not “a dialogical and collaborative effort for a true representation of what is at stake”. Additionally, the “legal argumentation on trial is not supposed to be a disinterested effort for truth and justice; it is supposed to be an effort for success. It is advocacy and not inquiry”.²³⁴

The commitment to fostering an avid competition between the parties has generally been through the adversarial system’s stimulation of the value of self-motivation and the ideology to win.²³⁵ The parties’ interest is geared towards engaging the court to approve of their respective stories and declare them winner.²³⁶ The dialectic of the adversarial procedure thus requires two key procedural deliverables. They are expressed as (i) vigorous partisan presentation of relevant and material facts in support of one’s case on the one hand, and (ii) uncovering and exposing the specious claims of the adversary on the other.²³⁷ Parties are highly

²²⁹ Weinstein “And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System” 1997-1998 *U. Miami L. Rev.* 79 93 96, citing Kutak *The Adversary System and the Practice of Law*, in Luban (ed) *The Good Lawyer* (1984) 172.

²³⁰ *Ibid.*

²³¹ Baron, Corbin & Gutman “Throwing Babies Out with the Bathwater? Adversarialism, ADR and the Way Forward” 2014 *Monash U. Law Rev.* 283 291.

²³² Barrett “The Adversarial System and the Ethics of Advocacy” 1962 *Notre Dame L. Rev.* 479 480.

²³³ See Landsman *The Adversary System: A Description and A defence* (1984) 8-10.

²³⁴ Tuzet *Arguing on Fact: Truth, Trials and Adversary Procedures* in Dahlman & Feteris *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (2012) 219.

²³⁵ Asimow 2007 *Loy. L. A. L. Rev.* 662; see also Saltzburg “Lawyers, Clients and the Adversary System” 1985-1986 *Mercer L. Rev.* 647 656, stating that “the notion is that people who stand to gain or lose from a transaction are likely to be motivated to act more effectively than those who are indifferent to the transaction.”

²³⁶ Weinstein 1997-1998 *U. Miami L. Rev.* 82. See also Saltzburg 1985-1986 *Mercer L. Rev.* 656, specifically referring to the American adversarial system.

²³⁷ Strier *How Much Justice Can You Afford?* In *Reconstructing Justice: An Agenda for Trial Reform* 1996 55.

motivated to produce and present all favourable material facts and evidence, and to develop all legal theories in support of their arguments for consideration by the judicial officer.²³⁸ They also bear an interest-driven duty to garner all energy and means at their disposal to expose the weaknesses in the adversary's case.²³⁹ Aggressive and strategic party participation therefore becomes indispensable in the adversarial trial. The contest becomes a fervent and keen confrontation of opposing views, arguments and supporting legal theories of the parties, a procedure that supposedly assists in objectively exposing the truth.²⁴⁰ The ensuing advantage is that the judicial officer is presented with the strongest and most convincing arguments and legal theories of the contending parties. S/he thus stands sufficiently informed to deliver a logical and reasoned judgment according to law.²⁴¹

Voice, individualism, competition and the ideology to win jointly define the values underlying the adversarial theory of adjudication. Together, they highlight one distinctive character of the adversarial system: the outcome of the trial is largely determined by the level of participation and strength of the arguments of the parties.

2.6.3 Ideological Assumptions of Truth and Justice in the Adversarial System

Effective criminal adjudication of adversarial criminal proceedings is realised through findings of the facts.²⁴² This exhortation certainly affiliates with the theory that truth and justice bear an indispensable correlation. Justice can only be achieved by establishing the facts of the events leading to a crime.²⁴³ Ho argues, "justice and truth are not separate and competing goals but integrated and concurrent aims (...) Justice must be done in the pursuit of truth".²⁴⁴ This position has long been cemented as the fulcrum of criminal proceedings in generally all

²³⁸ Saltzburg 1985-1986 *Mercer L. Rev.* 656; Weigend "Should We Search for the Truth, and Who Should Do it?" 2011 *N.C. J. Int'l L. & Com. Reg.* 389 396.

²³⁹ Weigend 2011 *N.C. J. Int'l L. & Com. Reg.* 396.

²⁴⁰ See Shroeder "The Adversarial Legal System: Is Justice Served?" 2010. <http://www.thelawinsider.com/insider-news/the-adversarial-legal-system-is-justice-served/> (Accessed 20-10-2015); Finkelstein "The Adversarial System and the Search for Truth" 2011 *Monash U. Law Rev.* 135 136. The adversarial procedural system of truth-search in essence justifies itself on the premise that the pursuit of partisan self-interests guarantees a fervent and keen confrontation of the opposite facts and evidence. It also ensures that all information material to the dispute are presented and tested before the court.

²⁴¹ Saltzburg 1985-1986 *Mercer L. Rev.* 656. In this sense, he links this incentive of adversarial practice to the idea of free enterprise that governs economic thinking.

²⁴² Tuzet *Arguing on Facts* 212; Edmond & Roberts "Procedural Fairness, the Criminal Trial and Forensic Science and Medicine" 2011 *Syd. Law Rev.* 359; see also, Goodpaster "The Adversary System, Advocacy and Effective Assistance of Counsel in Criminal Cases" 1986 *N.Y.U. Rev. L. & Soc. Change* 59 68, stating that one of the purposes of the American adversary system is truth finding.

²⁴³ Laudan *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (2008) 2. As he avers, a "just resolution crucially depends on correctly finding out who did what to whom."

²⁴⁴ Ho *A Philosophy of Evidence Law: Justice in the Search for Truth* (2008) 268 339; Weinstein "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials" 1966 *Colum. L. Rev.* 223 227.

jurisdictions and legal systems of modern liberal democracies. Lord Denning is often cited for his concurring opinion on the matter. He opined that in criminal adjudication, the main objective of the court is “to find out the truth, and do justice according to law.”²⁴⁵

One commonly cited quality of the adversarial system of adjudication is its ability to find the truth.²⁴⁶ In the pursuit of justice, the adversarial system has sometimes been touted, through its apparatus of cross-examination, as being the “greatest engine ever developed for the discovery of truth”.²⁴⁷ It is further claimed that the adversarial paradigm is the best procedural design for finding the truth.²⁴⁸ This truth-finding claim of the adversarial system has however been substantially criticised. In practice, any attempt at identifying an archetypical system of trial best suited to the ascertainment of the ‘factual truth’ in criminal cases will hardly settle for the adversarial system; so also will any endeavour at finding a procedural system that ensures that innocent accused persons do not unjustifiably suffer for inaccuracies and lapses inherent in its truth-finding procedures.²⁴⁹

2.6.3.1 The Consensus Theory of Truth in Adversarial Trials

The competition theory of the adversarial system rests on the assumption that allowing the contending parties to fight out their respective claims of facts in a structured forensic setting will best assist the decision-maker in discovering the truth of the matter.²⁵⁰ Barret captures this philosophy of the adversarial system as follows:

[T]he adversary system as a human device for getting at the truth of disputed facts in a lawsuit, is staked on the assumption that from the struggle between the litigants aided by their advocates, each with ardour, presenting one side of the case and each with the utmost skill attempting to detect the weaknesses of his adversary's evidence or points of law, the jury which must choose between the conflicting versions of the truth, and the court which is to select the applicable rules of law, will have before them, more often than not, the relevant material from which to fashion by their joint efforts, a just decision. Such is the theory of the adversary system, and such are its assumptions.²⁵¹

²⁴⁵ *Jones v. National Coal Board* 1957 2 QB 55 63.

²⁴⁶ *Goodpaster* 1986 *N.Y.U. Rev. L & Soc. Change* 68; *Polk County v. Dodson* 1981 454 U.S 312 318, stating that “[t]he System assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”; also, *Mackey v. Montrym* 1979 443 U.S 1 13, holding that “our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error...”

²⁴⁷ Wigmore *Evidence in Trial at the Common Law* (1974) 32. See Robinson “There is No Such Thing as Litigation: Access to Justice and the Realities of Adjudication” 2015 *JGRJ* 185 201 n.19.

²⁴⁸ Strier How Much Justice Can You Afford? 53.

²⁴⁹ E.g., Findley “Adversarial Inquisitions: Rethinking the Search for the Truth” 56 *N.Y.L. Sch. L. Rev.* 911 912. The author makes these remarks about the American adversarial criminal law system. However, the same observation can be generalized among countries under the adversarial system of the Anglo-American common law tradition.

²⁵⁰ Roodt 2004 *Fundamina* 154.

²⁵¹ Barrett 1962 *Notre Dame L. Rev.* 481.

The adversarial system relies on a contextual definition of 'truth', which in turns defines the nature of trial outcomes and the perspective of justice. Truth generally connotes the 'factual or forensic' truth. It relates to a 'reality of fact' capable of being determined and described in an adequate form, and which helps distinguish between what portrays actuality and sheer falsehood.²⁵² Truth thus bears semblance with an accurate reconstruction of a past event.

In adversarial proceedings, however, truth takes a contextual connotation. It refers to nothing "more than the ideal end of a properly structured inquiry". It becomes, in practical terms, what will be judicially established or agreed in the contest between the contending parties.²⁵³ How truth is determined in the adversarial contest is analysed within the framework of what is described as the 'consensus theory' of truth. This theory operates on an *a priori* assumption that there are no 'true facts' and rather emphasises a "process of justification of claims to knowledge."²⁵⁴ It professes that truth is simply what is agreed upon after a fair and complete interaction. In other words, it is the likely account established after sifting through the controversy.²⁵⁵ As a result, 'forensic truth' as discovered in an adversarial trial may differ from the 'truth' discovered through historical and scientific methods.²⁵⁶

2.6.3.2 The Truth-Finding Deficits of the Adversarial System

Various reasons have been advanced in support of the truth-defeating character of the adversarial system. Noticeably, the operational features of the system are not very conducive to truth finding. The underlying assumption of the adversarial system makes a partisan investigation of facts and presentation of evidence, the sole source of truth finding. This feature exposes the doubtful congruence between a genuine reconstruction of the historical facts and

²⁵² Weigend 2011 36 *N.C. J. Int'l L. & Com. Reg.* 389 390; see also, Grunewald 2014 *Alb. L. Rev.* 1150.

²⁵³ Damaška "Truth in Adjudication" 1998 *Hastings L.J.* 289 294; Grunewald 2014 *Alb. Law Rev* 1154 fn.79, 80, 81. This consensus truth theory has been contrasted with the correspondence truth theory, which characterizes the inquisitorial system. It sees truth as being a correspondent to a fact or simply reality. See David "The Correspondence Theory of Truth" 2009 *Stan. Encyclopedia of Philosophy*. <http://plato.stanford.edu/entries/truth-correspondence/>. (Accessed 19-10-2015).

²⁵⁴ Damaška 1998 *Hastings L.J.* 294.

²⁵⁵ Hodgson *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* in 2 *The Trial on Trial – Judgment and Calling to Account* (2006) 223 225. See also Weigend 2011 *N.C. J. Int'l L. & Com. Reg.* 395-396. He argues that whatever emerges from a fair and rational discourse among the parties can be accepted as the 'truth', the content of the rules that determine the process becomes more important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding. The rival approach is the correspondence theory, according to which a sentence is true if it corresponds to an objective reality capable of being discovered and exposed. In that case, since truth finding connotes the discovery of objective reality, it is the result that legitimises the process. This approach is associated with the inquisitorial system.

²⁵⁶ Dershowitz "Is the Criminal Trial a Search for the Truth?" www.pbs.org/wgbh/pages/frontline/oj.highlights/dershowitz.html. (Accessed 03-11-2015)

the projected value of the adversarial system expressed in the incentive to win.²⁵⁷ The truth-seeking objective of the adversarial trial is generally compromised by the overarching ambition to win.²⁵⁸ The practice of parties and their lawyers in the adversarial trial is to shape the facts and skew them towards their partisan interests, give their evaluative judgments and fine-tune them to suit their claims in order to secure a win.²⁵⁹ Parties manipulate their disclosure in order to advance the cause of the respective claims and cases.²⁶⁰ As Strier notes:

Zealous advocacy informs evidence presentation. Evidence admitted in the adversarial trial is not perforce pristine. Attorneys constantly strive to influence how evidence is processed by the fact finder... coaching of witnesses, fact finders process not only what is said but how it is said.²⁶¹

Menkel-Meadow also advances the argument in these very insightful words:

The binary nature of the adversary system and its particular methods and tactics often may thwart some of the essential goals of any legal system.... Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.²⁶²

These assertions have been empirically tested in studies that have proved that the adversarial system “may shield from the decision-maker, facts that are unfavourable to the parties, which in turn may lead to inaccurate decisions”.²⁶³ It is even more perturbing to note the fact that the contending parties control not only the questioning of witnesses, but their selection and preparation as well, thus deepening the fissure of factual inaccuracy. Frank commented on the matter as follows:

[T]he contentious method of trying cases augments the tendency of witnesses to mould their memories to assist one of the litigants, because the partisan nature of trials tends to make partisans of the witnesses. They come to regard themselves, not as aids in an investigation bent on discovering the truth, not as aids

²⁵⁷ See Strier *How Much Justice Can You Afford?* 54, arguing that the clash of partisan evidence flinches in the face of two main truths: first that party control dictates that the sole source of truth comes from the evidence of the partisan parties and their lawyers and secondly that the attorney’s professional goal, his legal obligation and his financial interests under the mandate of zealous advocacy is with the realization of his client’s success.

²⁵⁸ *Ibid.* He argues further that “the adversarial contest is by its very nature not one in which the objective of each side or of both together is to expose the truth, the whole truth and nothing but the truth. The lawyer aims at victory, at winning the fight and not at aiding the court to discover the facts”; see also Saltzburg 1986-1987 *Mercer L. Rev.* 647 653

²⁵⁹ Finkelstein 2011 *Monash U. Law. Rev.* 136, arguing that that partisan self-interest does not entail search for the truth in a system where it is routine a) for opposing testimony to be discredited regardless of whether it is true or not; b) for the incompetence of opposing counsel to be exploited; c) for the material facts to be omitted for pleadings or withheld due to privilege; d) for probative evidence to the excluded or e) for counsel to indulge in sophistry and rhetorical manipulation of which the primary aim is to obscure the truth; see also, Goodpaster 1987-1988 *J. Crim. L. & Criminology* 118-120.

²⁶⁰ Goodpaster 1986 *N.Y.U. Rev. L & Soc. Change* 71.

²⁶¹ Strier *How Much Justice Can You Afford?* 56.

²⁶² Menkel-Meadow 1996 *Wm. & Mary L. Rev.* 5-6.

²⁶³ Sevier “The Truth-Justice Trade-off: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems” 2013 *Psychol. Pub. Pol’y & L.* 212. In effect empirical studies have suggested in a comparative analysis that the adversarial system produces less truth than the inquisitorial system. See, e.g., Thibaut & Walker 1978 *Cal. Law Rev.* 541.

to the court, but as the 'plaintiff's witnesses' or the 'defendant's witnesses.' They become soldiers in a war and cease to be neutrals.²⁶⁴

Consequently, the development of factual truth becomes presumptively a defeated assignment of the adversarial process. What constitutes truth is reduced to a subjective reality driven by the personal evaluation of the parties and influenced by the partisan interest to win, thus giving greater incentive to conceal or distort the truth.²⁶⁵ There is technically no forensic procedure for an objective determination of the factual truth. Judges remain passive and are "neither concerned with nor responsible for identifying the truth".²⁶⁶ The completeness and veracity of the facts, which form the basis for judicial decision in an adversarial trial, are not fully certain.²⁶⁷ The factual truth at best remains a convenience, a by-product or an accidental approximation.²⁶⁸

This feature of the adversarial theory of justice is informed by the very objectives of the adversarial procedure itself. One truism is that the truth-seeking purpose of the adversarial criminal trial system is compromised by other ideologies and balanced with other values of the adversarial system.²⁶⁹ In fact, the major priority of the adversarial trial is not just finding the factual truth. Truth finding is admittedly one of the secondary goals that assist in the attainment of the primary goal of doing justice.²⁷⁰ The primary concern of the adversarial trial process is therefore to find a balance between these competing factors.²⁷¹ As Weigend argues, if the search for the truth stood as the ultimate goal of criminal adjudication, it "would have to result

²⁶⁴ Frank *Courts on Trial: Myth and Reality in American Justice* (1949) 86, cited by Slobogin "Lessons from Inquisitorialism" 2014 *S. Cal. Law Rev.* 699 706.

²⁶⁵ Roodt 2004 *Fundamina* 154; also Frank *Courts on Trial* (1950) 80-102: "[T]he partisanship of the opposing lawyers block the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it...we have allowed the fighting spirit to become dangerous and excessive... In short, the lawyer aims at victory, at winning in the fight, not aiding the court in discovering facts. He does not want the trial court to reach a sound and educated guess, if it is likely to be contrary to his client's interests. Our present trial method is the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation". <https://la.utexas.edu/users/jmciver/357L/FightTheory.PDF>. (Accessed 03-11-2015).

²⁶⁶ van Caenegem 1999 79, arguing that "[t]he adversarial system, typified by party disposition and party prosecution, is often criticized because it is not sufficiently concerned with finding the truth, as parties, rather than state agencies, control and circumscribe the forensic process and judges do not participate actively in the search for truth."

²⁶⁷ Strier *How Much Justice Can You Afford?* 55. He argues that by simply allowing adversaries control over the development of trial evidence, they may keep relevant information from the decision-maker, such that factual basis for the decision may be incomplete; Roodt 2004 *Fundamina* 154-155. There is no certainty and assurance that the neutral and passive decision-maker will be provided with the actual material facts for substantive and fair decision-making.

²⁶⁸ Finkelstein 2011 *Monash U. Law Rev.* 136. Also Frankel 1975 *U. Pa. L. Rev.* 1039.

²⁶⁹ Laudan refers to them as the non-epistemic values. See *Truth, Error and Criminal Law* 2.

²⁷⁰ Weigend 2003 *Harv. J.L. & Pub. Pol'y.* 168. See also van Caenegem 199 80: "[T]he ultimate aim of the system is to deliver justice, rather than truth. If the ultimate goal of the system were to deliver truth above all, it would no doubt have a totally different and not necessarily edifying aspect. From that perspective, forensic effectiveness is only one, if vital element of system with the prime goal of doing justice."

²⁷¹ Van Caenegem 1999 80.

in a statement of facts found to be true (and not in a judgment), and the process would have to be structured much more like a historian's research into events of the past".²⁷² Thus, factual truth finding in practice takes no priority and competes with other ends of the justice system, sometimes even detrimental to the truth.²⁷³ As Grunewald notes, "truth is important but it is balanced with other goals, goals like due process, fairness, procedural tradition, democracy and social ideas about the purpose of punishment".²⁷⁴

2.6.3.3 *The 'Fight Theory' of Truth and Adjudication*

The physiology of the adversarial truth-finding mechanism is mapped out in the philosophical idea of partisan development of facts.²⁷⁵ Truth is principally determined through an intellectual confrontation of partisan renditions of the material facts and evidence at trial.²⁷⁶ The idea of confrontation in itself lies at the core of the 'fight' theory of truth, which characterises the combative and partisan adversarial method of proof.²⁷⁷ The 'fight' theory in the adversarial system underlies the belief that, out of a confrontation of the arguments and submissions of the adversaries and their lawyers, material information is released to the neutral and impartial judge for just and fair adjudication. In other words, the expected upshot from an avid pursuit of partisan interest is the expansion of the amount of information that is released for judicial consideration, in greater amplitude than the court could by itself fish out through its own enquiry.²⁷⁸ A more graphic description of the fight theory, according to Finkelstein, is that "parties are supposed to engage in a fierce combat, pulling apart each other's case, and once the dust has settled, the truth will emerge. It should be the only thing standing after the

²⁷² Weigend 2003 *Harv. J.L. & Pub. Pol'y.* 169.

²⁷³ Goodpaster 1986 *N.Y.U. Rev. L & Social Change* 71.

²⁷⁴ Grunewald 2014 *Alb. Law Rev.* 1142.

²⁷⁵ This is the key feature of the adversarial system that distinguishes it from the inquisitorial system. See, e.g., van Caenegem 1999 69.

²⁷⁶ Note however, that the inquisitorial system "by contrast, assumes that an 'objective' investigation by a neutral judge is the best guarantee for bringing out the truth. In procedural systems that adhere to the inquisitorial principle, it is thus typically the responsibility of a judge—before trial, at trial, or both—to determine the scope of the investigation as well as the witnesses, experts, documents and other evidence to be presented." Weigend 2011 *N.C. J. Int'l L. & Com. Reg.* 397.

²⁷⁷ Frank *Courts on Trial* (1950) 80-102. The fight theory underlying the adversarial theory of justice is that truth principally emerges from a clash of opposing arguments. Frank contrasts this 'fight' theory with what he calls 'truth' theory associated with a trial system designed to yield the truth about the facts of a suit, as in inquisitorial systems.

²⁷⁸ See, Fong 2014 *Wash. U. Jur. Rev.* 109, fn. 13, quoting Lord Eldon: "Truth is best discovered by powerful statements on both sides of the question." In *ex parte Elsee* 1830 1 Montagu and Bligh 69 70; See also van Caenegem 1999 79.

battle”.²⁷⁹ This truth-claim theory of the adversarial system has been compared to a canonisation procedure. As Barrett puts it:

In the pragmatic assumptions of our adversary system, some have noted a resemblance to the theory of the canonist's procedure which provides for a '*promotor fidei*' (the 'devil's advocate' in familiar speech) charged with the duty to prepare and present all possible arguments, however seemingly slight, against a candidate proposed for beatification or canonization as a saint.²⁸⁰

At the end of the contest, it behoves the judge to find the truth from the body of mixed, partisan and biased facts and evidence and do justice to the parties according to the law. The neutrality of the judge sitting above the fray is considered crucial for a fair adjudication. It is believed that justice in the adversarial system is best achieved when the judge holds a fair balance between the contending parties without him/herself being a party to the dispute.²⁸¹ The impartial judge sitting across the bench and observing from a spectator's lens is more likely to see the truth standing as "the dust settles in the arena".²⁸² The adversarial system therefore remains a highly structured procedure. More importantly, its ability to find the truth and do justice between the parties fundamentally lies in the respective strengths and levels of participation of the parties in the trial.

2.7 CONCLUSION

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Ghana's legal system exhibits a profound sense of assimilation of the English adversarial ideology of law and justice. The juristic marks of adjudication and the colonial idea of law that nurtured the evolution and growth of the pre-independence legal regime of Ghana remain, for the most part, the foundational structure of its institutional and operational frameworks today. The criminal adjudicatory procedures of the Westminster Courts system still frame the modern structure of the Ghanaian adversarial criminal trial, with little variations over the years. This attachment to the colonial past literally consolidates the claim that the legal system of Ghana and its model of criminal adjudication are adversarial in nature. The adversarial system is itself

²⁷⁹ Finkelstein 2011 *Monash U. Law Rev.* 135-136; also Barrett 1962 *Notre Dame L. Rev.* 480, citing Frank *Courts on Trial* (1949) 92; "Lord Macaulay, a lawyer and a historian, once declared that we obtain the fairest decision 'when two men argue as unfairly as possible on opposite sides' for then 'it is certain that no important considerations will altogether escape notice.'"

²⁸⁰ See, Barrett 1962 *Notre Dame L. Rev.* 480, fn. 11: "The adversary method has a counterpart in the procedure followed by the Church in the canonization of saints. When it is proposed that someone should be canonized, there is always appointed an official known as the 'devil's advocate' whose job it is to think up all the reasons why the individual in question should not be canonized. The underlying theory of this procedure appears to be much the same as the underlying theory of the common-law adversary system, namely, that truth is best served by relying on the parties themselves to make their own case and to demolish that of their adversary."

²⁸¹ See Finkelstein 2011 *Monash U. Law Rev.* 136, referring to Lord Denning in *Jones v. National Coal Board* 1957 2 QB 55 63.

²⁸² Finkelstein 2011 *Monash U. Law Rev.* 135-136. Also Weinstein 1997-1998 *U. Miami L. Rev.* 82.

ingrained in certain values and ideologies that define its theory of justice; the parties participate in the decision-making process and control their destiny in a contest supervised by a neutral judicial officer. They fully handle the conduct of their case and protect their rights and interests in the proceedings. They are incentivised to vigorously participate in the trial in the spirit of competition. The adversarial system promotes the belief that truth is best determined, and justice best served, through a clash of opposing arguments between the Prosecution and the Defence.²⁸³ Criminal trials in Ghana are characterised by these features of the adversarial system.



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²⁸³ It is a general underlining theory of the adversarial system. See, *e.g.*, Plouffe, Jr. *Adversarial Justice* 18.

CHAPTER 3

OPERATIONAL ASSUMPTIONS UNDERLYING THE ADVERSARIAL SYSTEM OF CRIMINAL ADJUDICATION

3.1 INTRODUCTION

The adversarial system relies on the autonomy and competence of the parties to present the facts, evidence and legal submissions in criminal proceedings. It pitches the Prosecution against the accused person upon the assumption that the two parties operate from approximate position of procedural equality. The system actually guarantees procedural equality through a fair and equitable distribution of resources and power between the Prosecution and the Defence as implied by the principle of 'equality of arms'.

This chapter is an exploration of the concept of party autonomy and the principle of equality of arms, as well as the legal protections of accused persons and the strategic role of defence counsel in the adversarial criminal trial. This chapter provides the background for subsequent examination of the concept of self-representation and its values as far as ensuring procedural equality and fairness of the adversarial criminal trial is concerned. Part 2 is an examination of the concept of autonomy as an underlying precept of the adversarial system. It also addresses the power imbalance between the Prosecution and the Defence. Part 3 analyses the principle of equality of arms as a mechanism for ensuring procedural fairness in adversarial criminal trials. Finally, Part 4 is an assessment of the structural role of defence counsel in securing procedural equality and fairness of the adversarial criminal trial. It also contains an examination of the key functions of defence counsel in the criminal justice system of adversarial jurisdictions in general.

3.2 PARTY AUTONOMY AND PROCEDURAL EQUALITY IN THE ADVERSARIAL PHILOSOPHY OF TRIAL

The philosophy of the adversarial criminal trial rests on the belief that where the state accuses an individual of having committed a criminal offence, the merits of the accusations are more effectively determined through a legal contest that pitches the state against the accused.¹ As

¹ Barrett "The Adversarial System and the Ethics of Advocacy" 1962 *Notre Dame L. Rev.* 479 480-481; Finkelstein "The Adversarial System and the Search for Truth" 2011 *Monash U. Law Rev.* 135 135-136.

previously mentioned, the adversarial system thrives on the idea that truth and fairness of the trial are best achieved through partisan presentation of facts and evidence.² The system promotes the idea of party autonomy and gives room to the contending parties to take major decisions concerning the conduct of their case.³ The objective is to enable the parties to maximise their control of the adjudicatory process.⁴

The concept of party autonomy, as a theoretical foundation of the adversarial system, is rationalised based by two key ideologies. Firstly, the contending parties are regarded as an 'information-base'. Parties to the dispute are deemed masters of the facts. They are presumed to know more regarding the events surrounding the dispute than any other person. It therefore behoves them to personally build their respective cases and bring all the information in support of their respective claims before the court.⁵ Secondly, the adversarial system hinges on the idea of self-motivation.⁶ In an adversarial forum, self-interested parties can unearth and put forth material information and arguments much more efficiently than a judicial enquiry can reveal.⁷ It is believed that where litigants are personally involved in any particular dispute in pursuit of their self-interest, they are better incentivised to put up their best performance in fact gathering and argumentation.⁸

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The conventional scheme of operation of the adversarial criminal trial puts all trial and pre-trial decisions in the hands of the parties and their legal representatives.⁹ These decisions include investigating the facts in controversy, giving shape to the evidence, framing issues, discoveries, choice of witnesses, examination and cross-examination of witnesses, as well as the order of proof of legal issues.¹⁰ The adversarial system merely reserves the superintendence of the trial and the pronouncement of the verdict to the judicial officer.¹¹ The interest of the

² Discussed *supra*, Ch. 2, text at 2.6; *Pension v. Ohio* 1988 488 U.S. 75 84, holding that "[t]his system is premised on the well tested principle that truth – as well as fairness- is best discovered by powerful statements on both sides of the question."

³ Asimow "Popular Culture and the Adversary System" 2007 *Loy. L. A. L. Rev.* 656 658.

⁴ *Ibid.*

⁵ See, e.g., Sward "Values, Ideologies and Evolution of the Adversary System" 1989 *Ind. L. J.* 301 310.

⁶ See full discussion in Ch. 2, text at 2.6.2.3.

⁷ See Milani & Smith "Playing God: Critical Look at *Sua Sponte* Decisions in Appellate Courts" 2002 *Tenn. L. Rev.* 1 29.

⁸ Meuti "Legalistic Individualism: Alternative Analysis of Kagan's Adversarial Legalism" 2003-2004 *Hastings Int'l & Comp. L. Rev.* 319 337-338.

⁹ Asimow 2007 *Loy. L. A. L. Rev.* 651; Roodt "A Historical Perspective on the Accusatorial and Inquisitorial Systems" 2004 *Fundamina* 137 139; See also Zuckerman "No Justice without Lawyers – The Myth of an Inquisitorial Solution" 2014 *Civ. Justice Q.* 355 357.

¹⁰ *Ibid.*

¹¹ Damaška *The Faces of Justice and State Authority* (1991) 3.

Prosecution in initiating a criminal prosecution is to prove the guilt of the accused person.¹² The Defence responds by gathering relevant detrimental evidence to refute guilt.¹³ Both the Prosecution and the Defence argue the facts and the law in a way most favourable and persuasive to their respective cases and, most importantly, challenge the legal submissions of the opponent.¹⁴ This individualistic nature of the adversarial theory of adjudication rests on a presumption that each interested party possesses a reasonable level of knowledge, resource and competence to pursue his/her claims.¹⁵

The adversarial system further assumes equality between the parties. Every adversarial trial is analogised with a regulated combat arena and invokes the idea of a structured contest “between two equally armed advocates [who] aggressively [assert] their strongest positions”.¹⁶ The assumption of party equality implies two key procedural requirements. Firstly, it alludes to the notion that the resources needed to advance their respective cases and pursue their particular interests must be equally available to all parties.¹⁷ The contending parties ought to have equal accessibility to these resources. It is expected that both Prosecution and Defence would have roughly equal power and resources to investigate the facts, conduct the trial, as well as have the means to secure a vigorous trial and pose as zealous adversaries. Secondly, party equality connotes ‘equal competency’. The Prosecutor and the accused are expected to be capable of engaging in a balanced competitive presentation. Legal scholars such as Findley argue that it is “only when adversaries are evenly matched [that there can] be much hope that the rival testing of the evidence will expose the bare truth”.¹⁸ In other words, there must be parity in the

¹² The Prosecution also has an overarching obligation not to seek conviction at all cost but to do justice. See discussions in Ch.7, *infra*.

¹³ Corrado “The Future of Adversarial Systems: An Introduction to the Papers from the First Conference” 2009-2010 *N.C.J. Int’l L. & Com. Reg.* 285 285-296.

¹⁴ Grunewald “Comparing Injustices: Truth, Justice and the Systems” 2014 *Albany L. Rev.* 1139 1156; Landsman “A brief Survey of the Development of the Adversary System” 1983 *Ohio State L. J.* 713 715.

¹⁵ See generally, Bundy “Articles: The Policy in Favour of Settlement in an Adversary System” 1992-1993 *Hastings L.J.* 1 8.

¹⁶ Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wis. L. Rev.* 1007 1035. The adversarial system finds meaning in a ‘contest of equals’ before the court. See Rhode “Ethical Perspective on Legal Practice” 1985 *Stan. L. Rev.* 589 597; Meuti 2003-2004 *Hastings Int’l & Comp. L. Rev.* 340; also, see Talen & Alhstrand “The Public Prosecutor, Its Role, Duties and Powers in the Pre-Trial Stage of The Criminal Process - A comparative Study of the French Legal Systems” 2011 *R Int DP* 523.

¹⁷ Meuti 2003-2004 *Hastings Int’l & Comp. L. Rev.* 340, stating that “[i]n order for practice to follow theory, the two disputants must have roughly equal power to hire and compensate investigators, experts and attorneys”.

¹⁸ Findley “Adversarial Inquisitions: Rethinking the Search for the Truth” 2011-2012 *N.Y.L. Sch. L. Rev.* 911 912. See also Goodpaster “The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases” 1986 *N.Y.U. Rev. L. & Soc. Change* 59; Roodt 2004 *Fundamina* 137 138 (defining the term adversary to connote “participant in a contest between equal, private opponents.”); Lea “Criminal Court Trials in England and Wales” 2006, stating that “[t]he English trial is adversarial. That is to say it takes the form of a sort of battle between two (supposedly) equal parties.” <http://www.bunker8.pwp.blueyonder.co.uk/cjs/26905.htm> (Accessed 10-03-2015).

representation of the parties before the court and parity in the prowess of the adversaries in conducting the proceedings. This feature of the adversarial trial remains the principal guarantee through which a court presided over by a relatively passive arbiter may be presented with equally weighted partisan submissions for an informed and objective judicial decision.¹⁹ Equality of competencies also assists the judge in arriving at fair decisions based on the merits of the case.²⁰

The aforementioned qualities sum up the general presumption of equal competence between parties to an adversarial contest.²¹ Briefly, a procedurally fair adversarial trial is one in which the parties possess roughly equal resources, incentives, skills and strengths.²²

3.2.1 The Inherent Advantage of the State in Adversarial Criminal Trials

The adversarial system exhibits inherent traits of procedural imbalance between parties to a criminal trial. The system is marked by resources, skills and power disparities between the state and the accused person, which disrupt this inceptive premise of the adversarial trial procedure.²³ The inequalities accord favourable advantage to the State. The inherently privileged position of the state challenges procedural equality between parties to the adversarial trial.

Akin to many adversarial jurisdictions, limitless state resources are committed to ensuring crime control through prosecution and conviction of criminal offenders in Ghana.²⁴ The Supreme Court of Ghana emphasised in *Gabrielle Joanne v. The Republic*²⁵ that “the Republic is better placed and much resourced, to prove the guilt of the accused”.²⁶ The Prosecution is empowered by its membership to the Executive branch of Government.²⁷ The Attorney-General is the chief public prosecutor, as well as the principal adviser to Government on matters of general governance.²⁸ S/he also has a great deal of constitutional authority and institutional resources for purposes of instituting and conducting criminal prosecutions in the country. The

¹⁹ Bundy 1992-1993 *Hastings L.J.* 8.

²⁰ *Id* at 4-5.

²¹ Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 340.

²² *Ibid*; see also Rhode 1985 *Stan. L. Rev.* 597.

²³ Barrett *Legal Counsel* in Miller *The History of Crime and Punishment in America: An Encyclopedia*. (2012) 998.

²⁴ See, e.g. Walsh *Criminal Procedure* (2002) 5.

²⁵ 2012 47 GMJ 1

²⁶ *Id* at 45.

²⁷ See Constitution of Ghana, art 88. This observation applies to other adversarial jurisdictions. See, e.g., King, Jr. “Why Prosecutors are permitted to offer witness Inducements: A matter of Constitutional Authority” 1999 *Stetson L. Rev.* 155.

²⁸ Ghana Constitution, art 88(1).

prosecutorial mandate vests prosecutors with enormous state power over criminal suspects who are often ordinary citizens.²⁹ The Ministry of Justice and Attorney-General's Department in charge of criminal prosecutions in Ghana is relatively well funded and adequately staffed, and is reinforced by state law enforcement agencies. The national investigative and prosecutorial institutions including the Criminal Investigative Department (CID) of the Ghana Police Service (GPS), the Bureau of National Investigations (BNI), the Economic and Organised Crime Office (EOCO), the Financial Intelligence Centre (FIC) and the Prison Service among others, all belong to the state and are endowed with government resources in the discharge of their statutory functions. The Prosecution in Ghana can also be described in terms used in reference to the public prosecutors in the United States, as "the single most powerful figure in the administration of criminal justice."³⁰

The structural position of the prosecutor contrasts with that of an accused person, who in general, is guaranteed relatively limited institutional support.³¹ Achieving the public interest objective of crime control through a fully resourced prosecutorial machinery generally takes pre-eminence over any state's concern of providing accused persons with the requisite resources to make their defence.³²

In order to ensure a fair and just outcome of the adversarial criminal trial, it is imperative to give due consideration to the disparities between the Prosecution and the accused. Failure to realise the aforementioned objective may hinder the adversarial trial, which is essentially designed as a 'no-holds-barred party contest', from properly rationalising its precept of party autonomy, and lead to disregard of the disadvantaged position and the particular needs of the accused.³³ An imbalanced legal contest between the Prosecution and an accused person would be unsuccessful at producing fair results. The outcome of such a trial is determined by less legitimate factors associated with procedural inefficiencies arising from the disparities in the

²⁹ E.g., power of arrest and detention under ss 3 & ss 10-12 of Criminal and other Offences (Procedure) Act (Act 30 of 1960) (COOPA) and Ghana Constitution, art 14; power of search and seizure under s 8 of COOPA and Ghana Constitution, art 18(2). For a general statement of the point, see Flowers "Prosecution Law Symposium" 1999-2000 *Stetson L. Rev.* 1 2-3

³⁰ See Flowers 1999-200 *Stetson L. Rev.* 2-3, fn11, referring to Bubany & Skillern, "Taming the Dragon: An administrative Law for Prosecution decision-making" 1976 *Am. Crim. L. Rev.* 473 477.

³¹ See, e.g., Cole *Equality of Arms and Aspects of the Right to a Fair Trial in Botswana* (LLD- Thesis, SU, 2010) 36.

³² See, Walsh *Criminal Procedure* 5.

³³ Roberts & Zuckerman *Criminal Evidence* (2010) 59.

parties' respective competencies.³⁴ These include the accused's failure to raise and address technical points of law and the inability to seek the enforcement of his/her procedural rights.

Practical interventions are therefore required to realise the presumption of equality between parties to an adversarial criminal trial. Such interventions would focus on an upward adjustment of the relatively disadvantaged position of the accused person.³⁵ Every contending party is expected to advance and articulate his/her case, and to proceed through the entire trial without any substantial deficit in resources and competencies. The general remedial mechanism of ensuring procedural equality between the Prosecution and the accused person in modern criminal jurisprudence is guided by the adoption and application of the principle of 'equality of arms'.³⁶

3.3 'EQUALITY OF ARMS' IN ADVERSARIAL PROCEEDINGS

3.3.1 Contextual Meaning

The principle of 'equality of arms' is a fundamental element of the right to a fair trial.³⁷ It implies that parties to legal proceedings must be treated in such a manner to ensure that they have a procedurally equal position from which they make their case.³⁸ The early origins of the principle of 'equality of arms' are associated with the traditional form of trial by combat.³⁹ Despite its irrational philosophy of establishing guilt, the trial by combat, as a procedure of adjudication, was strictly regulated.⁴⁰ It involved a physical battle in which the contending adversaries were equally armed, and wore the same coat of armour.⁴¹ The rules of combat strictly required that "neither contestant would possess an advantage in armour or armaments".⁴² The main objective was to ensure that the adversaries stood on equal pedestals in terms of the means of combat, in order to ensure that the battle was fair.

³⁴ *Ibid.*

³⁵ Goodpaster "On the Theory of American Adversary Criminal Trial" 1978-1988 *J. Crim. L. & Criminology* 118 125.

³⁶ See, e.g., Silver 1990 *Wis. L. Rev.* 1032.

³⁷ United States Institute for Peace, <http://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf> 116 (Accessed 16-08-2016).

³⁸ *Id* at 115-116, Quoting from *Ofner & Hopfinger* cases, 1960 applications nos. 524/59 and 317/59 680 696.

³⁹ The principle is an expression of the old natural law principle, *audi alteram partem*, which was first formulated by St Augustine. See Lucas *On Justice* (1980) 84; see Jackson "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" 2005 *Mod. L. Rev.* 737 751, fn 67.

⁴⁰ See earlier discussion of trial by combat *infra*, Chap. 4, text at 4.2.

⁴¹ Silver 1990 *Wis. L. Rev.* 1007-1008.

⁴² *Ibid.*

Contemporary criminal jurisprudence has also embraced the principle of equality of arms with the aim of ensuring a balance in the respective positions and statuses of the Prosecution and the accused. The principle today hinges on the notion that “[a] just balance preserves justice”.⁴³

The modern conceptualisation of ‘equality of arms’ derives from the jurisprudence of the European Court of Human Rights (ECtHR) and the European Commission of Human Rights (ECsHR). The Court has rationalised the principle in a legendary aphorism, as striking a fair balance in order to afford both the Prosecution and the accused person, a “reasonable opportunity to present [their cases] in conditions that do not place [either party] at substantial disadvantage *vis-à-vis* [the] opponent”.⁴⁴ According to Negri, the principle of equality of arms is required at all stages of the criminal proceedings, to give to each party a reasonable opportunity to present his/her case from a roughly equal stand.⁴⁵

The principle derives precisely from the interpretation of article 6 of the European Convention on Human Rights (ECHR).⁴⁶ Its development marks the ECHR’s departure from the literal and purely theoretical exposition of the various rights enacted for the protection of the accused person in criminal proceedings. Its focus is towards a more holistic conceptualisation of the concept of fair trial.⁴⁷ The principle does not expressly figure in the text of article 6 of the ECHR, which only emphasises the right to a fair trial. The ECtHR has however interpreted the principle of equality of arms to be an intrinsic component of the right to fair trial.⁴⁸ As Negri argues, the right to a fair trial in itself involves protecting ‘equality of arms’, which in turn constitutes an inherent element of due process of law in all proceedings, criminal or otherwise.⁴⁹ Proponents of the theory of equality of arms have forcefully argued for its recognition and application in domestic criminal jurisdictions even outside the scope of influence of the ECtHR and the ECsHR.⁵⁰

⁴³ Latin proverb, reprinted in W Benham, *Book of Quotations* (1948) §6126; Silver 1990 *Wis. L. Rev.* 1032.

⁴⁴ *Kaufman v. Belgium* 1986 50 DR 98,115, *Foucher v. France* 1998 25 EHRR 234, cited by Jackson 2005 *Mod. L. Rev.* 751; *Dombo Beheer B.V v. the Netherlands*, Application No. 14448/88, Judgment (Merits and just satisfaction), 27 October 1993, Series A No. 274 19; *Dombo Beheer v. Netherlands* 1994 18 EHHR 213.

⁴⁵ Negri “The Principle of ‘equality of arms’ and the Evolving Law of International Criminal Procedure” 2005 *Int’l Crim. L. Rev.* 513 513.

⁴⁶ It is titled the right to a fair trial and refers to certain general standards of fairness and a number of procedural safeguards for accused persons at trial.

⁴⁷ Jackson 2005 *Mod. L. Rev.* 751.

⁴⁸ Knoops “The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective” 2005 *Int’l Stud. J.* 10.

⁴⁹ Negri 2005 *Int’l Crim. L. Rev.* 513.

⁵⁰ See, e.g., Cole *Equality of Arms* generally.

The principle of equality of arms is given an even more liberal interpretation within the jurisprudence of the international criminal courts and tribunals.⁵¹ The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia acknowledged that equality of arms between the prosecutor and the accused in a criminal trial goes to the heart of the fair trial guarantee.⁵² In modern criminal trials therefore, the principle is a derivative of the right to fair trial and is deemed to have attained the status of a fundamental human right in itself.⁵³ Indeed, the principle now falls within the universal procedural norms and protections under international law.⁵⁴ Equality of arms in modern criminal jurisprudence precisely translates into instilling a sense of procedural equity in all processes of adjudication.

3.3.2 Application and Relevance of Equality of Arms in Adversarial Criminal Trials

All modern criminal jurisdictions, in both the civil law and common law systems, subscribe to the need to give effect to the principle of equality of arms between the Prosecution and the Defence in criminal trials.⁵⁵ However, ensuring total application of the principle in adversarial criminal proceedings is even more fundamental to achieving trial fairness.⁵⁶ The adversarial procedure of adjudication is characterised as an interest-based system. The ECtHR has thus emphasised equality of arms between the Defence and the Prosecution as a vital aspect of the right to a fair trial in adversarial proceedings.⁵⁷ Tomkovicz expressed the view that the adversarial contest between the state and the accused can only be fair in the absence of substantial disparity in knowledge and skill between the parties.⁵⁸ Fairness, he poignantly argues, requires that the adversaries are 'roughly equal' in both strength and ability.⁵⁹

⁵¹ The principle is also adopted in international criminal courts and tribunals. The International Criminal Tribunal for the former Yugoslavia for example has ruled that the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. See <http://www.un.org/icty/tadic/appeal/judgement/index.htm>. Paragraph 52. (Accessed 01-10-2016); see also Meernik "Equality of Arms? The Individual v. The international Community in War Crime Tribunals" 2002-2003 *Judicature* 312 315.

⁵² See *Prosecutor v. Tadic*. Case No. 11-94-1-A, Judgment 15 July 1999 para 44; Knoop 2005 *Int'l Stud. J.* 3

⁵³ Knoop 2005 *Int'l Stud. J.* 1.

⁵⁴ International Convention on Civil and Political Rights (ICCPR) art 14.

⁵⁵ Roberts & Zuckerman *Criminal Evidence* 59.

⁵⁶ Steel & Morris v. UK 2005 41 EHRR 22 paras 50 and 59; Edwards & Lewis v. UK 2005 40 EHRR 593 Para 52.

⁵⁷ Knoop 2005 *Int'l Stud. J.* 3. See also *Rowe and Davis v. the United Kingdom* [GC], No. 28901/95, para 60, ECHR 2000-II.

⁵⁸ Tomkovicz *The Right to the Assistance of Counsel: A reference Guide to the United States Constitution* (2002) 48-49; Findley 2011-2012 *N.Y.L. Sch. L. Rev.* 911 912; see also Goodpaster 1986 *N.Y.U. Rev. L. & Soc. Change* 59; Roodt 2004 *Fundamina* 137 (defining the term adversary to connote "participant in a contest between equal, private opponents.").

⁵⁹ Tomkovicz *The Right to the Assistance of Counsel* 48-49.

In its application, the principle of equality of arms adopts a pragmatic meaning of procedural balance. Professor Silver debunks the contention that equality of arms connotes absolute equalisation. He emphasises the almost impossible task of achieving complete equality of skills and resources between the contending parties in an adversarial trial.⁶⁰ According to Silver, equality of arms does not mean that each attorney must meet a particular standard of performance or perform with equal effectiveness. It rather implies that the parties must be accorded equal procedural rights that permit them and their advocates, to efficiently formulate and present their respective cases.⁶¹ The American criminal jurisprudence advances the view that the principle of equality of arms is rather defined along the basic precepts of equity. By virtue of this assessment of the principle, a criminal prosecution cannot be considered a true symmetrical proceeding.⁶²

In addition, Roberts and Zuckerman point out the potentially misleading interpretation of the concept of equality of arms as implying any form of 'genuine parity of resources' between the contending parties.⁶³ They emphasise the notion that the majority of accused persons in a criminal trial "could never be equipped with sufficient resources to match the state apparatus of criminal investigation and prosecution".⁶⁴ Accordingly, they have argued that the real objective of the principle of equality of arms is to endeavour to mitigate the strategic procedural imbalance existing between the Prosecution and the Defence.⁶⁵ The principle of equality of arms therefore implies that certain guaranteed procedural rights must enable each side to formulate and present its position, and thereby assist the parties to be equally armed for 'combat'.⁶⁶ In this end, it is argued that the practical effect of equality of arms in an adversarial criminal trial is to simply ease the effects of the unavoidable inequality between the Prosecution and the accused. By infusing a sense of procedural equity in the respective positions of the Prosecution and the Defence, equality of arms give effect to the foundational precept of

⁶⁰ Silver 1990 *Wis. L. Rev.* 1009.

⁶¹ *Id* at 1037. The principle of equality between the parties in an adversarial trial generally refers to reasonably comparable adversarial prowess between the parties without substantial disparities. The idea that absolute equality is not intended finds expression in the qualifier "roughly" usually tagged to concept of equality in this context. See, e.g., Rhode 1985 37 *Stan. L. Rev.* 597; Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 347.

⁶² The Second Circuit in the case of *United States v. Turkish* 1980 623 F.2D 769 (2d Cir.).

⁶³ Roberts & Zuckerman *Criminal Procedure* 59.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Silver 1990 *Wis. L. Rev.* 1009.

equality, which underlies the adversarial model of justice.⁶⁷ It also ultimately guarantees the fairness of the adversarial process of criminal adjudication.⁶⁸

3.3.3 Fair Trial Rights as a Measure of Reinforcing the Defence in Adversarial

Proceedings

In order to reinforce the inherently disadvantaged accused persons against the sweeping powers of the Prosecution, a number of procedural measures have been laid down to assist them in order to meaningfully participate in their trial.⁶⁹ The postulation of fair trial rights, as enshrined in international human rights treaties and guaranteed in most liberal domestic legal regimes, is very important in this context.⁷⁰ Today, the most authoritative statement of the full spectrum of fair trial rights is contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR).⁷¹ This status is illustrated by the universality of article 14 and its widespread ratification and application among states and international bodies.⁷²

The guarantees in article 14 are meant to ensure fairness and procedural protections for accused persons in criminal trials.⁷³ The first category of rights establishes the general standards of fairness of the criminal trial itself.⁷⁴ They include (i) the right to equality before the law and the court that encompasses equal access and equality of arms, (ii) the right to a fair and public hearing, and (iii) the right to be heard before an independent, competent and impartial tribunal.⁷⁵ The second category of rights deals with the 'minimum guarantees' of protection for accused persons.⁷⁶ These include the right to be presumed innocent; the right to be informed of the accusation; the right to adequate time and facility for preparation of defence; the right to be tried without undue delay; the right to defence either in person or with legal assistance; the right to the examination of witnesses; the right to the assistance of an interpreter; the right

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ See, e.g., Roberts & Zuckerman *Criminal Evidence* 59.

⁷⁰ Stephanian 2005 *Int'l Crim. L. Rev.* 513; see, ICCPR, art 14; ECHR, art 6; ACHPR, art 7.

⁷¹ *General Assembly Resolution 2200A (XXI)* of 16 December 1966, in force on 23 March 1976.

⁷² 168 countries out of the total of 196 countries in the world have ratified the Covenant. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (Accessed 06-06-2016). International criminal tribunals which are in principle bound by their unique legal frameworks also operate key defined standards of fair trial drafted on the basis and in the likeness of article 14 of ICCPR. See arts. 18(3) and 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), arts. 17(3) and 20 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), art 17 of the statute of the Special Court of Sierra Leone (SCSL) and arts. 55 and 67 of the statute of International Criminal Court (ICC).

⁷³ See, e.g., Tulkens "The Paradoxical Relationship between Criminal Law and Human Rights" 2011 *JICJ* 577 578.

⁷⁴ These are specifically ICCPR, arts 14(1) and 14(2).

⁷⁵ Human right Committee (HRC) *General Comment 32 CCPR/C/GC/32* (2007) para 3.

⁷⁶ See, ICCPR, preamble and art 14(3).

against self-incrimination; the right to appeal a conviction; the right to compensation; and the right to protection against double jeopardy.⁷⁷

There are other rights, which, though particularly relevant to the application of criminal law, fall outside the immediate scope of fair trial rights in article 14. These include the right to protection of personal liberty and security.⁷⁸ This right does not in essence limit the possibility of deprivation of the individual's liberty. It rather contains a number of important safeguards for the protection of the person subject to such deprivation.⁷⁹ The right to prohibition of torture and cruel, inhuman and degrading treatment and punishment is noted in that regard. It is universally accepted and binding on all states by virtue of its status as *jus cogens*.⁸⁰ Lastly, are the right to privacy⁸¹ and the right against retrospectivity of criminal laws.⁸²

The modern philosophy of criminal justice aligns the purpose of the trial with the realisation of the aforementioned rights and procedural values.⁸³ The trial rights of the accused limit and guide the interference of state prosecutorial powers with the freedom and dignity of the accused. They counterbalance "the natural resource and public support advantage of the prosecutor".⁸⁴ Ultimately, they ensure that the "trial process is not one in which [accused persons] are crushed by the resources of the state and the machinery of justice".⁸⁵ As lucidly enunciated by the American Supreme Court, they constitute a wholesome "compact statement of rights necessary to a full defence" and are very basic to the adversarial system of criminal justice.⁸⁶ The trial rights more importantly work together to give the accused person a reasonable opportunity to present his/her case under conditions that do not place him/her at any substantial disadvantage *vis-à-vis* the Prosecution.⁸⁷ In other words, they reinforce the values

⁷⁷ ICCPR, art 14(3).

⁷⁸ See ICCPR, art 9; ACHPR, art 6; ECHR, art 5; ACHR, art 7; and UDHR, art 3.

⁷⁹ Trechsel 2011 *N.T.U.L Rev.* 182; see ICCPR, art 7; ACHPR, art 5; UDHR, art 5; ACHR, art 5; and ECHR, art 3.

⁸⁰ See Trechsel 2011 *N.T.U.L Rev.* 182.

⁸¹ ICCPR, art 17; ECHR, art 8; ACHR, art 11 and UDHR, art 12.

⁸² ICCPR, art 15; ACHPR, art 7(2); UDHR, art 11(2); ACHR, art 9; and ECHR, art 7.

⁸³ Edmond & Roberts "Procedural Fairness, the Criminal Trial and Forensic Science and Medicine" 2011 *Syd. Law Rev.* 359 362.

⁸⁴ Goodpaster 1978-1988 *J. Crim. L. & Criminology* 135, 126.

⁸⁵ Plouffe, Jr. *Adversarial Justice* in R. Miller *The History of Crime and Punishment in America: An Encyclopedia*. (2012) 18 19.

⁸⁶ *Faretta v. California* 1975 422 U.S 806 818.

⁸⁷ See, e.g., Langford "Fair Trial: The History of an Idea" 2009 *JHR* 37 48.

of fairness in the treatment of the accused person and in the conduct of the criminal proceedings in general.⁸⁸

Fair trial generally implies a trial procedure validated by compliance with the accused person's due process rights.⁸⁹ Strict enforcement of the fair trial rights of the accused person ensures that the inherent procedural advantages of the Prosecution are mitigated.⁹⁰ The procedural rights of the accused curtail the potential abuses of the adversarial contest through the unguarded use of state prosecutorial resources and power.⁹¹ As far as ensuring fairness of the adversarial criminal trial is concerned, the guarantee of these minimum protections for the accused is the means to ensuring that only the perpetrator of crime is deservedly convicted and the innocent accused person exonerated and acquitted.⁹²

It must however be noted that the concept of fair trial goes beyond mere compliance with the trial rights of accused persons, which are guaranteed under the various constitutional instruments and international human rights laws. This is because the fair trial rights of the accused can individually be complied with; yet, the resulting trial may not be necessarily fair if it does not comply with the general precept of fairness as a whole.⁹³ It is therefore not surprising that the law setting these international standards of protection of the accused refers to them as "minimum guarantees."⁹⁴ The right to a fair trial is broader than the sum of the individual trial guarantees and it depends on the entire conduct of the trial.⁹⁵ Ensuring fairness of an adversarial criminal trial therefore justifies the need to read the general principle of equality of arms into the right to a fair trial.

The Constitution of the Republic of Ghana provides a set of fair trial rights for all accused persons under article 19.⁹⁶ Indeed, Ghana ratified the ICCPR in its entirety on September 7,

⁸⁸ Fedovora The Principle of Equality of Arms in International Criminal Proceedings (PhD Thesis, UUTR, 2012) 25; see also Trechsel 2011 *N.T.U.L. Rev.* 182.

⁸⁹ Langford "Fair Trial: The History of an Idea" 2009 *JHR* 37 38. Also Namakula "Language Rights in the Minimum Guarantees of Fair Criminal Trial" 2012 *IJSLL* 74 defining fair trial as "a legal process conducted with due regard to the rights of the parties."; see also Cole *Equality of Arms* 5.

⁹⁰ See, e.g., Goodpaster 1978-1988 *J. Crim. L. & Criminology* 134-135.

⁹¹ *Ibid.*

⁹² Grunewald 2014 *Alb. L. Rev.* 1142.

⁹³ United States Institute for Peace, "Chapter 4: Rights of the Suspect and the Accused" <http://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf> 115 (Accessed 16-08-2016).

⁹⁴ See, ICCPR, art 14(3).

⁹⁵ United States Institute for Peace, "Chapter 4: Rights of the Suspect and the Accused" <http://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf> 115. (Accessed 16-08-2016); see also HRC *General Comment* 32 para 25, stating that "the notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entail the absence of any direct or indirect influence, pressure intimidation or intrusion from whatever side and for whatever motive."

⁹⁶ See, Ghana Constitution, arts 19(1) &(2) on Fair Trial in particular as follows:

2000. As such, with a few exceptions, the cluster of fair trial rights under the Constitution does not depart from the international best standards.⁹⁷ They enhance the position and status of the accused person at trial at least in theory, in order to match with the institutional position of the Prosecution. Similarly, constitutional fair trial rights in Ghana are supplemented by rights inherent in a democracy, and intended to secure the freedom and dignity of human beings.⁹⁸ The principle of equality of arms is recognised and applied in criminal proceedings in Ghana although it is not expressly stipulated in the Constitution.

Without a direct reference to the principle equality of arms, the Supreme Court of Ghana in the case of *Gorman v. The Republic*⁹⁹ underlined the importance of fair trial rights of the accused in criminal proceedings. It emphasised the character of these rights as providing “unequivocal protection for accused persons in the pre-trial and trial stages of the criminal process”.¹⁰⁰ In as far as the totality of fair trial guarantees ensures procedural equality between the accused and the Prosecution, article 19 of the Constitution may be deemed to give implicit recognition to the principle of equality of arms.

By invoking the principle of equality of arms, the adversarial procedure of criminal adjudication avails both the Prosecution and the Defence, the opportunity to “enjoy unique

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- (1) A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.
 - (2) A person charged with a criminal offence shall,
 - (a) in the case of an offence, other than high treason or treason, the punishment for which is death or imprisonment for life, be tried by a judge and jury and,
 - (i) where the punishment is death, the verdict of the jury shall be unanimous; and
 - (ii) in the case of imprisonment, the verdict of the jury shall be by such majority as Parliament may by law prescribe;
 - (b) in the case of an offence triable by a Regional Tribunal the penalty for which is death, the decision of the Chairman and the other panel members shall be unanimous;
 - (c) be presumed to be innocent until he is proved or has pleaded guilty;
 - (d) be informed immediately in a language that he understands, and in detail, of the nature of the offence charged;
 - (e) be given adequate time and facilities for the preparation of his defence;
 - (f) be permitted to defend himself before the Court in person or by a lawyer of his choice;
 - (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;
 - (h) be permitted to have, without payment by him, the assistance of an interpreter where he cannot understand the language used at the trial; and
 - (i) in the case of the offence of high treason, be tried by the High Court duly constituted by three Justices of that Court and the decision by the three Justices shall be unanimous.

⁹⁷ One key omission from the scope of due process rights of accused persons under the Constitution is the absence of the right to free legal assistance in case of indigency as postulated under ICCPR, art 14(3) (d). See full discussion in Ch. 6 *infra*.

⁹⁸ Ghana Constitution, art 33(5).

⁹⁹ 2003-2004 SCGLR 784.

¹⁰⁰ *Id* at 796; see also *Okyere v. The Republic* 1972 1 GLR 99 107; *Gabrielle Joanne v. The Republic* 2012 47 GMJ 1.

advantages that over all offset each other”.¹⁰¹ The Prosecution has access to the vast investigative resources of the State, while the Defence enjoys vast “constitutional protections unavailable or inappropriate to the Prosecution”.¹⁰² In a reverse analysis, without the special resources that the state is endowed with, prosecutors would be unable to compete with accused persons as equals in a criminal trial.¹⁰³ Fairness becomes “the result of an overall balance between the superior resources of the Prosecution and the constitutional protections of the Defence”.¹⁰⁴

3.4 LEGAL REPRESENTATION AS A TOOL OF SECURING PROCEDURAL EQUALITY IN ADVERSARIAL CRIMINAL PROCEEDINGS

3.4.1 Legal Representation in the Adversarial Structural Design

The complexities of the evidentiary and procedural rules governing criminal proceedings long provided the main justification for admitting counsel as a structural component of the adversarial criminal trial. It is assumed that the adversarial criminal procedure operates more effectively with the participation of lawyers representing the adversaries, in a contest where the role of the judges is to ensure compliance with the rules of procedure and evidence.¹⁰⁵ It is generally expected of the adversarial procedural regime that both the Prosecution and the accused person will act through their lawyers who will vigorously put forth and argue their respective cases.¹⁰⁶

The adversarial system is described as consolidating three (3) key features: (a) reliance on the freedom and competence of the parties to present evidence and arguments; (b) adjudication by a neutral and passive fact-finder; and (c) use of a highly structured forensic setting for the presentation of evidence and arguments.¹⁰⁷ As a procedural mechanism of justice, it operates efficiently as an integrated system in which “each piece is affected and supported by every other piece”.¹⁰⁸ In this context therefore, the adversarial system is considered as a special

¹⁰¹ Silver 1990 *Wis. L. Rev.* 1038.

¹⁰² *Ibid.*

¹⁰³ Zacharias “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice? 1991 *Van. L. Rev.* 45 77.

¹⁰⁴ Silver 1990 *Wis. L. Rev.* 1039.

¹⁰⁵ Roodt 2004 *Fundamina* 139; Zuckerman 2014 33 *Civ. Justice Q.* 357; Goldschmidt 2002 *Fam. Court Rev.* 42.

¹⁰⁶ Weinstein “And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System” 1997-1998 *U. Miami L. Rev.* 79 82.

¹⁰⁷ Landsman 1983 *Ohio St. L.J.* 714.

¹⁰⁸ Grunewald 2014 77 *Alb. L. Rev.* 1139 1144, quoting from Stacy “The Search for the Truth in Constitutional Criminal Procedure” 1991 *Colum. L. Rev.* 1369 1370-1373.

juridical construct “in which the generation of just outcomes depends on the regular functioning of each of its parts”.¹⁰⁹ Usually, the last two key operational features of the adversarial system place an onus of considerable importance on the first. The parties must be competent enough to present their respective cases and argumentatively challenge the submissions of their opponents. Obviously, it is regarding this key foundational block of the adversarial system that the assistance of counsel becomes essential to the parties.

According to Pearson, the modern trial differs substantially from the common law jury trial. Unlike the common law jury procedure, which thrived on the simplicity of its procedures regarding the determination of facts and the conduct of the trial, proceedings of the modern trial are “controlled by a highly stylised and ritualized process”.¹¹⁰ The design of the modern adversarial procedure of trial therefore rests on an assumption that counsel will be available for both the Prosecution and the Defence to manage the technicalities of the governing framework of law.¹¹¹ Law is not self-applying, and as a science, it is not readily open to the understanding and appreciation of persons not trained in the law. A person not learned in the law will barely cope with the highly complex legal manoeuvres at play in an adversarial trial.¹¹² Consequently, the effective management of a case in the adversarial system is usually deferred to skilled legal advocates, who act as agents of the parties.¹¹³

Lay parties to a trial obtain the necessary information about the dispute and make their physical appearance in court. Designing the strategy of a case and finding legal theories in support of the parties’ claims are the remit of counsel.¹¹⁴ Advocates in an adversarial trial apply the necessary legal prowess in terms of organising evidence, as well as identifying the legal issues to be addressed at the trial.¹¹⁵ They also develop the stories of their clients and advance the applicable law to prove their respective cases through zealous advocacy.¹¹⁶ Within this context

¹⁰⁹ Luban *The Adversary System Excuse*, in Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984) 117.

¹¹⁰ Pearson “Mandatory Advisory Counsel for *Pro Se* Defendants: Maintaining Fairness in the Criminal Trial” 1984 *Cal. L. Rev.* 697 707.

¹¹¹ Cerruti “Self-representation in the International Arena: Removing a False Right of Spectacle” 2009 *Geo. J. Int’l L.* 919 935, 939.

¹¹² Kim “Legal Education for *Pro Se* Litigant: Step Towards a Meaningful Right to be Heard” 1987 *Yale L. J.* 1641 1641, referring to Cheatham “The Lawyer’s Role and Surroundings” 1953 *Rocky MTN L. Rev.* 405.

¹¹³ Luban *The adversary System Excuse* 90.

¹¹⁴ Zacharias 1991 *Van. L. Rev.* 77, stating that “[i]n insisting that parties be roughly equivalent, the adversarial system intends that each side have access to key information and the means to find it. How the parties focus their respective time and resources before and during trials is a tactical choice that the theory of adversarial justice leaves to counsel.”

¹¹⁵ Landsman 1983 *Ohio State L. J.* 714-715.

¹¹⁶ Goldstein “Reflections on Two Models: Inquisitorial Themes in American Procedure” 1974 *Stan. L. Rev.* 1009 1016-1017.

of an open and balanced contest, a lawyer's zealous and faithful advocacy implies an "obligation to search [for] all favourable evidence, to seek, neutralize or destroy all unfavourable evidence, and to press the most favourable interpretation of the law for his/her client".¹¹⁷ To that end, the advocates become the influential participants in the trial for attaining equality of representation of the parties before the court. Through legal representation, the Prosecution's zeal to establish guilt and secure the conviction of accused persons is evenly matched against the skills and competence of defence counsel.

Professor Silver argues that the effectiveness of the adversarial process depends on the relatively equal positions of the parties and their counsel in furtherance and presentation of their strongest case.¹¹⁸ Legal representation therefore marks a form of procedural equality of the contending parties before an adversarial court. The assumption of equality is further described to cover two postulates. The first is 'equal competency'; it suggests that the adversarial system can only function properly when the advocates of the contending parties are roughly equal in their ability to perform their professional functions. The second postulate relates to the idea of 'equal adversariness' and connotes a roughly equal dedication of the advocates to the cause of their respective parties and same dedication in opposing the case of the opponent.¹¹⁹ While arguing in line with this ideology, Justice Marshall asserted that if the adversarial system is to function according to its theoretical design, one must presuppose that the respective attorneys will observe their responsibilities not only to the legal system, but also to the client.¹²⁰ The American Supreme court summarises the indispensability of legal representation in all modern adversary criminal trials as follows:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, they are few defendants charged with crime, few indeed who fail to hire the best lawyers they can to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities and not luxuries.¹²¹

¹¹⁷ Walpin "America's Adversarial and Jury Systems: More Likely to Do Justice" 2003 *Harv. J.L. & Pub. Pol'y* 175 177; see also Barrett 1962 *Notre Dame L. Rev.* 479 480, referring to the adversarial trial as a "battle of the advocates in the total process of getting at the truth."

¹¹⁸ Silver 1990 *Wis. L. Rev.* 1037.

¹¹⁹ Schwartz "The Zeal of the Civil Advocate" 1983 *Am. B. Found. Res. J.* 543 547.

¹²⁰ *Geders v. United States* 176 425 U.S. 80 93; Silver 1990 *Wis. L. Rev.* 1026.

¹²¹ *Gideon v. Wainwright* 1963 372 U.S. 335 344.

In the final analysis, it stands beyond doubt that lawyers for the Prosecution and the accused play a crucial role in ensuring both substantive and procedural justice.¹²²

3.4.2 Strategic Importance of Defence Counsel in Adversarial Criminal Proceedings

In Ghana, public prosecutors, acting on behalf of the Attorney-General, initiate and conduct all criminal proceedings.¹²³ Public prosecutors consist of both trained lawyers and other public officials who are skilled in matters of criminal law and procedure.¹²⁴ With an ably represented Prosecution, an unrepresented accused person is potentially disadvantaged procedurally in a trial. Such an accused person stands to suffer from his/her lack of requisite professional and legal knowledge to effectively defend him/herself.¹²⁵ The essence of this argument is that a fair adversarial trial is intrinsically dependent upon a rational balance between the respective positions and competencies of the Prosecution and the Defence.¹²⁶ The potential of the adversarial system to secure just outcomes is realised through a vigorous and knowledgeable defence that meets the professional submissions of the Prosecution.¹²⁷ It is mainly through defence counsel that the accused person can participate fully and effectively in the proceedings against him/her.¹²⁸ In his leading-edge *exposé* on the history of the adversarial criminal trial, Langbein explains the rationale behind the rise of the concept of defence counsel. He argues that the institutionalisation of the role of defence counsel as a structural block of the adversarial criminal trial is aimed at adjusting the imbalance between the public prosecutor and the generally lay and self-represented-accused person.¹²⁹

Where an unrepresented and legally ignorant accused is arraigned in a legal contest against a learned prosecutor, the adversarial system's ability to deliver justice on the merits of the case is impaired and the trial loses its efficiency.¹³⁰ In a typical adversarial criminal trial, lay accused persons are unquestionably on a disproportionate scale of competency *vis-à-vis* the Prosecution. They are presumed incapable of squaring up to the standards, skills and

¹²² See, e.g., Bekker "The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa" 2004 *CILSA* 173, addressing the issue of procedural justice in criminal trials as regards the right to effective representation of counsel.

¹²³ See Ghana Constitution, art 88.

¹²⁴ Discussed *infra*, Ch. 7 generally.

¹²⁵ In *Johnson v. Zerbst* 1938 304 U.S 458 462-463; also Pearson 1984 *Cal. L. Rev.* 707-708.

¹²⁶ See, e.g., Rhode 1985 *Stan. L. Rev.* 597; Meuti 2003-2004 *Hastings Int'l & Comp. L. Rev.* 340.

¹²⁷ See, e.g., Pearson 1984 *Cal. L. Rev.* 708.

¹²⁸ Roberts & Zuckerman *Criminal Evidence* 62.

¹²⁹ Langbein *The Origins of the Adversary Criminal Trial* (2003) 99 110. Providing legal assistance to the accused person is therefore the most immediate means through which the imbalance between the legally trained prosecutor and the accused person is mitigated. See, Roberts & Zuckerman *Criminal Evidence* 62.

¹³⁰ Pearson 1984 *Cal. L. Rev.* 708; Frey 1999 *Stetson L. Rev.* 181-183; *Gideon v. Wainwright* 344.

competence of the trained and experienced prosecutor.¹³¹ In their bid to cope with the complex legal framework of the trial, lay accused persons face difficulties throughout the course of the proceedings.¹³² They are often ill equipped to understand and effectively juggle the procedural and evidentiary rules that govern the adversarial criminal trial.¹³³ They are deficient in appreciating the theories associated with pre-trial fact-finding and general investigation matters and lack the competence to conduct the trial.¹³⁴ In cases where the unrepresented accused is unable to efficiently put up a rigorous defence, the trial automatically drops its balance in favour of the skilful professional attorney.¹³⁵ It is this procedural imbalance, which in turns wins the trial for the Prosecution to the detriment of the core values of truth, justice and fairness.¹³⁶

The main objective of every adversarial criminal justice system is to ensure that the accused is not sacrificed on the altar of the overwhelming powers and resources of the state. The realities of the adversarial criminal trial require not only a mere right to counsel, but the actual presence and effective assistance of defence counsel to ensure fair trial.¹³⁷

3.4.2.1 Supremacy of the Right to Counsel and Role of Defence Counsel

The right to counsel falls within the scope of application of the right to defence.¹³⁸ It is considered as an appendage of the personal and common law right of the accused person to have access to the courts.¹³⁹ It is trite that the fair trial rights of the accused are interdependent and they jointly contribute to the fairness of a criminal trial.¹⁴⁰ However, considered individually, there is a hierarchy among these rights. Some rights depend on others for their efficacy. Scholars have advanced a theory of supremacy of the right to counsel within the context of adversarial criminal trials. They have described the right to assistance of defence

¹³¹ Tomkovicz *The Right to the Assistance of Counsel* 48-50.

¹³² Frey "The State v. The Self-represented: A Florida Prosecutor's Concerns when litigating against a *pro se* Defendant in a criminal trial" 1999 *Stetson L. Rev.* 181 183.

¹³³ *Ibid*; see also Tomkovicz *The Right to the Assistance of Counsel* 48-50; Kempinen "The Ethics of Prosecutor Contact with the Unrepresented Defendant" 2006 *Geo. J. Legal Ethics* 1147 1148, stating that "[r]egardless of their station in life, the unrepresented are rarely familiar with the unwritten rules which define local practice or skilled in navigating the complex labyrinth of the criminal justice system."

¹³⁴ Frey 1999 *Stetson L. Rev.* 183.

¹³⁵ Pearson 1984 *Cal. L. Rev.* 707.

¹³⁶ Tomkovicz *The Right to the Assistance of Counsel* 50.

¹³⁷ Cerruti 2009 *Geo. J. Int'l. L.* 939. However note also the contrary view of Erica Hashimoto, arguing that self-represented accused persons do not necessarily fare worse than their represented counterparts. See generally Hashimoto "Defending the Right of Self-Representation: An Empirical Look at the *Pro Se* Felony Defendant" 2007 *N.C.L. Rev.* 423.

¹³⁸ ICCPR, art. 14; also HRC, *General Comment* 32 para 37.

¹³⁹ Bekker 2004 *CILSA* 176.

¹⁴⁰ See, e.g., Tomkovicz *The Right to the Assistance of Counsel* 45.

counsel as the gateway for the realisation of all the other due process rights.¹⁴¹ Brennan, a proponent of the theory of supremacy of the right to assistance of counsel posited, “without the help of a lawyer, all other safeguards of a fair trial may be empty”.¹⁴² The right to the assistance of counsel has also been referred to as a ‘safeguard of special value to the accused’, as well as the ‘most pervasive’ of all the procedural entitlements of the accused person.¹⁴³

The American Supreme Court accorded distinctive prominence to the right to assistance of counsel in adversarial trials, in its seminal decision in the case of *Powell v. Alabama*.¹⁴⁴ It postulated what has today become the most captivating opinion on the paramount significance of the assistance of counsel, especially as an indispensable part of the accused person’s right to be heard before the court.¹⁴⁵ In the following enthralling and much-honoured quote, Justice Sutherland held as follows:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.¹⁴⁶

Beyond the mere physical presence, legal representation affords the accused person the means to an effective presence before the courts.¹⁴⁷ In a ground breaking academic analysis, Luban underlined the role of criminal defence counsel in the adversarial system as a protector of the legal rights of the accused person.¹⁴⁸ In simple terms, the “[core] duty of lawyers is to assert legal interests”.¹⁴⁹ A zealous adversarial advocate who pursues the exclusive interests of the accused person provides the means for protecting the fair trial rights of the latter.¹⁵⁰ This conceptualisation of the role of defence counsel justifies its characterisation as the bulwark against violations of the interests and rights of accused persons.¹⁵¹

¹⁴¹ Cerruti 2009 *Geo. J. Int’l L.* 935; see also Tomkovicz *The Right to the Assistance of Counsel* 45. Defense counsel is “essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a fair trial itself would be “of little avail”. See *United States v. Chronic* 1984 U.S. 653-654.

¹⁴² Brennan “The Bill of Rights and the States” 1961 *N.Y.U.L. Rev.* 761 773.

¹⁴³ Tomkovicz *The Right to the Assistance of Counsel* 45, referring to *United States v. Chronic*, 1984 U.S. 648.

¹⁴⁴ 1932 287 U.S. 45. See also Cerruti 2009 *Geo. J. Int’l L.* 935.

¹⁴⁵ Cerruti 2009 *Geo. J. Int’l L.* 935; Kim 1987 *Yale L. J.* 1641.

¹⁴⁶ *Powell v. Alabama* 1932 287 U.S. 45 68-69; see also Cerruti 2009 *Geo. J. Int’l L.* 936.

¹⁴⁷ Bekker 2004 *CILSA* 174.

¹⁴⁸ Luban *The adversary System Excuse* 92.

¹⁴⁹ *Id* at 89.

¹⁵⁰ *Id* at 97-98.

¹⁵¹ *Id* at 89; Cerruti 2009 *Geo. J. Int’l L.* 935; see also Tomkovicz *The Right to the Assistance of Counsel* 45.

In Ghana, due recognition is also given to the status and role of counsel in the formal administration and conduct of criminal proceedings. According to Taylor J, the peculiarity of the role of defence counsel is associated with the nature of the common law adversarial trial. The judge analogised the structural importance of defence counsel in criminal trials in the following words:

In our common law system, the most we seek is objective truth within the limits of admissible evidence. But the application of even objective justice requires technical skills in knowledge of the law, dialectic skills in its presentation and argument. The ordinary citizen often over-awed and tongued tied by his unfamiliar surrounding must have a spokesman to argue for him. As Lord Macmillan put it in one of those charming essays of his, the lawyer is there to assist justice. It is his business to present to the court all that his client would have said for himself had he possessed the requisite skills and knowledge.¹⁵²

The adversarial quality of defence counsel is significant to the discharge of his/her duty to the accused person. The adversarial system requires not just the presence of counsel, but relies on the zealousness of his/her advocacy as a means of meaningfully safeguarding the liberty and rights of the accused person against the interests of the Prosecution. Defence counsel must therefore exhibit the required competence to put the state to the strictest proof of its claims and in the most uncompromising way possible.¹⁵³ It is through such qualities of defence counsel that his/her participation at the trial may be valued as reinforcing the accused person's ability to successfully defend him/herself during the trial.¹⁵⁴ This structural importance of the role of defence counsel is now a settled theory in the criminal jurisprudence of Ghana. Taylor J in the case of *Affail v. The Republic*¹⁵⁵ quoted Lord Birkett's submission on the role of advocates in England as applicable to the position of defence counsel in Ghana as follows:

And what is the duty of the advocate who shoulders the heavy burden of defending the prisoner...? It is to devote himself completely to his task whatever he himself may think of the charges, and to lay aside every other duty, so that he may watch constantly in the interest of the accused, and say for him all that he would wish to say for himself, were he able to do so. The purpose of this procedure... is not that a guilty person shall escape, but to make certain, so far as human fallibility can do so, that no innocent person shall suffer.¹⁵⁶

¹⁵² *Affail v. The Republic* 1975 2 GLR 69 78-79, quoting Sir Harley Shawcross, seventeenth Benjamin Cardozo Lecture, May 1958, referring to the role of the advocate in Berman & Greiner *Nature and Functions of Law* (1967) 357.

¹⁵³ Luban *The adversary System Excuse* 91. "Zealous advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachment of the state. The good criminal defence lawyer puts the state to its proof in the most stringent and uncompromising way possible. Better we say that a hundred criminals go free than one person be wrongly convicted." Referring to Freeman *Lawyers' Ethics in an adversary system* (1975) 24; also see *United States v. Chronic* 1984 U.S 653-654.

¹⁵⁴ Storm *Criminal Procedure* (2016) 404.

¹⁵⁵ 1975 2 GLR 69.

¹⁵⁶ *Id* at 78, quoting Lord Birkett *Great Six Advocates* (1702) 99-100.

3.4.2.2 Defence Counsel as Guarantor of Trial Fairness

The conceptualisation of criminal justice in the modern adversarial system establishes a logical connection between legal representation and fair trial.¹⁵⁷ Bekker, among other legal academics, has underlined the practical necessity of legal representation for securing the accused person's right to a fair trial especially in an adversarial trial.¹⁵⁸ It is the role of defence counsel to ensure that the accused is treated fairly throughout the proceedings and to ensure that state-actors including the Prosecution, police and the courts, do not take unfair advantage of his/her circumstances.¹⁵⁹ In brief, effective assistance of counsel is required to ensure that the outcome of the trial is just and fair.¹⁶⁰ The strength of any legal system and its efficacy in safeguarding trial fairness is primarily measured by the extent to which it guarantees the right to the assistance of counsel.¹⁶¹ In adversarial criminal proceedings, the fairness of the trial remains an objective concept, measured by the adequacy of protection of the accused person's trial rights and by his/her ability to put up a legally effective defence.¹⁶² The right to counsel embodies a value "that is critical to the ability of the adversarial system to produce just results".¹⁶³ Most importantly, it is the most reliable mechanism for ensuring that the Prosecution and the accused compete on a 'level playing field' in the spirit of fair trial.¹⁶⁴

3.4.2.3 The Role of Defence Counsel in Ensuring Credibility of the Adversarial Process

Beyond its benefits to the accused person, another considered role of defence counsel in the adversarial trial lies in the promotion of a social interest in the criminal justice system itself. The criminal adjudicatory system is regarded as 'the most distinctive embodiment of societal interest in the process of administering law'.¹⁶⁵ Securing effective participation of accused persons in criminal trials through defence counsel reinforces public confidence in the ability of the legal system to achieve fair trial and thereby safeguards the legitimacy of the courts. To that effect, defence counsel carries society's distinctive value of ensuring the reliability of the

¹⁵⁷ Bekker 2004 *CILSA* 177, referring to the American jurisdiction.

¹⁵⁸ *Id* at 176.

¹⁵⁹ See, e.g., in the United States, *Gideon v. Wainwright* 344; *Strickland v. Washington* 1984 466 U.S. 668 685.

¹⁶⁰ See, e.g., Strauss "Between the Defendant's Scylla and Charybdis: *Brooks v. McCaughtry* and the Right to a Fair Trial and the Right to self-representation" 2005-2006 *U. Tol. L. Rev.* 235 238.

¹⁶¹ Cerruti 2009 *Geo. J. Int'l. L.* 923-924.

¹⁶² See, e.g., Finegan 2008-2009 "Pro se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice" *Cath. U. L. Rev.* 445 448; Bekker 2004 *CILSA* 177.

¹⁶³ *Strickland v. Washington* 1984 466 US 668 685, referred to by Storm *Criminal Procedure* 404.

¹⁶⁴ Tomkovicz "An Adversary System Defence of the Right to Counsel against Informants: Truth, Fair Play, and the Massiah Doctrine" 1988-1989 *U.C Davies L. Rev* 1 47-48.

¹⁶⁵ See, e.g., Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure" 1959-1960 *Yale L. J* 1150. Also in Goldstein & Goldstein *Crime, Law and Society* (1971) 174.

guilt-determining process and strengthening the interests and integrity of the criminal justice system.¹⁶⁶ In the context of this two-pronged logic, scholars have reasoned that society maintains an overriding interest in ensuring the fairness of its judicial processes. This concern for fairness, which aims at protecting the accused from the powerful resources and authority of the State, presents a vital theoretical value of the role of legal representation and assistance of counsel in criminal trials.¹⁶⁷ The responsibility of realising the goals of integrity, reliability and fairness in criminal adjudicatory processes therefore primarily rests on the intervention of defence counsel.¹⁶⁸

3.5 CONCLUSION

The adversarial system is ingrained in the idea of party autonomy. This precept of autonomy in turn rests on the assumption that parties are masters of the facts surrounding the controversy and that they are self-motivated to earnestly pursue their personal interests. The adversarial system also operates under the presumption that the parties are procedurally equal and evenly matched in terms of resources, skills and strengths.

In practice however, the criminal adjudicatory procedure is characterised by an inherent procedural imbalance of power and resources between the state and the accused person. Therefore, the adversarial system generally relies on the principle of equality of arms to ensure that the accused person is not substantially disadvantaged *vis-à-vis* the Prosecution. The enactment of a spectrum of fair trial rights of the accused, as articulated by article 14 of the ICCPR, is a key mechanism adopted under international law to enhance the position of the accused in a criminal trial.

The Constitution of Ghana has re-enacted the fair trial rights under article 14 of the ICCPR, which have been fully effectuated by the judiciary. Among this cluster of rights, the right to counsel assumes a level of prominence. Defence lawyers essentially afford accused persons, the means to match the professional quality of the Prosecution. More importantly, the institutionalisation of the system of defence counsel reinforces public confidence in the ability of the criminal adjudicatory system to achieve fair trial outcomes, especially in the adversarial system.

¹⁶⁶ Cerruti 2009 *Geo. J. Int'l. L.* 939.

¹⁶⁷ See, e.g., Pearson *Cal. L. Rev.* 709.

¹⁶⁸ Brick "Self-Representation in Criminal Trials: The Dilemma of the Pro se Defendant" 1971 *Cal L. Rev.* 1479 1481.

PART 2

CONCEPTUAL EVALUATION OF SELF-REPRESENTATION UNDER COMMON LAW AND HUMAN RIGHTS LAW



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CHAPTER 4

THE COMMON LAW PERSPECTIVE OF SELF-REPRESENTATION IN THE ADVERSARIAL CRIMINAL TRIAL

4.1 INTRODUCTION

Legal scholars and jurists trace the roots of self-representation in adversarial criminal trials partly to the practices of the English courts in the period preceding the mid-nineteenth century in English legal history.¹ This chapter analyses the evolving stages of self-representation and the underlying theoretical values, from the early medieval trials to the advent of the modern adversarial criminal trial as a contest between competing lawyers.² It provides a historical perspective on the practice of self-representation as a background for further analysis of the concept in modern criminal trials. Part 2 examines the practice of self-representation as an inherent feature of the early medieval criminal trials. Part 3 analyses self-representation in the early common law jury trials, which hinged on the express denial of defence counsel to accused persons. Part 4 is a discussion of the repressive practices of the Star Chamber and the apparent 'constructive' ideology of self-representation *vis-à-vis* the juridical policy, which mandated legal representation for accused persons appearing before the Chamber. Part 5 presents the downswing of the ideology of self-representation in the wake of the modern conceptualisation of the adversarial criminal trial as a 'lawyer-conducted' trial. Finally, Part 6 discusses the false connection between the historical antecedents of self-representation in English common law and the modern concept of self-representation as a right of accused persons.

4.2 SELF-REPRESENTATION IN ENGLISH MEDIEVAL TRIALS

In its very beginnings in the Middle Ages, the legal system in England operated unique adjudicatory procedures.³ Self-representation was the only mode by which parties accessed the judicial forum. Within that period, which spanned the eleventh to the thirteenth centuries,

¹ See, e.g., Meckstroth "Note – The Case against Self-Representation in Capital Proceedings" 2014-2015 *Minn. L. Rev.* 1973 1941, tracing the origins of the right to self-representation from *Faretta v. California* 1975 422 U.S. 806. To some extent, these roots are also linked to some socio-legal developments in American colonial history. This part of the argument is fully discussed in Ch.5, *infra*.

² Langbein *The Origins of the Adversary Criminal Trial* (2003) 1. He refers to it as the 'lawyer-dominated' or 'lawyer-conducted' trial.

³ Roodt "A Historical Perspective on the Accusatorial and Inquisitorial Systems" 2004 *Fundamina* 137 142; Landsman "A Brief Survey of the Development of the Adversary System" 1983 *Ohio St L. J.* 713 717.

judicial proceedings adopted irrational evidentiary and procedural methods of proof. The theory of justice rested on the idea of divine intervention and on the recognition of God as the ultimate judge. It was believed that justice was of God and not of man.⁴ Divine judgment was expressed in the outcome of the three (3) principal models of proof: (i) Trial by Combat, (ii) Wager of Law, or (iii) the Trial by Ordeal.⁵ The trial generally took the form of a contest that sometimes pitched the antagonistic parties against one another. Trials were by nature a confrontation between the accuser and the accused. The contending parties controlled the proceedings themselves. Legal representation was unknown in the practice of courts and each party assumed the duty to protect his/her best interests in the proceedings.⁶ Victory was proof that a party had proved his/her case, as well as translated into the expression of God's justice for the victor. Justice generally was the preserve of the stronger and more powerful party to the dispute.⁷

The Trial by Combat was the first model of trial to emerge in the medieval period in England. It is said to have existed throughout Northern Europe in the early Middle Ages, before being introduced in England after the Norman Conquest of 1066. The procedure of the Trial by Combat involved pitching the antagonistic parties, being the accuser and the accused, in a physical battle generally overseen by judicial officers. Innocence or guilt was decided by the eventual outcome of the battle. The person who emerged victorious in the combat won the case. The leading philosophy of the criminal trial by combat was embedded in the belief that "God would not let evil prevail".⁸ Victory was determined when a party capitulated by shouting the word 'craven' or where a party was eventually slain.⁹ Where the accused person emerged victor in the combat, it was a sufficient indication of his/her innocence regarding the offences for which s/he is standing trial. The irrationality of this model of trial was further heightened by the fact that litigants were allowed to hire professional fighters to combat in their stead.¹⁰ The

⁴ Landsman 1983 *Ohio St L. J.* 719; Plouffe, Jr. *Adversarial Justice* (2012) 18.

⁵ Landsman 1983 *Ohio St L. J.* 719. It has been argued that these were among the several alternative modes of trial as were being practiced in the English courts. *Id.* at 718, referring to Holdsworth *A History of English Law* (1956) 299-312 and Plucknett *A Concise History of Common Law* (1956) 113-119; also Sward "Values, Ideologies and the Evolution of the Adversary System" 1989 *Ind. L. J.* 301 320-322.

⁶ See, e.g., Goldschmidt "The *Pro se* Litigant's Struggle for Access to Justice: Meeting the Challenge of the Bench and Bar Resistance" 2002 *Fam. Court Rev.* 36 36.

⁷ Plouffe, Jr. *Adversarial Justice* 18.

⁸ *Id.* at 18-19. Also note that the Trial by Combat did not gain too much popularity after its introduction in England as a result of its deadly and destructive ends. The justice of this procedure was highly criticized as favouring those with means to hire professional fighters or to learn the skills of martial arts. See Landsman 1983 *Ohio St L. J.* 718, referring to Thayer *A preliminary Treatise on Evidence at the Common Law* (1898) 40-42.

⁹ Landsman 1983 *Ohio St L. J.* 717.

¹⁰ Barrett "The Adversarial System and the Ethics of Advocacy" 1962 *Notre Dame L. Rev.* 479 481.

focus of the trial was solely based on the outcome of the combat. Adjudication was totally devoid of any rational exercise seeking to establish the facts of the controversy, causation and guilt or innocence of the accused. Obviously, legal representation, even if available, had no room in this form of adjudication.

Similarly, the Wager of Law involved a process of proof that established guilt or innocence of the accused based on considerations other than facts, evidence and law. It called upon a litigant to literally swear an oath that was prescribed in very specific words, to affirm the fact that his/her claims in the controversy are nothing but the truth. The litigant was equally required to find and call a number of persons known as 'compurgators' or 'suitors' to corroborate and support his/her oath by taking their own separate oaths and swearing to the truth of the case. Where the litigant and his/her suitors successfully performed the elaborate ceremony of oath swearing without any errors, s/he was deemed to have satisfactorily proved his/her case and adjudged the winner.¹¹ The oaths were the objective reality of the truth and were founded on the belief that eternal damnation was the eventual consequence of swearing falsely.¹² This scheme of proof did not involve any legal reasoning or legal representation.

The Trial by Ordeal gained considerable popularity throughout medieval Europe. It required a priest to administer an oath to a litigant and submit him/her to a 'test'. The Trial by Ordeal differed in no material respect from the Trial by Combat and the Wager of Law. It was essentially founded upon the idea that God, through a miraculous sign, would dictate either the guilt or innocence of the litigant, who is subjected to the ordeal. Its methods took such forms as placing red-hot iron bars in the hands of a litigant or placing his/her hand into boiling water. Judgment was based on the effects of the burns. If the wounds did not fester, the litigant was pronounced innocent.¹³ In some cases, the litigant was immersed in deep waters. Guilt or innocence of a person was determined by whether s/he sank briefly or floated.¹⁴

Irrespective of the model of proof used, the trial system exhibited certain characteristics of self-representation by the contending parties. Firstly, a true legal system and adjudicatory procedure, in the modern sense of a structured system of rational rules, procedures and institutions, did not exist. The legal profession had not yet developed and the concept of legal

¹¹ It was also described as a "Character Test" in that it required "the oath taker to establish his case by demonstrating his good standing in community". See Plucknett *A Concise History of the Common Law* (1956) 115, cited by Landsman 1983 *Ohio St L. J.* 718.

¹² Sward 1989 *Ind. L. J.* 321.

¹³ *Id* at 320; Landsman 1983 *Ohio St L. J.* 718.

¹⁴ Landsman 1983 *Ohio St L. J.* 718; Sward 1989 *Ind. L. J.* 320.

representation as a structural component of the trial procedure was simply unknown.¹⁵ The accuser and the accused were each for him/herself. Each party stood personally responsible for the success or otherwise of his/her case. Secondly, legal representation, even if available, would matter little, because evidence, facts and law played a meagre role in searching for the truth and in determining guilt or innocence.

The contributions of the aforementioned trial models to the conceptualisation of the modern adversarial philosophy of trial are two-fold. First is the rationalisation of trials as a contest between the parties, and the development of the concept of party autonomy regarding the control and conduct of proceedings.¹⁶ Second is the nearly total insulation of judicial officers from the process of proof, which underlined their passivity throughout the conduct of the trial.¹⁷ The medieval modes of trial procedures fell into disuse in the thirteenth century.¹⁸ This development ushered in the common law jury trials, which would later impose a practice of self-representation as far as accused persons in felony and treason trials were concerned. The practice would continue until the final stages of development of the adversarial criminal as a 'lawyer-conducted trial', in the nineteenth century.¹⁹

4.3 SELF-REPRESENTATION IN THE COMMON LAW JURY TRIALS

The decline of the medieval trial procedures heralded the emergence of the common law jury trials in the thirteenth century.²⁰ Jury trials began the process of rationalising English procedures of trial. Criminal adjudication during that period relied on facts, evidence and law for the determination of guilt or innocence of the accused. It is noted however that in this system of trial, which generally dominated the English legal system for the period up to the eighteenth century, accused persons were for the most part unrepresented in criminal proceedings. Two

¹⁵ Goldschmidt 2002 *Fam. Court Rev.* 36.

¹⁶ In some cases, this concept of party control was found to be only superficial as much of the process of the trial was controlled by the clergy, sole repository of the authority to invoke God's power and interpret his signs, and also to pronounce judgment of God. This unbridled power of the clergy fundamentally enfeebled the concept of party control. See, Sward 1989 *Ind. L. J.* 321.

¹⁷ Landsman 1983 *Ohio St L. J.* 719-720, referring to Holdsworth *A History of English Law* (1926) 280-81, stating: "We have seen that it was an old principle that the business of the court, which was trying an action was merely to see that the law, adjective and substantive, was observed by the litigants. The strict rules of law determined the rights of the litigants; and its administrators were passive agents -umpires- set there to see that the law was observed by both parties, and that the final decision was arrived at, and executed, in accordance therewith."

¹⁸ *Id* at 720; see also Sward 1989 *Ind. L. J.* 321. She notes however that the trial by combat was still operative even though it was less significant and was later practiced in the form of duels. It was finally abolished in the year 1819.

¹⁹ Langbein *The Origins* 1.

²⁰ This is estimated to be generally around the thirteenth century. See Landsman 1983 *Ohio St L. J.* 720-723; Sward 1989 *Ind. L. J.* 321-322.

key theories evolved that justified and reinforced the practice of self-representation in the common law jury trial procedures. The early common law jury trial, extending from the thirteenth to the sixteenth centuries relied on *quasi*-inquisitorial techniques of fact-finding and trial. As a result, criminal proceedings were characteristically ‘lawyer-free’ trials. The jury controlled the pre-trial and trial stages of the proceedings. Subsequently, an ideological shift in the structure of criminal proceedings reshaped the jurisprudence of the jury trial during the seventeenth and eighteenth centuries. The jury trial adopted a new philosophy of criminal adjudication, known as the ‘informational resource’ theory. This was an austere ideology of express deprivation of defence counsel and a stark imposition of self-representation in felony and treason trials.

4.3.1 Self-Representation in Jury Trials between the Thirteenth and Sixteenth Centuries

Early common law jury trials were essentially designed on the procedural premise that both parties to the trial would be self-represented. The jury trial essentially developed in England as a counter-trial procedure to the Roman-canon trial system, which developed in civil law countries, in a bid to find alternatives to the medieval trial procedures that had fallen into disuse.²¹ The Roman-canon system operated a judicial model that emphasised active judicial participation in the fact-discovery process.²² The judge remained the central figure in the proceedings and was solely entrusted with the duty to investigate, present evidence, and deliver judgments.

The system also applied evidentiary rules that developed in the ecclesiastical courts. It also engaged in the practice and use of torture for purposes of securing confessions from accused persons, and as a tool of general judicial inquiry.²³ The English courts, on the other hand, embraced a jury trial procedure that was in principle marked by a refutation of the Roman-Canon principles and procedures of adjudication.²⁴ The jury that presided over the hearings in

²¹ There is no consensus among legal historians as to the exact period of emergence of the jury trial. According to Landsman, some historians attribute its beginnings to a Carolingian genesis. Plucknett in *A Concise History of the Common Law* 109-110 points to the period under the reign of Louis the Pious around 829 A.D in France as marking the origins of the jury concept. See also Holdsworth *A History of English Law* 312-312; J. Thayer *A preliminary Treatise on Evidence at Common Law* (1898) 48. Other historians also attribute the inception of the jury concept to an Anglo-Danish beginning. Though its exact originating date has not been authoritatively determined, the practice of the jury system in the English courts was noted at the close of the twelfth century. See generally, Landsman 1983 *Ohio St L. J.* 720-723.

²² Landsman 1983 *Ohio St L. J.* 724, referring to Langbein *Prosecuting Crime in the Renaissance* (1974) 129-139.

²³ *Id* at 725.

²⁴ *Ibid.*

criminal trials was known as the Jury of Presentment or the Grand Jury.²⁵ It generally consisted of a group of prominent citizens, called at royal insistence, not only to report on misdeeds of the local citizens but also to prepare their indictment for prosecution.²⁶ The jury trial was not essentially adversarial in nature. Its trial procedure in practice leaned towards the modern inquisitorial approach to adjudication.²⁷ The investigative jury controlled the proceedings, and not the parties or their lawyers.²⁸ The jury solely executed the task of determining the facts and presenting the evidence in the case.²⁹ The methods of investigation transmuted into a public fact-finding mission.³⁰

The question of guilt or innocence of the accused was subsequently referred to a second jury within the trial system.³¹ The jury's finding of facts and control of proceedings overshadowed the role of the parties in the conduct of the trial. The accused person did not present much by way of actual forensic defence at the trial.³² The early common law jury criminal trial was a 'lawyer-free' contest. Neither the accuser, nor the accused, was represented by counsel during the proceedings.³³ With an adjudicatory design that emphasised the role of the jury, judicial control of proceedings and limited participation of parties in the trial, legal representation would certainly be redundant. The rudimentary inquisitorial character of the early common law jury trial therefore justified the practice of self-representation during this period of English legal history.

4.3.2 Self-Representation in Criminal Practice and the Rule against Defence Counsel between the Sixteenth to Eighteenth Centuries

The period beginning from the sixteenth century marked some important developments in the procedures of the common law jury trial in English legal history. The changes included the fall

²⁵ Landsman 1983 *Ohio St L. J.* 720.

²⁶ *Ibid.*

²⁷ Landsman 1983 *Ohio St L. J.* 722.

²⁸ Kessel "Adversary Excesses in the American Criminal Trial" 1991-1992 *Notre Dame L. Rev.* 403 431.

²⁹ Discussed, *supra*, Ch. 2, text at 2.5.1

³⁰ Landsman 1983 *Ohio St L. J.* 722; Sward 1989 *Ind. L. J.* 321-322.

³¹ Landsman 1983 *Ohio St L. J.* 720, stating that this jury often consisted of some members of the presentment jury and its number was fixed at twelve, all drawn from the locality where the crime was committed.

³² Cerruti "Self-representation in the International Arena: Removing a False Right of Spectacle" 2009 *Geo. J. Int'l. L.* 919 923.

³³ The legal profession actually developed in the thirteenth century and by the fourteenth century, legal education and training had been formalized in the King's court. However, lawyers participated mostly in civil proceedings and controlled the advocacy process. From the fourteenth century, judges were appointed from among the lawyers. See Landsman 1983 *Ohio St L. J.* 725.

of the common law ‘inquisitorial’ jury trial system, the rise of the passive jury,³⁴ the concomitant transfer of the jury’s fact-finding functions and powers to the parties to the dispute,³⁵ and the emergence of the rule against defence counsel. These developments reinforced the autonomy of the parties, as far as finding the facts and evidence in support of their respective cases were concerned.³⁶

English criminal procedure denied the right to legal representation to all persons charged with serious offences. It was a rule of audience in the trial courts that persons charged with felonies and the offence of treason, should not be represented by counsel at trial.³⁷ While justifying the prohibitive rule, Hawkins contended that any accused person “of common understanding may properly defend himself as if he were the best lawyer” and that “it requires no manner of skills to make a plain and honest defence”.³⁸ The denial of legal representation to accused persons in serious offences in the jury trial had no cause in a presumed lack of lawyers or in a sentiment of aversion to lawyers.³⁹ It was simply commanded by a juridical policy of express deprivation of defence counsel to the accused.⁴⁰ Self-representation was therefore the only available option for accused persons to access the court and defend themselves.⁴¹ All accused persons who applied to be represented and assisted by defence counsel, were unequivocally refused.⁴²

³⁴ From the 15th century, jurors were restricted to consider the evidence as presented in court by the parties, as the basis for their decision. See Landsman 1983 *Ohio St L. J.* 722-723.

³⁵ Landsman 1983 *Ohio St L. J.* 722; Langbein *The Origins* 2.

³⁶ Landsman 1983 *Ohio St L. J.* 722-723.

³⁷ Langbein “The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors” 1999 *CLJ* 314 314; Langbein *The Origins* 33-36; Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (1999) 4; Myers “A Fool for A Client: The Supreme Court Rules on the *Pro Se* Right” 1975-1976 *U. Pitt. L. Rev* 403 408; Cerruti 2009 *Geo. J. Int’l. L.* 927; Kessel 1991-1992 *Notre Dame L. Rev.* 426, fn. 88 referring to Langbein “The Criminal Trial before the Lawyers” 1978 *U. Chi. L. Rev.* 263 311-313.

³⁸ Hawkins A treatise *Pleas of the Crown* (1721) 400, cited by Langbein *The Origins* 314.

³⁹ Cerruti 2009 *Geo. J. Int’l. L.* 929. The fourteenth century had already seen a growth in legal education and training; Landsman 1983 *Ohio St. L.J.* 724-25.

⁴⁰ It is however noted that this idea of mandatory self-representation which was expressed through the prohibition of defence counsel in felony and treason trials was not followed in the American colonies. See, Swift *A system of the laws of the State of Connecticut* (1795-1796) 398-399: “We have never admitted that cruel and illiterate principle of the common law of England that when a man is on trial for his life, she shall be refused counsel and denied those means of defence, which are allowed when the most trifling pittance of poverty is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten out indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice and assistance necessary to make his defence...”, cited in *Faretta v. California* 1975 422 U.S 806 828, fn. 35; Langbein *The Origins* 40; see also Cerruti 2009 *Geo. J. Int’l. L.* 933 adding that self-representation in the American colonial era, for most accused persons was “borne of necessity rather insistence”.

⁴¹ Cerruti 2009 *Geo. J. Int’l. L.* 930-931; see Langbein *The Origins* 253, stating that “replying in person to the charges and evidence against him was the only practical means of defence the procedure allowed.”; see also Myers 1975-1976 *U. Pitt. L. Rev* 403 408.

⁴² Langbein *The Origins* 11-13.

There were few exceptions to the rule on prohibition of defence counsel. Firstly, accused persons retained the right to engage counsel to make submissions on grounds of law at the preliminary stage of the trial itself. Where accused persons pleaded not guilty to the charge, counsel could act for and on their behalf, especially at the arraignment or pleading phase.⁴³ Such counsel had no business arguing the facts to the jury.⁴⁴ The factual and evidentiary development of the case was the personal responsibility of the accused person. Defence attorneys could not examine or cross-examine witnesses or present evidence. They did not address the jury in opening or closing arguments.⁴⁵ Accused persons were bound to appear before the judge and the jury, to personally answer to the charges against them.⁴⁶ Secondly, the fact that the trial system allowed defence counsel to assist accused persons in misdemeanour trials was a paradox to the prohibition of defence counsel.⁴⁷ Under the English adjudicatory system, it was generally assumed that misdemeanours involved matters of civil or regulatory character, and lawyers were already prominent in civil practice.⁴⁸ In those instances, the interest of the state was deemed so trivial that the trial system was considerate towards the accused.⁴⁹

4.3.2.1 Theories Underlying the Rule against Defence Counsel

The rule against defence counsel in treason and felony trials is explained by various theories that are grounded in certain procedural and institutional developments of the jury trial.

a) *Accused Person as an 'Informational Resource'*

There was considerable dependency on the accused person as an 'informational resource' for the court. This was the most viable alternative during a time where the inquisitorial prowess of the jury and the courts' ability to investigate cases were lost.⁵⁰ The strategy was to compel the accused to 'speak' and to conduct his/her defence. The accused was pressured to disclose all material information within his/her personal knowledge and to respond to the merits of the

⁴³ See Coke *Third Institute of the Lawes of England* 1628-1644 137, stating that "[only after the accused had pleaded not guilty and entered the trial phase of the proceedings] which goeth to the fact best known to the [accused] "... shall [he] have no counsel to give in evidence, or allege any matter for him..." quoted by Langbein *The Origins* 26. See also at 109, where he argues that the rule did not impede solicitors from pre-trial work; Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 86.

⁴⁴ Langbein *The Origins* 26.

⁴⁵ See Jonakait "The Rise of the American Adversary System: America before England" 2009 *Widener L. Rev.* 325.

⁴⁶ Cerruti 2009 *Geo. J. Int'l. L.* 927; Langbein *The Origins* 10.

⁴⁷ Langbein *The Origins* 36.

⁴⁸ Langbein 1999 *CLJ* 316.

⁴⁹ Cerruti 2009 *Geo. J. Int'l. L.* 929; see also Beany *The Right to Counsel in American Courts* (1955) 8.

⁵⁰ Langbein *The Origins* 65.

charges laid against him/her.⁵¹ That was considered the most efficient way of discovering the facts.⁵² The accused person was expected to personally mount his/her own defence, either to clear him/herself of the allegations made or to incriminate him/herself and establish guilt.⁵³ This theory placed a number of accused persons' fair trial rights, such as the right against self-incrimination and the presumption of innocence, at risk and the concomitant burden of the Prosecution to solely establish the guilt of the accused beyond all reasonable doubt.⁵⁴

Validation of the rule against defence counsel also revolved around the idea that an accused person was presumably able to represent him/herself in the proceedings.⁵⁵ A defence in criminal proceedings involved a rather simple and ordinary act of disclosure of facts that were materially known to the accused. The task of defending oneself was considered an effortless exercise, which involved merely telling the bare truth "without any [d]ilatories, [a]rts or [e]vasions".⁵⁶ The accused was more strategically positioned, because of his/her personal knowledge and experience of the events, to put out and argue the facts even more strongly than counsel who was only learned in matters of law could.⁵⁷ During this period, the procedures governing the trial were technically simple and comprehensible to the common person.⁵⁸ The trial system assumed that an innocent accused person who was directly confronted by his accusers and put on the spot to respond impulsively to the charge, would effortlessly put up his/her defence before the judge and the jury. Hawkins noted that,

The [s]implicity and [i]nnocence, artless and ingenious [b]ehavior of one whose conscience acquits him, ha[s] something in it more moving and convincing than the highest [e]loquence of [p]ersons speaking in a [c]ause not their own.⁵⁹

As a result, persons falsely charged with criminal offences could clear themselves through the simplicity and innocence of their responses at trial. Conversely, any response from a culpable accused person would "help disclose the truth, which probably would not so well be discovered

⁵¹ *Id* at 35-36. As he states, the rationale was to prevent any undue interference of defence counsel with the fact adducing process. The central dynamic of the trial was to compel the accused to speak and prove his innocence or otherwise.

⁵² Langbein *The Origins* 21.

⁵³ *Id* at 2. Also at 36, stating that "[t]he logic of early modern criminal trial was to pressure the accused to speak either to clear himself or hang himself."; Cerruti 2009 *Geo. J. Int'l. L.* 932, stating that the intendment of the practice of self-representation was to promote self-incrimination.

⁵⁴ See, e.g., International Covenant on Civil and Political Rights (ICCPR), *General Assembly Resolution 2200A* (XXI), arts 14(2) & 14(3) (g).

⁵⁵ Finegan "Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice" 2009 *Cath.U. L. Rev.* 445 456.

⁵⁶ See Langbein *The Origins* 34, fn. 123.

⁵⁷ *Id* at 33.

⁵⁸ Cerruti 2009 *Geo. J. Int'l. L.* 929.

⁵⁹ Hawkins *A Treatise of the Pleas of the Crown* 400, quoted by Langbein *The Origins* 34.

from the artificial defence of others speaking for them”.⁶⁰ Legal assistance to the accused would serve no substantive purpose. The main concern of the adjudicatory system was the apprehension that defence counsel would obtrude the ‘informational resource’ strategy of the court. The rule sought to keep defence counsel from interfering with what the court deemed its mission to extract information from the accused at trial.⁶¹ It was feared that making defence counsel an integral part of the adversarial proceedings would make it less likely for the Prosecution to secure convictions.⁶²

b) Limited Participation of Counsel in Criminal Prosecutions

Criminal trial between the sixteenth and eighteenth centuries was ‘lawyer-free’.⁶³ It took the form of a direct confrontational proceeding that strategically pitched the accuser and the accused person in what Langbein describes as an ‘open altercation’.⁶⁴ Generally, the victim acted as the prosecutor and was unrepresented.⁶⁵ In fact, the office of public Prosecution was also inexistent and the accuser led the prosecution of the accused in his/her personal capacity. S/he established the facts and evidence in support of the charge before the court and the jury.⁶⁶ Two main interventions reinforced the position of the accuser in the trial process to the detriment of the accused. Firstly, the Marian Committal Statute enacted in 1555⁶⁷ established a system of pre-trial procedure to assist the accuser in the preparation of his/her case against the accused.⁶⁸ Secondly, during the period of deprivation of defence counsel, the accuser was given the right to hire a private attorney to prosecute felony cases.⁶⁹ The right was however, seldom exercised, as complainants more often than not acted by themselves.⁷⁰ With the exception of treason trials, which mandatorily involved Crown counsel for the Prosecution,

⁶⁰ Hawkins *A Treatise of the Pleas of the Crown* 400, quoted by Langbein *The Origins* 35. He states, “the very speech, gesture and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not be so well discovered from the artificial defence of others speaking for them.”

⁶¹ Langbein 1999 *CLJ* 315.

⁶² Cerruti 2009 *Geo. J. Int’l. L.* 920, also Langbein *The Origins* 2, 35.

⁶³ Langbein 1999 *CLJ* 314.

⁶⁴ Langbein *The Origins* 13; see also Langbein 1999 *CLJ* 315.

⁶⁵ Langbein 1999 *CLJ* 314.

⁶⁶ Langbein *The Origins* 12-13, stating that criminal prosecution was privately led either the victim or his/her relatives or representatives.

⁶⁷ No. 2 & 3 Phil. & Mar. c. 10 of 1555.

⁶⁸ Discussed, *supra*, Ch. 2, text at 2.5.2

⁶⁹ Jonakait 2009 *Widener L. Rev.* 324-325. It is reported that even as of the nineteenth century, the concept of public prosecution was not fully institutionalized and operational in England. Private prosecution still dominated criminal trials in 1820s. See, Cottu, *On the Administration of the Criminal Code in England* (1820).

⁷⁰ See Beattie “Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries” 1991 *Law & Hist. Rev.* 22; also Langbein *The Origins* 12.

accusers in cases of felonies personally led the prosecution in practice.⁷¹ Therefore, even though the accuser benefited from state assistance in pre-trial preparations, the trial itself generally remained a private contest between the accuser and the accused.

c) Prosecution's Burden of Proof, the Politics of Repression and the Protective Role of the Courts

There were other noteworthy presumptions in defence of self-representation in the common law jury trials. The first is that the burden of proof rested entirely on the Prosecution. The Prosecution was solely responsible for establishing the accused's guilt, and doubt was to be resolved in favour of the accused person.⁷² The Prosecution therefore assumed the entire burden of persuasion, which rendered assistance of counsel in pleading a defence unnecessary. It is noteworthy that once the Prosecution succeeded in convincingly proving the charges, the accused person was consequently found guilty and was convicted. A denial of the charge or raising a defence to it was pointless and inconsequential.⁷³ The second and even more sombre rationalisation of the practice of self-representation was based on a rather repressive political ideology that denigrated the position of the accused person at trial.

In the practice of the King's courts, serious offences constituted a breach of the King's peace and an accused person who refuted a felony or treason charge in effect audaciously 'challenged' the King's accusation.⁷⁴ The trial procedure thus consciously and punitively restricted the accused person in his/her ability to prevail against the Crown's indictment.⁷⁵ This practice was also reinforced by an overarching juridical principle of the common law jury trial according to which an accused person was 'an enemy of the King' and was at least 'half guilty' even before the trial. This underlying theory thus demanded, "all aids [...] be furnished to the King, whose security [...] was more important than that of the individual interest".⁷⁶ Lastly, self-representation also found a theoretical justification in a presumed protective role that the courts played regarding accused persons. The underlying judicial assumption was that the courts

⁷¹ Langbein *The Origins* 2.

⁷² *Id* at 33, arguing that long before the standard of proof was developed in the eighteenth century, the applicable principle was that the Prosecution bore the burden of proving the guilt in criminal trial, and that any doubt need to be resolved in favour of the accused.

⁷³ See Cerruti 2009 *Geo. J. Int'l. L.* 928, fn. 26, quoting *R v. Edward Coleman*, 1678 7 St. Tr 1. 14 (KB) cited in Stephen *A History of the Criminal Law of England* (1883) 382: "[T]he proof belongs to [the crown] to make out these intrigues of yours; therefore you need not have counsel because the proof must be plain upon you and then it will be in vain to deny the conclusion."

⁷⁴ Cerruti 2009 *Geo. J. Int'l. L.* 929.

⁷⁵ *Ibid.*

⁷⁶ *Ibid*, referring to Beany *The Right to Counsel in American Courts* 11.

served as counsel for the accused and had the duty to ensure that accused persons were treated according to the law.⁷⁷ The trial system assumed that the trial judge was better placed to protect accused persons during proceedings. In maintaining a stance of impartiality and neutrality, the judge availed him/herself as an objective umpire, who could in the same judicial capacity deliver as counsel for the accused.⁷⁸ The active role of judges in the trial relieved the parties of certain procedural difficulties. For example, the responsibility for directing the trial in the absence of counsel fell squarely on the trial judge who controlled the development of the facts of the case.⁷⁹ The trial judge organised the presentation and admission of evidence in court. S/he also personally examined the accuser, the accused and their witnesses, and commented on their testimonies at trial.⁸⁰ This conceptualisation of the defence role of the court was however erroneous. Whereas a court could protect the unrepresented accused against procedural irregularities and illegalities, its assistance did not however extend to helping the accused to formulate a defence or act as a real advocate would do.⁸¹

The aforementioned philosophies and values defined the substantive theories of the practice of self-representation in common law jury trials. Essentially, the status of self-representation did not benefit the accused person. As an express denial of legal assistance, self-representation was punitive to the accused.⁸² Accused persons suffered several procedural limitations. They had no right to testify on their own behalf or to offer any evidence in support of their case. They could neither confront and cross-examine their accusers nor compel witnesses to give evidence in support of their defence. Accused persons were not allowed to develop any positive case in their defence.⁸³ The logic of the adjudicatory system strictly downplayed the strains experienced by accused persons who were forced to personally defend themselves in criminal proceedings.

⁷⁷ See, e.g., Langbein 1999 *CLJ* 316, referring to Coke *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (1644) 29; Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 86.

⁷⁸ Cerruti 2009 *Geo. J. Int'l. L.* 928-929, referring to Chitty *A Practical Treatise on the Criminal Law* (1816) 407.

⁷⁹ See Jonakait 2009 *Widener L. Rev.* 325; Langbein *The Origins* 15, stating that “without counsel to order proofs and to examine and cross-examine, witnesses and accused, the responsibility for directing felony trials fell to the judges.”

⁸⁰ Langbein *The Origins* 15 fn 27. This practiced continued into the early 18th century. See Beattie *Crime and the Courts in England 1660-1800* (1986) 342 stating that “the common practice clearly was for the judge to take [the prosecutor and the witnesses] through their testimony line by line, acting as both examiner and cross-examiner...”

⁸¹ Beattie “Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries” 1991 *Law & Hist. Rev.* 221 223.

⁸² Cerruti 2009 *Geo. J. Int'l. L.* 920.

⁸³ *Id* at 923, 927, arguing that all serious offenses were in effect capital offences, and any person charged with a capital offence faced his/her accusers without witnesses, without counsel, even without assurance of opportunity to question the witnesses against him/her; Landsman 1983 *Ohio St L. J.* 728.

The common law juridical policy of self-representation of accused persons was vigorously defended well into the eighteenth century. The practice merely reflected the juristic ideas that informed the nature of common law trial procedures during the period between the sixteenth and eighteenth centuries, and long before the advent of modern adversarial criminal trial. The present day justification of self-representation in modern adversarial criminal trials is very remotely and, to a large extent, falsely connected with these underlining philosophies of common law jury trials.

4.4 THE RISE OF SELF-REPRESENTATION IN THE PRACTICE OF THE STAR CHAMBER

The practice of the Star Chamber accorded the only positive appeal to self-representation in English common law history. It is noteworthy that the Star Chamber was the only court that required and actually mandated legal representation for all accused persons appearing before it.⁸⁴ However, due to the compromised and complicit attitude of lawyers in the abusive procedures and notorious practices of the Chamber, accused persons clamoured for a waiver of their entitlement to legal representation.⁸⁵

The Star Chamber was a special tribunal of the King's Council, established by King Henry VII in 1487. Its notoriety rose from the seventeenth century when as a tribunal, it specialised in the trial of such offences as treason, seditious libel and cases of religious and political dissidence. It operated for a period of close to two centuries. Its jurisdiction was based on the royal prerogative, which vested the Chamber with power to administer justice in cases not remediable in the regular courts of law. It was in essence a court of Equity. Its practices were tainted with abject disregard for due process and personal rights.⁸⁶ It was most infamously known for the peculiarity of its judicial procedures, which included the use of inquisitorial processes of trial, secrecy of procedures, practice of torture to extract evidence from witnesses, unlawful imprisonment and unlawful impositions of fines.⁸⁷ Intriguingly, the Chamber became

⁸⁴ *Faretta v. California* 821; also Leventon "Constitutional Law- Criminal Procedure- Independent Right of Self-Representation in Sixth Amendment Permits Defendant to Act as Own Lawyer at State Criminal Trials" 1976 *Cornell L. Rev.* 1019 1023; Hawkinson "The Right of Self-Representation Revisited: A return to the Star Chamber's Disrespect for Defendant Autonomy? [*Indiana v. Edwards*, 128 S. Ct. 2379 (2008)]" *Washburn L. J.* 465 474.

⁸⁵ Cerruti 2009 *Geo. J. Int'l. L.* 920.

⁸⁶ *Faretta v. California* 821. The court of the Star Chamber was an efficient and somewhat arbitrary arm of royal power. See fn. 17

⁸⁷ Cerruti 2009 *Geo. J. Int'l. L.* 930.

an instrument of royal oppression for the persecution of religious and political dissidents.⁸⁸ It was later abolished by the Long Parliament in 1641 following a popular uprising against it due to arbitrary use of power and practice of cruel punishment.⁸⁹

The importance attached to the role of defence counsel in proceedings of the Star Chamber differed from the practice of the common law jury trial. Contrary to the common law policy of deprivation of counsel to accused persons in felony and treason trials, legal representation was a requirement for appearing before the Chamber.⁹⁰ Every accused person was required to have his/her answer to an indictment signed and validated by counsel. Where the accused was unable to get his/her answers signed by counsel, s/he was deemed to have confessed to the truth of the accusations.⁹¹ No defence to a criminal charge was accepted unless a lawyer took the onerous responsibility of vouching for the defence pleaded.⁹²

This legal assistance provided by defence counsel in the practices of the Chamber was however illusory.⁹³ Technically, the Chamber leaned towards securing confessions and admissions of guilt from accused persons. This goal was driven by a subtle imposition of severe punishments on defence counsel. Counsel faced rebuke, suspension, fine or imprisonment, if s/he signed an answer to an indictment, which either proved to be false or which essentially offended the King.⁹⁴ Counsel equally escaped no punishment if s/he got involved in trivial pleadings.⁹⁵ In this unfriendly and intimidating judicial atmosphere, lawyers exercised caution and observed some threshold regarding which defences “not to sign so as not to disturb the King”.⁹⁶ Consequently, counsel provided measured assistance to accused persons with relatively dim enthusiasm. Counsel’s presence in proceedings before the Star Chamber was therefore never inspired by a genuine zeal to positively defend the accused.⁹⁷ Defence counsel was essentially an agent in service of the Crown’s interest, a ‘shrewd state-apparatus’ operating in furtherance of the royal political and ideological interests.⁹⁸ It is reported that by the seventeenth century, lawyers had become fully complicit in the nefarious practices of abuse and tyranny of the

⁸⁸ Assy “Revisiting the Right to Self-Representation in Civil Proceedings” 2011 *C. J. Q.* 267 274.

⁸⁹ <http://legal-dictionary.thefreedictionary.com/Star+Chamber> (Accessed 12-03-2016).

⁹⁰ See note 84 above.

⁹¹ See *Faretta v. California* 822, fn. 18, referring to Stephen *A History of the Criminal Law of England* 341; see also Landsman “The Growing Challenge of *Pro se* Litigation” 2009 *Lewis & Clark L. Rev.* 439 454.

⁹² Cerruti 2009 *Geo. J. Int’l. L.* 930.

⁹³ E.g., Leventon 1976 *Cornell L. Rev.* 1023.

⁹⁴ *Faretta v. California* 822, fn. 18, referring to Holdsworth *A History of English Law* (1924) 179.

⁹⁵ Leventon 1976 *Cornell L. Rev.* 1023; Hawkinson 2008 *Washburn L. J.* 475 fn. 79.

⁹⁶ Hawkinson 2008 *Washburn L. J.* 475.

⁹⁷ Leventon 1976 *Cornell L. Rev.* 1024.

⁹⁸ Assy 2011 *C. J. Q.* 274.

Chamber. Thus, the policy of mandatory legal presentation, and conversely of express denial of self-representation during the reign of the Star Chamber was a directive in pursuit of the Crown's prosecutorial interest. It had very little regard for securing the protection of the accused and the fairness of the proceedings.⁹⁹

The implicit appeal for recognition of self-representation and a denunciation of the policy of compulsory legal representation by a class of 'politically compromised castes of esquires' provided the only avenue to safeguard the interests of accused persons before the Chamber.¹⁰⁰ In other words, having an accused person represent him/herself in a trial before the Star Chamber was the only way to safeguard his/her personal dignity and freedom.¹⁰¹ It is therefore rightly argued that the Star Chamber and its attendant requirement of legal representation marked the sole crucial moment in the history of the Anglo-American common law trial where self-representation attained a positive status.¹⁰² It must however be emphasised that the desperate call for self-representation in the practices of the Star Chamber did not in any way establish a precursory phase to an 'entitlement' or a 'right' to self-representation in the common law trial; neither did it express an acceptance of the concept of "liberal individualism of self-representation at common law".¹⁰³ The objection to legal representation and its counter-insistence on self-representation in the practices of the Star Chamber were not a rejection of the role of defence counsel. They were only a denunciation of the complicity of counsel's assistance in service of the Crown's interest. It embodied the notion that a disloyal form of legal representation in an adversarial trial was worse than self-representation.

4.5 THE ORIGINS OF LEGAL ASSISTANCE

The movement away from the policy of self-representation began in the late seventeenth century, paving the way for the rise of the modern adversarial criminal trial, generally defined as a contest between competing lawyers.¹⁰⁴ In essence, the advent of the modern adversarial criminal trial began with the gradual obliteration of the common law juridical policy of self-representation. The procedure for allowing defence counsel over self-representation was however fragmented. It began from the last quarter of the seventeenth century in 1696. The

⁹⁹ *Ibid.*

¹⁰⁰ Cerruti 2009 *Geo. J. Int'l. L.* 930.

¹⁰¹ Assy 2011 *C. J. Q.* 274.

¹⁰² Cerruti 2009 *Geo. J. Int'l. L.* 920.

¹⁰³ Contrary to the view of the American Supreme Court in *Faretta v. California* 823.

¹⁰⁴ Piper & Finnane "Access to Legal Representation by Criminal Defendants in Victoria, 1861-1961" 2017 *U.N.S.W. L. J.* 638 638; Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 5.

process culminated in the rise of the full right to assistance of counsel to all accused persons in the second quarter of the nineteenth century, precisely in 1836. Generally, the purpose for allowing defence counsel in all adversarial proceedings was to even up the advantages of the Prosecution and establish procedural fairness between the Prosecution and the accused.¹⁰⁵

4.5.1 Legal Assistance in Treason Trials

The movement for the liberalisation of use of defence counsel began with the notorious treason prosecutions of political and religious dissidents. It gained momentum with the devastating miscarriages of justice that occurred in a series of treason trials held in England from 1678 to the year of the Glorious Revolution of 1688-9.¹⁰⁶ These were scandalous criminal proceedings that exposed the disdainful abuses of otherwise innocent but self-represented accused persons who had no opportunity to fairly defend themselves against the politically biased court and Crown Counsel. Accused persons who were unrepresented were substantially disadvantaged in treason trials. The Crown was customarily represented by skilled and zealous advocates in all treason trials, unlike in trials of felonies.¹⁰⁷

The turning point in the treason trials system began with the enactment of the Treason Trials Act (TTA).¹⁰⁸ The Act guaranteed the accused person's right to just and equal means to defend his/her innocence.¹⁰⁹ It granted to all persons charged with treason offences a full right to the assistance of counsel both at the pre-trial and trial stages of the proceedings.¹¹⁰ The TTA characteristically marked the first breach into the common law rule against defence counsel and eventually of the practice of self-representation. It is also noted that the right provided for by the TTA was limited, as defence counsel in the treason trial was not allowed to argue the case directly to the jury. The Act did not do away with the common law strategy of pressurising the accused to speak for him/herself as far as the argumentation of facts is concerned.¹¹¹

Furthermore, legal assistance under the TTA was not free. It was available to accused persons with the financial means to hire counsel. Interestingly, the Act appeared to target the privileged classes of English society such as 'political figures' who nurtured treasonable ambitions and

¹⁰⁵ Langbein 1999 *CLJ* 317.

¹⁰⁶ Langbein *The Origins* 67-69 referring to the Popish Plot Trials 1678-80, trial of Fitzharris and College 1681, the Rye House Plot trials of 1683 and the Bloody Assises of 1685.

¹⁰⁷ *Id* at 2, 13, 98, 99, 110, referring to Hawkins *A Treatise of the Pleas of the Crown* 402.

¹⁰⁸ No. 7&8 Will 3 c. 3 of 1696

¹⁰⁹ *Id*, see Preamble.

¹¹⁰ *Id*, s 1.

¹¹¹ See Cerruti 2009 *Geo. J. Int'l. L.* 931. As Langbein states, "securing the accused as an informational resource was the central pre-occupation of the early modern trial". See *The Origins* 61.

thus stood to be potentially charged with treason offences.¹¹² The statutory protection was therefore intended for the benefit of the limited class of affluent potential offenders only. These privileged individuals were the first and sole beneficiaries of the right. They represented the only social class that had the means to afford the services of counsel.¹¹³ Despite its limited application, this legislative intervention began the slow but steady movement away from the practice of self-representation in the common law criminal trial in general.¹¹⁴ It is in this context that Langbein argues that the modern adversarial criminal trial is founded on the advent of the TTA.¹¹⁵

4.5.2 Legal Assistance in Trials of other felonies

The second quarter of the eighteenth century in English criminal jurisprudence also brought about a phenomenal change to felony trials. From the 1730s, judges began to depart from the practice and rule forbidding defence counsel in felony trials. They granted access to defence counsel, even though for limited purposes. Defence counsel's assistance was confined to examining and cross-examining witnesses. The accused however still personally addressed the jury and not counsel.¹¹⁶ The reason for permitting legal representation for accused felons rested on the fact that lawyers increasingly participated in the prosecutions of felonies.

Earlier, the individual prosecutor was assisted by lay magistrates and justices of the peace who organised the prosecution witnesses for trial at a pre-trial committal proceeding.¹¹⁷ Lawyers assumed the task of investigating crimes, shaping facts and evidence, as well as sometimes conducting the trial.¹¹⁸ Around the same time, lawyers were motivated by a reward system imposed by the state to recompense those who successfully prosecuted offenders charged with serious property crimes.¹¹⁹ Taking a cue from the purpose of the TTA, judges allowed defence counsel to probe the evidence of the Prosecution that was mainly 'solicitor-driven' and whose actions were motivated by rewards.¹²⁰ In the end, the purpose was to also even up the advantages of the Prosecution and ensure procedural fairness. Defence counsel's assistance to the accused was indeed invaluable.

¹¹² See Langbein *The Origins* 3; also Beany *The Right to Counsel in American Courts* 9.

¹¹³ Cerruti 2009 *Geo. J. Int'l. L.* 923.

¹¹⁴ *Id* at 923-924.

¹¹⁵ *Id* at 931; Langbein *The Origins* 68.

¹¹⁶ Langbein *The Origins* 106, 110.

¹¹⁷ Langbein *CLJ* 315. See also note 68 above.

¹¹⁸ *Id* at 319.

¹¹⁹ *Id* at 320.

¹²⁰ *Id* at 361.

It is reported that as counsel participated in the trial and assisted accused felons, “they made a great difference to the way trials were conducted”.¹²¹ Eventually in 1836, the Prisoner’s Counsel Act (PCA) was enacted, thereby extending the right to assistance of counsel to all accused persons.¹²² The Act crystallised legal representation into a generalised procedural right of the accused and ended the long-honoured practice of self-representation in the common law felony trials. Indeed, the PCA gave full right to assistance of counsel to all persons in all felony trials at all stages of the proceedings.¹²³ With the advent of the TTA and PCA, all accused persons, irrespective of the nature of the offence, acquired the right to legal representation and assistance in criminal adversarial trials.

In the final configuration of the adversarial criminal trial, defence counsel assumed two main roles that were originally the sole responsibility of the unrepresented accused person. Firstly, s/he probes and tests the case of the Prosecution to determine whether a case has been sufficiently made against the accused.¹²⁴ Secondly, where a case is positively established against the accused, it behoves defence counsel to adduce evidence to rebut the Prosecution’s allegations and thereby secure the acquittal of the accused. The new concept of the adversarial criminal trial is a ‘battle’ of lawyers. It is no longer a forum to secure the accused to defend against a charge, but an avenue for defence counsel to shield the accused person and professionally test the case of the Prosecution.¹²⁵ The value of defence lawyers since their integration into the body of the adversarial criminal trial has been immense.¹²⁶ Consequently, the adage emerged from the realities of the modern adversarial criminal trial that “every man who is his own lawyer, has a fool for a client”.¹²⁷ Parity in the form of legal representation as an element of procedural fairness maximises the efficiency of the adversarial criminal trial in terms of securing just results.

¹²¹ Beattie 1991 *Law & Hist. Rev.* 360; Langbein *The Origins* 267.

¹²² No. 6 & 7 Wil. 4, c. 114 of 1836.

¹²³ *Id.*, s 1.

¹²⁴ Langbein *The Origins* 269, 271.

¹²⁵ Kessel 1991-1992 *Notre Dame L. Rev.* 432. Defence counsel is “a shield between the [accused] and the prosecutor, judge and the jury.”

¹²⁶ Discussed *supra*, Ch. 3, text at 3.5.

¹²⁷ Piper & Finnane 2017 *UNSW L. J.* 640, 641.

4.6 THE FALSE THEORY OF A COMMON LAW RIGHT TO SELF-REPRESENTATION IN MODERN ADVERSARIAL CRIMINAL TRIALS

The common law background of self-representation in criminal trials has generated a scholarly debate about its relationship with present-day recognition of the right of the accused to opt to represent him/herself at trial.¹²⁸ It has been argued that the conceptualisation of self-representation as a right in modern criminal proceedings evolved from the historical circumstances preceding the right to counsel in the nineteenth century.¹²⁹ Cerruti rightly argues that the only justifiable proposition for the continuing practice of self-representation, as it applies under common law, is based on necessity rather than it being a choice or a right.¹³⁰ With the advent of defence counsel, accused persons who could not afford counsel reserved the right to appear unrepresented at the trial. Similarly, in circumstances where they qualified for court-appointed counsel, such accused persons could waive counsel's assistance if they were desirous to appear by themselves. Despite these exceptions, which allowed an accused individual to appear unrepresented before the courts, the focus of the new adversarial theory of criminal adjudication leans towards promoting the benefits of full assistance of counsel. In simple terms, with the rise of the concept of defence counsel, the policy of the adversarial criminal aims solely at safeguarding the exercise of the right to the assistance of counsel. It remains far from promoting a right or an entitlement to self-representation.

The American Supreme Court case of *Faretta v. California*¹³¹ is a classic authority on the articulation of the common law foundation of the right to self-representation in modern adversarial criminal trials. In the opinion of the Court, the roots of recognition of the right to self-representation in modern adversarial criminal trials are partly grounded in the legal developments of the English common law juridical practices.¹³² The Court contended that throughout the stages of growth of the adversarial criminal trial, accused persons maintained an 'indefeasible' right to present their defence in person. The *Faretta* court thus consequently emphasised the absoluteness and primacy of the right to conduct one's own defence over the

¹²⁸ Discussed *infra*, Ch. 5.

¹²⁹ See Cerruti 2009 *Geo. J. Int'l. L.* 920.

¹³⁰ *Id* at 933.

¹³¹ 1975 422 U.S. 806. It is the first classic judicial authority on the right to self-representation.

¹³² *Id* at 818, stating that the right to self-representation finds support in English and American colonial jurisprudence.

right to the assistance of counsel. In its opinion, the right to the assistance of counsel remains a mere supplementary right to the right to self-representation.¹³³

These theories of rationalisation of the practice of self-representation as a right however, appear to have been misconstrued from a misinterpretation of the foundational theories of the concept of self-representation, as analysed within the scope of the common law history. The practice of self-representation as gleaned from its origins in the common law criminal trial weakly supports any assumption that may seek to elevate it to the status of an absolute right. The practice simply arose from a negative disposition inherent in the deprivation of assistance of counsel, with an intention to submit the accused into speaking for him/herself and to facilitate a conviction that would otherwise be inhibited by counsel. Therefore, any logic seeking to rationalise the practice of deprivation of defence counsel as a right undoubtedly remains insufficiently justified. Assy, in that vein, has rightly argued that considering its legal history, self-representation can hardly be considered the “product of deliberate recognition of its normative value as a right”.¹³⁴ Thus, *Faretta*’s inductive conclusion, which relies on the common law history of the adversarial criminal trial to justify self-representation as a right in modern adversarial criminal trial, is falsely justified.¹³⁵

The functional theories of legal assistance in modern adversarial criminal trials express a refutation of the concept of self-representation. With the conscious rise of the concept of defence counsel as an integral component of the modern adversarial criminal trial, the philosophy accommodating the contemporary practice of self-representation has meagre theoretical foundations at common law.

4.7 CONCLUSION

The various contexts of the practice of self-representation from the medieval times to the modern configuration of the adversarial criminal trial relied on key theoretical assumptions that justified the nature of the adversarial proceedings and justice at each epoch. Self-representation in the early inceptions of English medieval trials adopted a form of adjudication based on

¹³³ See Meckstroth 2014-2015 *Minn. L. Rev.* 1941; *Faretta v. California* 816, 820, 828-830, 838.

¹³⁴ Assy 2011 30 *C. J. Q* 273.

¹³⁵ See, e.g., Cerruti 2009 *Geo. J. Int'l. L.* 923, stating that “[h]owever well intentioned, *Faretta* misread the common law history it relied upon and constructed a false idea for a practice that was utterly at odds with the new constitutional driven system”; Hashimoto “Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case” 2010 *B.U.L Rev.* 1148 1150, fn 8.

divination. This procedure deprived the trial of all rationality, as justice was derived from abstract considerations.

The mutation to jury trials in the aftermath of the downswing of the medieval modes of proof brought about the 'open altercation' procedures of trial, pitching the private accuser against the private accused. The disappearance of the investigative jury from the judicial landscape however, ushered in the first formal recognition of self-representation through a policy of deprivation of defence counsel in treason and felony trials.

Beginning from the last quarter of the seventeenth century, the policy and practice of self-representation in criminal trials lost their essence; a new trajectory emerged that culminated in the full development of the adversarial criminal trial as a 'lawyer-controlled' trial. Accused persons acquired the full right to legal representation in all criminal trials by the mid-nineteenth century. The scholarly claim that the common law jury practice of self-representation provided the ground for the development of a right to self-representation in modern criminal trials cannot therefore be supported in legal history. The rise of the position and role of defence counsel fulfilled the overriding concern of the adversarial criminal trial in terms of ensuring a procedural balance of the trial and the fairness of its outcomes. More importantly, it added value to the societal interest in ensuring the reliability and legitimacy of the adversarial criminal trial process. With these developments, self-representation stands at odds with the value and role of legal representation in the adversarial trial. Paradoxically however, the concept of self-representation remains specially grounded in the modern human rights regime.

CHAPTER 5

THE RIGHT TO SELF-REPRESENTATION IN MODERN CRIMINAL TRIALS: PERSPECTIVES ON GHANA AND INTERNATIONAL LAW

5.1 INTRODUCTION

The right to self-representation in criminal trials is a universally guaranteed fair trial right of accused persons. It is one of the two alternative modes of appearance before the court.¹ In principle, the right to self-representation gives accused persons the possibility to reject legal assistance and personally conduct their defence.² This chapter is an analysis of the underlying values of the right to self-representation and its contributions to the judicial goals of fair trial and procedural fairness in adversarial criminal proceedings. It examines the normative substance and theoretical values underlying the right to self-representation within the general human rights framework. It also includes a focused discussion of the implementation and jurisprudential values of the right to self-representation in criminal proceedings in Ghana. Part 2 discusses the conceptual evolution of the right to self-representation in American legal history, while Part 3 presents an analysis of the theoretical values underlying the right to self-representation.³ Part 4 is an *exposé* of the normative substance of the right to self-representation under international law. Part 5 examines the nature, values and implementation of the right to self-representation in criminal proceedings in Ghana. Finally, Part 6 is a discussion of the need to attune the normative substance of the right to self-representation to the core objectives of fair trial, procedural equality and protection of accused persons in adversarial criminal proceedings.

5.2 BACKGROUND AND CONCEPTUAL EVOLUTION OF THE RIGHT TO SELF-REPRESENTATION IN AMERICAN LEGAL HISTORY

The justification for self-representation as a procedural right for accused persons in modern adversarial criminal trials are rooted in legal developments in American colonial and legal

¹ The other alternative is representation through an advocate.

² The Human Rights Committee (HRC) *General Comment 32*, CCPR/C/GC/32 (2007) para 37.

³ A conscious decision was made to discuss the American legal context before the international dispensation because the former provides the historical background and development of the right to self-representation in international law.

history. The practice of self-representation as a procedural right is originally linked to the rise of an anti-lawyer sentiment in American colonies.⁴ This anti-lawyer crusade was mainly fuelled by American colonists' early appreciation of the virtue of self-reliance and even more importantly by their general sense of distrust of lawyers.⁵ A number of reasons accounted for these facts. Firstly, the sense of denunciation of lawyers was associated with the lack of 'high quality' practicing lawyers, as most legal practitioners had returned to England during the American Revolution.⁶ A good number of lawyers had also either joined politics or decided to serve on the bench. Legal practice was thus left in the hands of a few lawyers of inferior ability and competence.⁷ Secondly, the colonists' distrust for lawyers was partly motivated by a perceived negative attitude of lawyers, who in essence merely and blindly acted in the interest of the Crown. Lawyers were generally bent on securing the conviction of all persons who opposed the King's prerogatives. They applied all means including twisting the law to secure such convictions.⁸ Furthermore, lawyers were socially associated with the elite class and professed beyond the reach of the poor who could not afford their services.⁹ Entitlement to legal representation in criminal trials solely depended on the financial ability of the accused person. As a result, accused persons, for the most part, adopted the practice of representing themselves, notwithstanding that counsel were permitted.¹⁰

Insistence on a right to self-representation was therefore more fervent in American colonies than it was in English legal history.¹¹ It must also be noted that the English juridical practices, which prohibited assistance of defence counsel in felony and treason trials, were contrary to the practice in the American courts of the colonies.¹² The judicial system in American colonies operated a policy that duly recognised and granted a right to full assistance of counsel to all

⁴ See Meckstroth "Note – The Case against Self-Representation in Capital Proceedings" 2014-2015 *Minn. L. Rev.* 1935 1941, tracing the origins of the right from *Faretta v. California* 1975 422 U.S 806 821-823.

⁵ Stewart J in *Faretta v. California* 826-827.

⁶ Hashimoto "Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case" 2010 *B.U.L Rev.* 1148 1166, referring to Warren *A History of American Bar* (1911) 214.

⁷ *Ibid.*

⁸ *Faretta v. California* 826; see also Meckstroth 2014-2015 *Minn. L. Rev.* 1941, referring to White "Rethinking the Standards for Waiver of Counsel and Proceeding *Pro se* in Iowa" 1992 *Iowa L. Rev.* 205 208-209, arguing that "distrust for attorneys was more intense than their English counterparts because of the persecution they suffered for their opposition to the Crown."

⁹ Hashimoto 2010 *B.U.L Rev.* 1166, referring to Beany *The Right to Counsel in American Courts* (1955) 21.

¹⁰ *Ibid.*

¹¹ *Faretta v. California* 826.

¹² Discussed *supra*, Ch.4, text at 4.3.2, fn. 40.

accused persons and in all cases.¹³ However, the right of every accused person to represent him/herself at the trial was accorded primacy.

Most of the American state constitutions and charters that emerged in the eighteenth and nineteenth centuries enacted both the due process right of the accused to be represented by counsel and the right to defend oneself in person in criminal proceedings.¹⁴ The right to self-representation was preserved throughout the American colonial criminal practice. It was later re-enacted under the American Judiciary Act¹⁵ as a key procedural right of every accused person. The Act specifically allowed all persons to “plead and manage their own causes personally or by the assistance of counsel”.¹⁶ Eventually, this legal development in the American jurisprudence spearheaded the growth and recognition of the right to self-representation in modern international law. Beyond the socio-cultural factors that justified the practice of self-representation, certain theoretical values underlay its crystallisation into a fundamental procedural right for the accused person. These values remain the main philosophical underpinnings of the right to self-representation in modern criminal practice. Very little discourse has, however, been engaged on the need to match these values with the assumption of procedural equality, which underlies the operation of the adversarial procedure of trial.

5.3 THEORETICAL VALUES OF THE RIGHT TO SELF-REPRESENTATION

5.3.1 Personal Autonomy

The philosophical underpinnings of the right to self-representation are generally ingrained in the affirmation of the value of personal autonomy.¹⁷ The founding theory of self-representation as a right rests on the principle that the litigant stands at the core of the litigation and is therefore free to decide whether to act in person or through counsel.¹⁸ Autonomy relates to the “concept of private space within which a person can make and act on decisions free from government intervention”.¹⁹ It also connotes the ability of the person to “do what one wants – choosing

¹³ *Ibid*; also see Langbein *The Origins of the Adversary Criminal Trial* (2003) 39-40; *Faretta v. California* 827-828.

¹⁴ See *Faretta v. California* 828.

¹⁵ No. 1 Stat. 73 of 1789.

¹⁶ See Judiciary Act, s 35 now codified 28 U.S.C 1654.

¹⁷ Finegan “*Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*” *Cath. U. L. Rev.* 2008-2009 445 454; also *McKaskle v. Wiggins* 1984 465 U.S 168 176-177.

¹⁸ Assy “*Revisiting the Right to Self-Representation in Civil Proceedings*” 2011 *C.J.Q* 267 273.

¹⁹ Hashimoto 2010 *B.U.L.Rev.* 1153.

freely without outside constraints”.²⁰ Regarding its import in judicial proceedings, it specifically embodies the idea of ‘free choice’ and presents accused persons with the opportunity to personally decide how to conduct their own trials and thereby shape their own destinies.²¹ This value portrayed and rationalised in the libertarian concept of the individual’s ‘free choice’ or ‘autonomy’ evolved from the jurisprudence of the American Supreme Court case of *Faretta v. California*.²² The *Faretta* case, essentially, remains the *locus classicus* on the nature and substance of the right to self-representation, not only under American law but also under international law.²³ It is the most cited reference on the rationalisation and promotion of the right to self-representation under international law.²⁴

According to the American Supreme Court in *Faretta*, the right to self-representation implies a primary obligation of a personal nature on the part of the accused person to conduct his/her defence.²⁵ Even in the alternative case where the accused person opts for legal representation in court proceedings, what is required of counsel is not a total substitution of the task of putting forth a defence. This duty remains at all times in the hands of the accused person—no other person, whether a lawyer or the government, can make a decision for an accused person.²⁶ In the opinion of the Court, Counsel’s participation in a trial is limited to providing his/her professional assistance to the accused.²⁷ The law on legal representation speaks of the right of the accused to defend him/herself through the “assistance of counsel”.²⁸ As the saying goes, “an assistant, however expert is still an assistant”.²⁹ Thus, within the legal framework of modern trial rights, the idea of personal autonomy, which underlies the right to self-representation, has been justified from this textual analysis of the law on legal representation.

²⁰ *Ibid*, referring to Luban “Partisanship Betrayal and Autonomy in the Lawyer-client Relationship: A reply to Stephen Ellmann” 1990 *Colum. L. Rev.* 1004 1036.

²¹ *Adams v. United States ex rel. McCann* 1942 317 U.S. 269 279-280.

²² 1975 422 U.S 806; Hashimoto 2010 *B.U. L. Rev.* 1152, stating that the historical trajectory of autonomy interest of criminal defendants essentially begins and ends with the Court’s decision in *Faretta v. California*.

²³ Cerruti “Self-representation in the International Arena: Removing a False Right of Spectacle” 2009 *Geo. J. Int’l L.* 919 975.

²⁴ See, e.g., *Prosecutor v. Milošević* 2003 No. IT-02-54 (Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel). <http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm>. (Accessed 22-4-2016); *Prosecutor v. Milošević* 2004 No. IT-02-54 (Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel). <http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm>. (Accessed 22-04-2016).

²⁵ See *Faretta v. California* 819-820

²⁶ Hashimoto 2010 *B.U.L. Rev.* 1149.

²⁷ *Faretta v. California* 820.

²⁸ See, e.g., International Covenant on Civil and Political Rights (1966) (ICCPR), art 14(3) (d). It mentions defence “through legal assistance of his own choosing.”

²⁹ *Faretta v. California* 820.

Other factors also reinforce the concept of personal autonomy in defence of the right to self-representation in criminal trials. These operate around the idea that the right to defence in criminal trials is personal and it vests in the accused person only.³⁰ The value of autonomy propounded by the right to self-representation is in essence justified by the fact that “it is [the accused] who suffers the consequences if the defence fails”.³¹ Consequently, as the accused stands responsible for the success or otherwise of his/her defence, a lawyer may not be forced on an unwilling accused person who truly wants to defend him/herself in person.³² The right to self-representation therefore guarantees the need to secure the voice of the accused person by preventing mandatory assignment of state-counsel against the wishes of the accused. It essentially ensures the protection of the accused person from such binding acts and decisions taken independently of his/her interests by an unwanted lawyer.³³

In the opinion of the *Faretta* Court, all the rights, which guarantee the protection of the accused and the fairness of his/her trial, allude to the primary interest of the accused in making a defence to a criminal charge. The Court held that

It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him and who must be accorded compulsory process for obtaining witnesses in his favour.³⁴

Thus, respect for the dignity of the person who is affected by the outcome of the trial duly justifies the guarantee of his/her autonomy in deciding how to conduct his/her defence, whether with or without legal assistance. In this context, allowing accused persons to control their own proceedings in court provides them with the opportunity to make their personal choices, as well as to affirm their sense of personal dignity, individuality and control.³⁵ On the contrary, to deny such accused persons of their free choice, in their capacity as best advisors of their own deeds may be tantamount to imprisoning them in their privileges.³⁶ It is thus assumed that in as much as the administration of criminal justice revolves around the constitutional guarantees of fair trial, the accused person still retains the unbridled right to wilfully dispose of any of these

³⁰ *Id* at 834, arguing that “[p]ersonal liberties are not rooted in the law of averages. The right to defend is personal.”

³¹ *Id* at 819-820; also at 834 holding that “[t]he defendant, and not his lawyer or the state, will bear the consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case, counsel is to his advantage.”

³² *Faretta v. California* 817.

³³ Bekker “The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa” 2004 *CILSA* 173 193.

³⁴ *Faretta v. California* 819.

³⁵ See e.g., Sabelli & Leyton “Train Wrecks and Freeway Crashes: An Argument for Fairness and against Self-Representation in the Criminal Justice System” 2000-2001 *J. Crim. L. & Criminology* 161 189.

³⁶ Finegan 2008-2009 *Cath. U. L. Rev.* 454, referring to *Adams v. United States ex rel McCann* 280.

safeguards, including the right to assistance of counsel.³⁷ In any case, personal autonomy is also one of the values underlying the adversarial system.

The system, as previously discussed, guarantees the personal participation of the contending parties in the trial and ensures that their voice is heard and not that of an unwanted or unapproved defence lawyer.³⁸ Consequently, in all modern adversarial criminal trials in particular, courts are enjoined to respect the choice of the accused person if s/he wishes to defend him/herself in person. The lead theory is that honouring the wishes of the individual in legal proceedings is the “lifeblood of the law”.³⁹ Accordingly, the sole issue that a court ought to determine while allowing accused persons to represent themselves at trial is whether they have the mental competency to knowingly, voluntarily, and intelligently waive their right to assistance of counsel.⁴⁰

5.3.2 Denunciation of the Paternalistic Idea of Defence Counsel

The recognition and evolution of the right to self-representation in criminal trials have also been linked to a movement of denunciation of the protective role of counsel in criminal proceedings. This drive is somewhat influenced by certain theories of natural law and egalitarianism. These theories largely underscore the notion of equality of all persons and reinforce the presumption that the outcome of litigation ought not to depend on the status of representation and personalities of the litigants involved.⁴¹ This presumption embodies the idea that all persons, both the rich and the poor, the legally represented and unrepresented accused, have unqualified access to the court and can “be treated equally with the resulting decisions being as fair as possible”.⁴² Thus, accused persons who waive legal assistance and opt to represent themselves at trial, may do so out of a genuine belief that they will obtain a fair trial. Such accused persons personally decide to defend their cause in criminal trials, moved by the belief that they stand equal with their legally represented counterparts before the law. In such cases, the interest of the self-represented accused person is directed at the exercise of his/her right to fair proceedings and trial,⁴³ unqualified by the status of his/her representation.⁴⁴ These

³⁷ *Ibid.*

³⁸ Discussed *supra*, Ch. 2, text at 2.6.2.1 & 2.6.2.2

³⁹ *Faretta v. California* 834, referring to *Illinois v. Allen* 1970 397 U.S 337 350 -351.

⁴⁰ *Id* at 835. The Court however noted that the right may be denied where the accused engages in serious and obstructionist misconduct. See *Id* at 834 fn. 46.

⁴¹ See, e.g., Swank “The *Pro se* Phenomenon” 2005 *B.Y.U. J. Pub. L* 373 374.

⁴² *Id* at 374-375, speaking in the context of the American system.

⁴³ See, e.g. ICCPR, art 14(1).

⁴⁴ See Pearson “Mandatory Advisory Counsel for *Pro se* Defendants: Maintaining Fairness in the Criminal Trial” 1984 *Cal. L. Rev.* 697 712.

arguments in defence of the right to self-representation primarily call into play the overarching duty of the court, which is to ensure that in all cases and beyond all considerations of representation, justice is done between the parties.

Following this proposition, some proponents of the right to self-representation have spewed even more ardent criticism of the paternalistic view of defence counsel. They have denigrated the idea that “lawyers are more capable of making decisions that will achieve optimal results for their clients than are clients themselves”.⁴⁵ Hashimoto, among others, has argued that the paternalistic view of the assistance of counsel lacks empirical support and takes a narrow view of what constitutes best results for the accused person in any particular case.⁴⁶ She further contends that there is no empirical evidence that lawyers are better able to make decisions leading to the most beneficial outcomes than lay accused persons would.⁴⁷ However, beyond these eloquent statements in defence of the right to self-representation, attention must be given to the greater concern expressed in the need to ensure procedural equality and trial fairness.

5.3.3 Limits to the Values Underlying the Right to Self-Representation in Adversarial Proceedings

The values of personal autonomy and denunciation of the protection of defence counsel do not present any essential ideas that delineate the contributions of the right to self-representation to the operational assumptions of procedural equality and fair trial in adversarial proceedings. The arguments in favour of the denunciation of the protective role of defence counsel may be justified only to the extent that defence lawyers do not always, and in all cases, secure the best results for accused persons at trial. However, the professional capacity and expertise of the lawyer puts him/her in a much better position to realistically safeguard the interests of the accused person in a legal forum than the latter would do for him/herself. The due process rights of the accused person can only be protected effectively and efficiently through a zealous advocate acting in pursuit of the exclusive interests of the accused.⁴⁸ As far as the value of personal autonomy is concerned, it does assume a fundamental character in terms of emphasising the authority of the accused person in managing his/her defence in criminal proceedings. However, the narrow focus on merely guaranteeing the formal validity of the

⁴⁵ Hashimoto 2010 *B.U.L. Rev.* 1151.

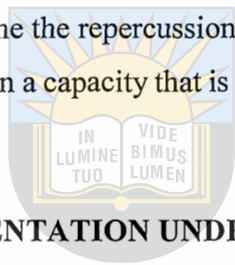
⁴⁶ *Ibid.*

⁴⁷ *Id* at 1176; Hashimoto “Defending the Right of Self-Representation: An Empirical Look at the *Pro se* Felony Defendant” 2007 *N.C.L. Rev.* 423 447.

⁴⁸ See, e.g., Luban *The Adversary System Excuse*, in Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984) 97-98.

proceedings through representation of the accused by him/herself is problematic. In other words, the right to self-representation may guarantee the personal attendance of the accused person in defence of him/herself, but without a corresponding guarantee of his/her aptitude to defend him/herself or to enforce his/her due process rights.

It is thus not surprising that several legal scholars have launched scathing criticisms at the idea of radical libertarianism undergirding the concept of autonomy in modern criminal jurisprudence.⁴⁹ A far greater concern for the adversarial system lies beyond the personal representation of the accused by him/herself, to ensuring the fairness of the trial itself. The need to ensure procedural fairness and equality of arms between the unrepresented accused and the Prosecution must trump the selfish desire of the accused person to represent him/herself.⁵⁰ Care should therefore be taken not to undermine the repercussions of encouraging legally unskilled accused persons to represent themselves in a capacity that is ideally assumed by legally trained persons.



5.4 THE RIGHT TO SELF-REPRESENTATION UNDER INTERNATIONAL LAW

International human rights law adopted the right to self-representation in criminal trials among the cluster of due process rights of accused persons.⁵¹ The right is widely ratified by most countries adherent to the adversarial system⁵² including Ghana. Accused persons are allowed the right to appear without legal representation at trial. It is important to consider the substantive values of the right to self-representation under international law, as far as its contribution to the trial objectives of substantive and procedural fairness is concerned. This

⁴⁹ Cerruti 2009 *Geo. J. Int'l. L.* 945, fn. 102, quoting Toone "The Incoherence of Defendant Autonomy" 2005 *N.C.L. Rev.* 624 651: "As autonomy has played an increasingly important role in modern moral and political philosophy, so has it become central to the Supreme Court's constitutional jurisprudence."; also *Id* at 945-946: "The philosophical principle of autonomy has become a powerful, if often-ill-used, reference to support a broad array of restraints upon the state. The modern concept of autonomy is a mercurial construct, difficult to isolate or pin down, it has become something of a catch-all reference, sometimes loosely applied to identify a broad libertarian commitment to permitting individuals to control those decisions that have a recognized (or at least arguable) normative value to the essential conditions of individual self-identity.(...) Autonomy as used in the modern legal context is not a radical libertarian concept that posits an existential freedom to be free from all state regulation or restriction over any choices/decisions thought to have a bearing on self-identity (...) no one in a modern society could reasonably raise the banner of autonomy to claim, for example, a right to self-operate in a public hospital. This is not recognised as a legitimate choice."

⁵⁰ Cerruti 2009 *Geo. J. Int'l. L.* 940.

⁵¹ The right to self-representation also features in all major universal and regional human rights instruments. It is jointly enacted with the right to counsel. See, ICCPR, art 14(3) (d); American Convention on Human Rights (ACHR) art 8(2) (d); European Convention on Human Rights (ECHR), art 6(3) (c); African Charter on Human and People's Rights (ACHPR), art 7(1) (c); as well as principle 1 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, *UNGA A/RES/43/173* (1988).

⁵² Assy 2011 *C.J.Q.* 267.

provides the necessary background and framework for analysing its implementation and application in criminal proceedings in Ghana.

5.4.1 Drafting History and Normative Substance of the Right to Self-Representation under International Law

The right to self-representation is one of the minimum procedural guarantees given to all accused persons in all criminal trials under modern international law. Every accused person who desires to represent him/herself in a criminal trial is entitled to do so within the limits allowed by law.⁵³ This right is recognised in almost all domestic jurisdictions that have ratified the provisions under article 14(3) of the International Covenant on Civil and Political Rights⁵⁴ (ICCPR), among others. This provision provides in pertinent part 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...*⁵⁵ (Emphasis added)

The history of the enactment of this influential provision under the ICCPR reveals very little or no theoretical values underlying the rationalisation and eventual incorporation of self-representation as a due process right within the general *corpus* of fair trial rights under international law. Indeed, the very first draft of the provision on legal representation in criminal proceedings under the ICCPR originally appeared in the main Draft Outline of the Commission on Human Rights' Drafting Committee on an International Bill of Human Rights in 1947.⁵⁶ Article 27 of the Draft Outline specifically provided the right of every accused person "to consult with and be represented by counsel" in criminal trials.⁵⁷ Clearly, it made no mention of a right to self-representation in criminal trials. The United States subsequently provided the first substantive contributions to the Draft and suggested a redraft of certain articles in the Draft Outline, including articles 6⁵⁸ and 27.⁵⁹ The proposal, which was later adopted by the

⁵³ HRC *General Comment* 32 para 37.

⁵⁴ General Assembly *Resolution* 2200A (XXI) (1966).

⁵⁵ See para (d).

⁵⁶ E/CN.4/AC.1/3 (1947). http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3 (Accessed 15-03-2016). It provided the basis for discussion at the 1st Session of the Committee held from 9-25 June 1947 in New York.

⁵⁷ It provided that: "There shall be access to independent and impartial tribunals for the determination of rights and duties under law. Everyone has the right to consult with and be represented by counsel." E/CN.4/AC.1/3 (1947) 10.

⁵⁸ Art 6 provided that "no-one shall be deprived of his personal liberty save by a judgment of a court of law, in conformity with the law and after a fair public trial at which he has had an opportunity for full hearing, or pending his trial which must take place within a reasonable time after his arrest. Detention by purely executive order shall be unlawful except in time of national emergency."

⁵⁹ Scharf & Rassi "Do Former Leaders have an international Right to Self-Representation in War Crimes Trials?" *Ohio St. L. J on Disp. Resol.* 2005 3 11. Also E/CN.4/AC.1/8 (1947) 1, 5.

Committee, modified the provisions of articles 6 and 27 of the Draft Outline, while still restating the accused person's "right to consult with and be represented by counsel" in both provisions.⁶⁰ These provisions were originally intended to be included in the text of the Universal Declaration of Human Rights (UDHR). They were however excluded from the Declaration and were reserved for consideration in the drafting of the ICCPR at a later stage.⁶¹ Of note, the Draft Outline and its amended texts merely considered and provided for the accused person's right to assistance of counsel only. The various debates did not refer to a right to self-representation in criminal trials.⁶²

Further, the Drafting Committee only deliberated on the general right of the accused person to be represented by counsel in criminal trials. The Committee more specifically considered issues relating to the right to assistance of counsel such as the right to have counsel of choice, the right to assigned counsel in case of indigence and the right to be notified of these rights.⁶³ In fact, there is no record of any official discussion or consideration of self-representation as a right for accused persons in criminal proceedings by the Drafting Committee.⁶⁴

The first reference to the right to self-representation in international law appeared in a proposed amendment submitted by the Philippines during the Commission on Human Rights' deliberations on the draft International Covenant on Human Rights in 1949.⁶⁵ The text of the proposed amendment, for the first time, substituted the earlier designated right to counsel with both the right to self-representation and the right to defence through counsel of one's own choosing.⁶⁶ The text of the Philippines' proposed amendment was however never acted upon.

⁶⁰ E/CN.4/AC.1/8 http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/8- (Accessed 15-03-2016) art 6: "No one shall be deprived of his life or personal liberty, or be convicted or punished for crime in any manner, save by judgment of a competent and impartial tribunal, in conformity with law, after a fair and public trial at which he has had the opportunity for a full hearing, the right to be confronted with the witnesses against him the right of compulsory process for obtaining witnesses in his favour, and the right to consult with and be represented by counsel." Also, art 27: "Every person has the right to have any civil claim or liabilities determined without undue delay by competent and impartial tribunal before which he has the opportunity for a fair hearing, and has the right to consult with and be represented by counsel."; see, also Scharf & Rassi 2005 *Ohio St. L. J on Disp. Resol.* 2005 11.

⁶¹ Scharf & Rassi 2005 *Ohio St. L. J on Disp. Resol.* 2005 11.

⁶² *Ibid*, referring to Weissbrodt *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) 43-45; see also, Cerruti 2009 *Geo. J. Int'l. L.* 966.

⁶³ Cerruti 2009 *Geo. J. Int'l. L.* 967; Scharf & Rassi 2005 *Ohio St. L. J on Disp. Resol.* 12, referring to Weissbrodt *The Right to a Fair Trial* 57; Scharf "Self-representation versus Assignment of Defence Counsel before International Criminal Tribunals" 2006 *J. Int'l Crim. Just.* 31 34.

⁶⁴ *Ibid*.

⁶⁵ See Cerruti 2009 *Geo. J. Int'l. L.* 967, fn.213, referring to U.N Econ. & Soc. [ECOSOC] Commission on Human Rights Fifth session, *draft international covenant on Human Rights, Philippines: Amendment to articles 13, 15, 20 E/CN.4/232* (1949).

⁶⁶ *Ibid*.

However, the language of the draft was subsequently inserted in a joint proposal submitted by Chile, Egypt, France, Philippines and the United States. The resulting text was eventually adopted and was officially included in the provision of clause (d) of article 14(3) of the ICCPR, as it exists today.⁶⁷ Unfortunately, no jurisprudence, reasoning, or theory informs the characterisation of the right to self-representation as an absolute procedural right for the accused. Further, there are no records of any official deliberations held by the Drafting Committee on the principles of the right as a procedural guarantee. There are no defined grounds justifying its worth and expediency for realising the fairness of the trial, especially in adversarial criminal proceedings.⁶⁸

The Human Rights Committee (HRC), the body established to monitor compliance with the rights enacted under the ICCPR, on its part, has provided very little insight into the substance and values of the right to self-representation. The Committee simply promotes respect for the right to self-representation, while prohibiting a complete bar against its exercise in domestic jurisdictions.⁶⁹ However, the only directive given by the HRC regarding the exercise of the right to self-representation relates to conditions under which an accused person may be allowed to represent him/herself in criminal proceedings. The HRC emphasises that the right to self-representation is not an absolute right. It insists that in certain defined cases, the exercise of the right may or ought to be excluded altogether. This includes cases where the accused person intends to use his/her status of self-representation to substantially and persistently obstruct the proper conduct of a trial.⁷⁰ Another category of cases where the status of self-representation may be withdrawn is those involving accused persons being tried for serious criminal offences, but who lack the competency to properly defend themselves.⁷¹ In some other cases, the accused person may be deprived of the right to act in person where it “is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused”.⁷² Beyond these defined circumstances, any restrictions on the exercise of the right to self-representation must be supported by an ‘objective and sufficiently serious purpose’, which is ‘necessary to uphold the interests of justice’ in any particular case.⁷³ The HRC provides no further comments to justify the promotion of self-representation as a fair trial right in

⁶⁷ *Ibid*; see also Scharf 2006 *J. Int’l Crim. Just.* 34.

⁶⁸ Scharf 2006 *J. Int’l Crim. Just.* 34.

⁶⁹ HRC General Comment 32 para 37.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² *Ibid*.

⁷³ *Ibid*.

adversarial criminal proceedings. The right to self-representation has not undergone critical review since its enactment in international law.⁷⁴

5.4.2 Implementation of the Right to Self-Representation under International Law

The practice of international criminal tribunals and courts pioneered the implementation of the right to self-representation in an adversarial context under international law. Generally, the international courts and tribunals of criminal justice adopted more of the definitive features of the adversarial system.⁷⁵ They all provided for the right to self-representation to all accused persons who fell within their respective jurisdictions as defined by their enabling statutes.⁷⁶ However, the right to self-representation in such international criminal trials has also been applied without any defined substance. Legal scholars have resultantly argued that the right to self-representation has no groundings in international criminal justice.⁷⁷

The Nuremberg trials were the first to integrate the right to self-representation. The governing Charter of the International Military Tribunal (IMT) guaranteed the right to self-representation to all those who were indicted before the Tribunal.⁷⁸ According to Cerruti, this right however simply “slipped unnoticed through the international door at Nuremberg” into the domain of international criminal justice.⁷⁹ The right bore no substantive justification either in aid of the accused or in pursuit of the cause of justice through fair trial. It was thus not surprising that this procedural option received no attention at Nuremberg. All those indicted to stand trial opted to be represented by counsel.⁸⁰

There was little or no intellectual discourse on the right in the period following its promulgation and recognition under the ICCPR until the last decade of the twentieth century. The dearth of jurisprudence on the right to self-representation in modern international law only made a turnaround from the 1990s with the establishment and operations of the first International

⁷⁴ Cerruti 2009 *Geo. J. Int'l. L.* 965.

⁷⁵ Finegan 2008-2009 *Cath. U. L. Rev.* 493. International courts and tribunals have assigned a clear value to the adversarial criminal trial system as being a suitable procedural model for the protection of the accused's rights at trial. See, e.g. Cerruti 2009 *Geo. J. Int'l. L.* 972, referring to Zappala *Human Rights in International criminal proceedings* (2003) 16.

⁷⁶ See, e.g., Statute of the International Criminal Tribunal for Yugoslavia, (ICTY) art 21(4) (d); Statute of the International Criminal Tribunal for Rwanda, (ICTR), art 20(1) (d); Statute of the Special Court for Sierra-Leone (SCRL), art 17(4) (d); Rome Statute of the International Criminal Court (ICC), art 67(1) (d).

⁷⁷ Cerruti 2009 *Geo. J. Int'l. L.* 920.

⁷⁸ Agreement and Charter, International Conference on Military (1945), art 16(d).

<http://avalon.law.yale.edu/imt/jack60.asp> (Accessed 15-03-2016), stating that a defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

⁷⁹ Cerruti 2009 *Geo. J. Int'l. L.* 965, fn 207.

⁸⁰ *Ibid.*

Criminal Tribunals, beginning with the International Criminal Tribunals for the former Yugoslavia (ICTY)⁸¹ and for Rwanda (ICTR).⁸² Since then, the various statutes and governing rules of international criminal tribunals and courts have all guaranteed an undisputed right to self-representation to all accused persons appearing before them.⁸³ The working groups on the establishment of the international criminal courts and tribunals also stopped short of providing any insight into the substance of the right and of assigning a clear theoretical value to it.⁸⁴

In justifying the essence of the right, the courts and tribunals have also relied on the same Anglo-American common law historical background of the practice of self-representation as provided in the *Faretta* case.⁸⁵ It is thus beyond dispute, that in the domain of international criminal law also, no substance has been attached to the right to self-representation as far as achieving the fairness of the proceedings is concerned.⁸⁶ The right has also received no scrutiny and review in terms of its predisposition to ensure fair trial in the jurisprudence of the courts. The notorious trials involving self-representation, especially before the ICTY, rather portrayed disastrous spectacles. Many accused persons, beginning with Slobodan Milošević, and later Momeilo Krajčević and Vojislav Šešelj among others, strategically sought to use the right to self-representation to delay the trial, disrupt courtroom activities and embarrass the Tribunal.⁸⁷ They acted under the cover of self-representation to simply impugn the integrity and professional competence of the Tribunal.⁸⁸ In terms of procedural fairness, it was variously reported that self-represented accused persons before these tribunals were obviously unable to cope with the intricate rules of procedure and evidence.⁸⁹

Notwithstanding the universal recognition of the right to self-representation, the key concern of international criminal law has always been to guarantee and expand the right to counsel for the benefit of accused persons.⁹⁰ This focus has never shifted to promotion of self-representation as an independent and absolute entitlement in criminal trials.⁹¹

⁸¹ Established in May 1993. See *U.N.Doc. S/RES/827* (1993).

⁸² Established in November 1994. *U.N.Doc. S/RES/955* (1994).

⁸³ See note 76 above.

⁸⁴ Cerruti 2009 *Geo. J. Int'l. L.* 920, stating the right to self-representation has “even less of a foundation, either normative or systemic in the contemporary ‘mixed’ or ‘hybrid’ systems of international criminal justice.”

⁸⁵ See *Prosecutor v. Milosevic* 2003 No. IT-02-54.

⁸⁶ See, e.g., Cerruti 2009 *Geo. J. Int'l. L.* 972.

⁸⁷ Camier “Controlling the Wrath of Self-Representation: The ICTY’S Crucial Trial of Radovan Karadžić” *Val. U. L. Rev.* 2009-2010 957 977-979.

⁸⁸ See Cerruti 2009 *Geo. J. Int'l. L.* 972-982.

⁸⁹ Camier 2009-2010 *Val. U. L. Rev.* 1009.

⁹⁰ Cerruti 2009 *Geo. J. Int'l. L.* 966.

⁹¹ *Ibid.*

The scope of application of the right to self-representation in the jurisprudence of the various international criminal tribunals has not been uniform. The question of implementation of the right to self-representation arose at some points in the proceedings before each of the tribunals. Although all the tribunals recognised and unequivocally affirmed the right of the accused person to defend him/herself in person, only the ICTY felt obligated to liberally grant and enforce it. The ICTR and the Special Court of Sierra Leone (SCSL) for example rather avoided the implementation of the right to self-representation⁹² by generally subjecting the personal value of self-representation to the overarching adjudicatory principle of fair and expeditious trial.

An analysis of selected decisions clearly depicts the various ideological paradigms underlying the recognition and implementation of the right to self-representation among the tribunals.

a) Self-Representation before the ICTY

The ICTY witnessed the first and major experience with a self-represented accused person before an international criminal tribunal. The accused, Slobodan Milošević, a former President of Serbia and the Federal Republic of Yugoslavia, was indicted before the ICTY on multiple charges of war crimes. At his initial appearance before the Trial Chamber in July 2001, he informed the Tribunal that he did not want to be represented by a lawyer.⁹³ The Chamber acceded to his request, relying on article 21(4) (d) of the Statute of ICTY Statute, which guaranteed the right of an accused “to defend himself in person or through legal assistance of his own choosing”.

To ensure that the trial was fair and the trial rights of the accused were fully respected however, the Trial Chamber invited the Registrar to appoint an *Amicus Curiae* to assist in the proper determination of the case.⁹⁴ The Prosecution suggested further that the Trial Chamber should assign defence counsel for the accused.⁹⁵ The Chamber refused the Prosecution’s application on the ground that defence counsel would not be imposed on the accused against his wishes. The Chamber reasoned that proceedings before the Tribunal were essentially adversarial and the imposition of defence counsel on an unwilling accused would deprive him/her of the

⁹² See, e.g., Cerruti 2009 *Geo. J. Int’l. L.* 973.

⁹³ *Prosecutor v. Slobodan Milošević* 2003 IT-02-54-T (Reasons for Decisions on the Prosecution Motion Concerning Assignment of Counsel) para 2.

⁹⁴ *Id.*, para 3. The term ‘amicus curiae’ generally refers to an impartial adviser to a court of law in a particular case.

⁹⁵ *Ibid.*

genuine possibility of making his/her defence.⁹⁶ The Chamber relied on the principle in the *Faretta* case, to the effect that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself, if he truly wants to do so.”⁹⁷

More importantly, the Chamber ruled on the qualified nature of the right to self-representation and reiterated the parameters of its implementation. Laying the scope of exclusion of the right to self-representation, Rule 80 (B) of the Rules of the Tribunal provided that

The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.

Furthermore, while emphasising the need to keep the enforcement of the right to self-representation under review⁹⁸ the Tribunal stated the possibility that certain circumstances could justify assignment of counsel, where the interests of justice so demanded.⁹⁹ Thus, over the course of proceedings, the Trial Chamber engaged the review process when the Prosecution applied for counsel to be assigned to the accused following his deteriorating health and for avoiding further delays in progress of the trial.¹⁰⁰ The Chamber reiterated the fact that “the right of an accused to represent himself is not unfettered, and that in the circumstances of this case, it [was] both competent to assign counsel to the accused and in the interests of justice to do so.”¹⁰¹ To that effect therefore, the Chamber justified its decision on the primary aim of ensuring a fair and expeditious trial.¹⁰²

Qualifying the scope of assignment of counsel however, the Appeals Chamber emphasised that counsel ought not to be appointed so as to restrict the ability of the accused to participate in the conduct of his case in any way or to relegate him to a “visibly second-tier in the trial”.¹⁰³ Any restrictions on the right of the accused to represent himself “must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial.”¹⁰⁴ Consequently, the acceptable standard of interference with the accused person’s right to self-representation ought to be such as to impair the right no more than is necessary to accomplish

⁹⁶ *Id.*, paras 8, 24.

⁹⁷ *Id.*, para 22, quoting *Faretta v. California* 817.

⁹⁸ *Id.*, para 8. See ruling of Trial Chamber of 18 November 2002.

⁹⁹ *Id.*, para 40.

¹⁰⁰ *Prosecutor v. Slobodan Milošević* 2004 IT-02-54-T (Reasons for Decision on Assignment of Counsel) para 1.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Slobodan Milošević v. Prosecutor* 2004 IT-02-54- AR73.7 (Decisions on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Counsel) para 16.

¹⁰⁴ *Id.*, para 17.

this stated objective.¹⁰⁵ Ultimately, and in the view of the Tribunal, it is the accused who must lead his defence in court with limited practical impact of the assignment of counsel.

Another intriguing decision of the ICTY on the implementation of the right to self-representation arose from the trial of Vojislav Šešelj, indicted for crimes against humanity and war crimes, for developing the ideology of ethnic cleansing.¹⁰⁶ At the initial appearance of the accused before the Tribunal, he expressed his intention to defend himself in person.¹⁰⁷ The Prosecution sought an order from the Trial Chamber directing that counsel be assigned to assist the accused in his defence, due to the complexity of the case and the obstructionist conduct of the accused, among other reasons.¹⁰⁸ The Tribunal gave primacy to the right to a fair trial of the accused and underlined its importance in criminal proceedings for the purpose of ensuring trials in a timely manner without interruptions, adjournments or disruptions. It found that the “best way to preserve the rights of the accused while at the same time satisfying the interests of justice [was] to assign a ‘standby counsel’.”¹⁰⁹ Once again, the Chamber insisted that the “accused’s right to defend himself was to be left ‘absolutely untouched’”. It clarified the position that a standby counsel was not *amicus curiae*, but an assistant operating in the sphere of the accused only, appointed to safeguard a fair and expeditious trial.¹¹⁰

It must be noted that in these very instructive decisions, the ICTY did not deny the accused persons of their right to represent themselves at will. More so, the Tribunal did not in any way revoke the right even in the face of ample evidence supporting the accused persons’ calculated attempts to disrupt proceedings and denigrate the Tribunal. The Tribunal was rather amenable to limiting the accused persons’ power of self-representation by simply appointing *amicus curiae* and standby counsel.¹¹¹

b) Self-Representation before the ICTR

The question of imposing defence counsel did not arise directly in trials before the ICTR. The issue regarding the exercise of the right to self-representation arose in the nature of requests

¹⁰⁵ *Ibid.*

¹⁰⁶ *Prosecutor v. Vojislav Šešelj* 2003 IT-30-67-PT 2003 (Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence). www.un.org/icty/seselj/trialc/decision-e/030509.htm. (Accessed 15-04-2016).

¹⁰⁷ *Id.*, para 2.

¹⁰⁸ *Id.*, para 3 & 26.

¹⁰⁹ *Id.*, para 27.

¹¹⁰ *Id.*, para 28.

¹¹¹ Finegan 2008-2009 *Cath. U. L. Rev.* 492. In the *Milošević* case, the Trial Chamber also appointed ‘legal associates’ for the purpose of supplying the accused with legal advice and discuss and supply the accused with copies of protected materials. See *Prosecutor v. Vojislav Šešelj* (Decision on Prosecution’s Motion) para 12.

for replacement or withdrawal of counsel. Generally, the general disposition of the ICTR leaned towards safeguarding the rights and interests of accused persons through the guarantee of counsel. As a result, the Tribunal moved to dismiss all grounds seeking to favour the implementation of the right to self-representation.

In *Prosecutor v. Jean Paul Akayesu*,¹¹² the accused was tried before the ICTR for crimes of genocide, crimes against humanity, and violations of common article 3 to the Geneva conventions of 1949. He was convicted and sentenced to life imprisonment. He appealed among other grounds that he had at various times during the trial asked his counsel to be withdrawn but his request was denied by the Trial Chamber. By his conflicting instructions to the Trial Chamber requesting to be represented by a lawyer of his choice, the Appeals Chamber dismissed the accused's appeal on the ground that his "attitude was not entirely clear inasmuch as he was at one and the same time asking to represent himself and to be represented by counsel of his own choosing."¹¹³ Re-echoing the words of the Trial Chamber, the Appeals Chamber consequently noted that

It was difficult for the Trial Chamber to discern any firm and unyielding desire on the part of the accused to represent himself. Even though Akayesu did on several occasions express the desire to represent himself, his attitude towards the Chamber suggested otherwise.¹¹⁴

The trial of *Jean-Bosco Barayagwiza*¹¹⁵ is even more instructive on the subject of implementation of the right to self-representation before the ICTR. The accused was charged, along with two other persons before the Tribunal, with conspiracy to commit genocide, genocide and crimes against humanity, among others. He fired the counsel assigned to him by the Trial Chamber at the beginning of the trial. As a result, the Chamber directed the Registrar of the Tribunal under article 20(4) (d) of the Statute of the ICTR¹¹⁶ to assign new counsel "with the goal of safeguarding the rights and interests of Barayagwiza."¹¹⁷ The accused argued that counsel could not be assigned to him against his will.¹¹⁸ The Appeals Chamber noted that Rule 45 quarter of the Rules of the ICTR expressly granted the Trial Chamber the right to instruct

¹¹² 2001 ICTR-96-4-A. <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/appeals-chamber-judgements/en/010601.pdf> (Accessed 08-04-2018).

¹¹³ *Id.*, para 59.

¹¹⁴ *Id.*, para 65. The Chamber also found that in fact the accused had been allowed to cross-examine some witnesses in the course of trial.

¹¹⁵ *Ferdinand Nahimana, Jean Bosco Barayagwiza & Hassan Ngeze v. The Prosecutor (Jean Bosco Barayagwiza v. Prosecutor)* 2007 ICTR-99-52-A; <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf> (Accessed 08- 4-2018)

¹¹⁶ It guarantees the accused person's right to "defend himself or herself in person or through legal assistance of his or her own choosing."

¹¹⁷ *Jean Bosco Barayagwiza v. Prosecutor* para 122.

¹¹⁸ *Id.*, para 126.

the Registrar to assign counsel to represent the interest of the accused in the interest of justice. More particularly, article 19(1) of the Statute, which applied to Barayagwiza at that time, also allowed the Tribunal Chamber to instruct the Registry to assign counsel to represent the interests of the accused, to

ensure that a trial is fair and expeditious, and that the proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The Appeals Chamber held that the Trial Chamber fulfilled its obligation by requesting the Registrar to assign counsel to represent the interests of Barayagwiza.

It is duly observed that the enabling Statute of the ICTR and its applicable Rules of evidence and procedure expressly governed the factors limiting the exercise of the right to self-representation. Essentially, these factors embodied the spirit of the Tribunal in terms of safeguarding the protection of the rights and the interests of the accused person and the integrity of its proceedings.

c) *Self-Representation before the SCSL*

The last batch of selected cases under international law dealing with the application of the right to self-representation is examined from the jurisprudence of the SCSL. Of note, the decisions of this hybrid court of criminal justice aligned with the jurisprudence of the ICTR in terms of minimising reliance on the right to self-representation in international criminal trials. Generally, the penchant of the Court was to deny the right of accused persons to represent themselves in person, where acting without counsel would result in a violation of the right to a fair and expeditious trial.

In *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*¹¹⁹, after the Trial Chamber prevented the appellant Augustine Gbao from making a political statement on 6 July 2004, Gbao made an oral application to withdraw his counsel on the ground that he (Gbao) did not recognize the legitimacy of the Court.¹²⁰ The Chamber found that this reason could not meet the Rule 45(E) standard, which required an applicant to demonstrate exceptional circumstances in order to withdraw counsel. The Chamber therefore denied the application.¹²¹ The Appeals Chamber held that “reference to exceptional circumstances can be understood as emphasizing that the accused was not in a position to request or instruct that his counsel

¹¹⁹ 2009 SCSL-04-15-T.

¹²⁰ *Prosecutor v. Sesay, Kallon and Gbao* 2004 SCSL-04-15-T 14.

¹²¹ *Prosecutor v. Sesay, Kallon and Gbao* 2004 SCSL-04-15-T (Decision on Application to Withdraw Counsel).

withdraw from the case without showing good cause.”¹²² Affirming the decision of the Trial Chamber to refuse the motion to withdraw counsel, it reiterated the position of the Trial Chamber that, having examined the circumstances of the case,

the interest of justice would not be served by allowing Mr. Gbao to be unrepresented before this Court. The Trial Chamber accordingly takes the position that it must safeguard the rights of the accused and the integrity of the proceedings before the Court by insisting that Mr. Gbao should continue to be represented by the Counsel that have represented him throughout these proceedings. We hold in this regard that an accused person cannot waive his right to a fair and expeditious trial whatever the circumstances.¹²³

Additionally, the Appeals Chamber ruled that the rights which an accused has in regard to the conduct of his defence in terms of article 17(4) (d) of the Statute of the Court guarantees three (3) main independent rights. These are namely, the right (i) to defend himself or herself in person; or (ii) to defend himself or herself through legal assistance of his or her own choosing; and (iii) to have legal assistance assigned to him or her, in any case where the interests of justice so require. The Chamber rules that the first two are within the choice of the accused but not the third. The novel proposition of the Court was that the law does not recognise a right “not to have counsel assigned” to an accused who has refused to exercise the choice available to him under (i) and (ii).¹²⁴

This interpretation of article 17(4) (d) was the substance of the Court’s decision in *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*.¹²⁵ At the commencement of the trial, Samuel Hinga Norman wrote to the Court to represent himself in person and dispensed with his lawyers. Rule 26 bis of the Rules of Procedure and Evidence provided that

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The Trial Chamber held that the right to self-representation “is not absolute but rather a qualified right.”¹²⁶ This interpretation was amply corroborated by the qualifying clause of article 17(4) (d) which guarantees the power to assign legal assistance to an accused in any case where the interests of justice so require.¹²⁷ In addition, by rule 26 bis, the Court deduced the necessity and obligation of both the Trial and Appeals Chambers to ensure a fair and expeditious trial, which implies a restriction on the scope of the right to self-representation.¹²⁸

¹²² *Id.*, para 44.

¹²³ *Id.*, para 46.

¹²⁴ *Id.*, paras 57-58.

¹²⁵ (*Sam Hinga Norman v. Prosecutor*) 2004 SCSL 04-14-T.

¹²⁶ *Id.*, para 8.

¹²⁷ *Ibid.*

¹²⁸ *Sam Hinga Norman v. Prosecutor* para 11.

Generally, the Court relied persuasively on the opinion of Judge Reindhardt in the case of *Farhad v. United States*¹²⁹ where the trial judge observed that it could be destructive to permit accused persons to represent themselves regardless of the consequences. The potential to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence could not be ruled out. In that regard, the trial judge ruled that an accused person could not waive his right to a fair trial, which implied not only the interests of the accused but also the overarching interest and legitimacy of the judicial system. In the opinion of the court therefore, a right to self-representation could be derogated from, where the interests of justice so dictate.

Thus, although the right of self-representation appears in virtually the same form in the various statutes and governing procedural and evidentiary rules of all the international criminal tribunals, the scope of its implementation differed between the strictly compliant ICTY jurisprudence and the daring ICTR and SCSL jurisdictions. The latter managed to avoid the spectacles created the unguarded exercise of the right of self-representation. The main concern in all jurisdictions today is about the fairness of proceedings involving self-represented accused persons and the need to adopt procedures to ensure consistency and accuracy of verdicts.¹³⁰

Bassiouni, a leading scholar in international law has in that regard strictly interpreted the scope of the right to self-representation in criminal proceedings. He rationalises the right to self-representation as complementary to the right to counsel, and not as a valid substitute for the latter.¹³¹ This interpretation prevailed prior to the adoption and implementation of the right by the international criminal tribunals.¹³² Its exercise included the limited acts of directing the defence, rejecting appointed counsel, while permitting the accused to personally conduct the defence under certain limited circumstances.¹³³ The instances that could generally validate an unrestricted exercise of the right to represent oneself in a criminal trial related to cases of indigence. These pointed to cases where accused persons had no resources to hire the services of a lawyer and had equally no right to state-assigned counsel.¹³⁴ Even in those circumstances, the right to self-representation in criminal proceedings could only be legitimately exercised to

¹²⁹ 199 190 F.3d 1097.

¹³⁰ Finegan 2008-2009 *Cath. U. L. Rev.* 493.

¹³¹ Bassiouni "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" 1993 *Duke J. Comp. & Int'l L* 235 283.

¹³² *Ibid*

¹³³ *Ibid*.

¹³⁴ See Cerruti 2009 *Geo. J. Int'l. L.* 966.

the extent that it did not compromise the integrity of the judicial process and complied with due process of law.¹³⁵

Thus, the law validated a criminal process by allowing an accused person to represent him/herself only when in the opinion of the court the accused could effectively and adequately do so.¹³⁶ It was also recommended that self-representation was simply inappropriate, where in the interest of justice, the accused person required effective and adequate assistance of counsel.¹³⁷ This reasoning sums up the wisdom that ought to govern the implementation of the right to self-representation by individuals unskilled in the law, as far as adversarial criminal proceedings are concerned. Any genuine theories justifying the edification of the right to self-representation must exhibit certain inherent values that contribute to the accused person's ability to safeguard his/her own interests in order to secure the fairness of the trial. Without these theoretical values contributing to trial fairness, the concern that the right to self-representation is a "right without a reason"¹³⁸ remains legitimate.

5.4.3 Domestic Implementation: The Common Law and Civil Law Divide

While international criminal tribunals and courts generally guarantee an unconditional right to self-representation for persons indicted before them, the implementation of the right in the domestic jurisdictions of states however varies in content and extent of application.¹³⁹ The level of recognition attached to the right within the various domestic jurisdictions differs along the lines of procedural divergence existing between the common law and the continental European systems of adjudication. With its common law historical antecedents, the right to self-representation is most commonly identified in its full extent with countries adherent to the adversarial system of trial.¹⁴⁰ In virtually all countries of the common law system, self-representation is liberally allowed¹⁴¹ and accused persons are guaranteed a relatively unqualified right to defend themselves in person, if they so wish.¹⁴² Among these jurisdictions,

¹³⁵ *Id* at 967; also Bassiouni 1993 *Duke J. Comp. & Int'l L* 283.

¹³⁶ Bassiouni 1993 *Duke J. Comp. & Int'l L* 283.

¹³⁷ *Id* at 283-284.

¹³⁸ Cerruti 2009 *Geo. J. Int'l. L.* 924.

¹³⁹ See, e.g., Finegan 2008-2009 *Cath. U. L. Rev.* 493.

¹⁴⁰ See, e.g., *Prosecutor v. Vojislav Šešelj* (Decision on Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Seselj in his defence) para 17; *Milošević v. Prosecutor* (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (Appeals Chamber) paras 11-13; *Prosecutor v. Milošević* (Reasons for Decision on Assignment of Defense Counsel) paras 31-36.

¹⁴¹ Jones "Untangling the Right to Self-Representation in the International Criminal Tribunal for the Former Yugoslavia" 2008-2009 *Ga. L. Rev.* 1285 1295.

¹⁴² Assy 2011 *C.J.Q.* 267. For example, in England and Wales the right is guaranteed at common law in *R v. Woodward* 1944 KB 118, which held that "no person charged with a criminal offence can have counsel forced

the right to self-representation is granted at all levels of the proceedings. The criteria for exercising the right give no considerations to the accused person's competency to present his/her defence effectively or adequately or to the seriousness of the offence charged.¹⁴³ It is however worthy to note that a lot of caution is sounded to all accused persons who desire to represent themselves. For purposes of fairness of the trial and of the protection of the accused person, the exercise of the right is recommended only in simple and minor criminal cases that entail less substantive and procedural technicalities. In all other cases that put the trial rights of the accused at stake, it is advised to act through counsel in order to navigate the procedural and linguistics complexities attendant to a trial.¹⁴⁴

The perspective of civil law countries on the extent and application of the right presents a much-restricted use of the right of the accused person to self-representation. The Continental European countries consider the right to and practice of self-representation as lacking any intrinsic value and is thus accorded very little or no recognition.¹⁴⁵ Consequently, even the fact that their judges take active part in the conduct of proceedings does not prevent them from limiting the exercise of the right.¹⁴⁶ Generally, the complexities of the trial have been a defining factor in the approach taken by many civil law countries to restrict the practice of self-representation in all trials, both civil and criminal.¹⁴⁷ They therefore practice a greater amount of derogation from their international obligation in terms of permitting accused persons to represent themselves at trial.¹⁴⁸ For example, it is a common practice in the legal systems of civil law countries to mandatorily assign defence counsel against the wish of the accused person in all serious cases that usually carry long imprisonment sentences.¹⁴⁹

The issue of whether this imposition of mandatory legal representation in criminal trials violates the right to self-representation has however not been definitely answered. The HRC

upon him against his will." In the USA, the right to self-representation is guaranteed in 28 U.S.C s. 1654. The Canadian Supreme Court also affirmed the existence of the right in *R v. Swain* 1991 1 S.C.R. 933.

¹⁴³ Jørgensen "Notes and Comments – The Right of the Accused to Self-Representation before International Criminal Tribunals" 2004 *Am. J. Int'l. Law* 711 716.

¹⁴⁴ *Id* at 714, fn.41.

¹⁴⁵ See, e.g., Cerruti 2009 *Geo. J. Int'l. L.* 972.

¹⁴⁶ Assy 2011 *C.J.Q.* 281.

¹⁴⁷ *Ibid*.

¹⁴⁸ Scharf 2006 *J. Int'l Crim. Just.* 35; Jørgensen 2004 *Am. J. Int'l. Law* 716.

¹⁴⁹ See, e.g., Scharf 2006 *J. Int'l Crim. Just.* 35-36, stating that in France, defence counsel is imposed in the trial of felonies punishable by imprisonment with hard labour, or for life or for a fixed period of time. In Germany, mandatory counsel is required in such situations including trials of serious offences where the assistance of counsel is necessary due the complexity of the case, or where the accused is simply incapable of defending himself. In Belgium, mandatory counsel is required to represent the accused before the Cour d'Assises. See also, Jones 2008-2009 *Ga. L. Rev.* 1295.

fell short of authoritatively pronouncing on the subject in the sole case of *Michael & Brown Hill v. Spain* that was brought before it on the subject matter.¹⁵⁰ The European Court of Human Rights has ruled in favour of a restricted application of the right to self-representation. In *Phillis v. Greece*,¹⁵¹ it held that a provision of the Greek Code of Criminal Procedure, which required accused persons to appear before the Court of Cassation through counsel, was not incompatible with the right to self-representation as guaranteed under article 6(3)(c) of the European Convention. Earlier on in the case of *Croissant v. Germany*,¹⁵² the Court had ruled that the interest of justice might justify the appointment of counsel against the wishes of the accused in certain cases. The Court held that the length and size of the case, as well as its level of complexity might justify the need for legal representation in order to ensure that the accused is adequately represented.¹⁵³ In Addition, the Inter-American Court of Human Rights, in an advisory opinion assented to the idea of limited exercise of the right to self-representation as permitted under certain jurisdictions of American states.¹⁵⁴ Thus, the right to self-representation lacks all traits of absoluteness and suffers diminished recognition outside countries of the common law tradition.

5.4.4 Qualifying the Right to Self-Representation in Adversarial Jurisdictions

The derogation of civil law countries from their obligation to enforce the right to self-representation in trials of certain criminal offences unravels a more general debate on the status of fair trial rights within the regime of international law as ratified by states. Legal scholars and jurists have argued that all the fair trial rights of accused persons, including the right to self-representation, are so widely adopted and recognised in the practices of states that they are

¹⁵⁰ Communication No. 526/1993. Para.3.2, Report of the Human Rights Committee, 52d. Sess., Supp. No. 40, UN Doc. A/52/40. <http://www.unhrc.ch/tbs/doc.nsf>. (Accessed 17-04-2016). The case was brought on limited facts and issues. The accused considered their assigned lawyer to be incompetent and the first accused opted to personally conduct his defence. His application was refused represent himself was denied by the trial judge. The HRC held that the accused had the right to defend himself pursuant to article 14(3) (d) of ICCPR. There was no determination as to whether the position of the national law as regards the imposition of mandatory counsel in criminal trials was in violation of ICCPR, art 14(3) (d).

¹⁵¹ 1997 Eur. Ct. H.R. 1074.

¹⁵² 1992 237 – B – Eur. Ct. H. R (Ser. A). The case was not directly on self-representation. Accused had objected to the appointment of a third counsel in addition to his two lawyers of choice. See Jørgensen 2004 Am. J. Int'l. Law 715.

¹⁵³ See Jørgensen 2004 Am. J. Int'l. Law 715.

¹⁵⁴ *Id* 716, referring to "Exceptions to the Exhaustion of Domestic Remedies, arts 46(1), 42(2)(a) & 46(2)(b) of the American Convention on Human Rights, Advisory Opinion OC-11/90, 11 Inter. Am. Ct. H.R (Ser. A. para 25) (1990), para 28 holding that "the circumstances of a particular case or proceedings, its significance, legal character and its content in a particular legal system are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing."

deemed to have acquired the status of customary international law.¹⁵⁵ The universal recognition and acceptance of the trial rights through the wide ratification of article 14 of ICCPR, their integration into the legal systems of most countries, supported by the *opinio juris*, all justify the conclusion that all the due process rights of accused persons reflect customary international law.¹⁵⁶

However, considering the widespread and non-conventional practice of the civil law countries and the normative framework of its operation, a conclusion that the right to self-representation is a peremptory norm of human rights is neither convincing nor substantiated.¹⁵⁷ While article 4(1) of the ICCPR duly permits states to derogate from their obligations in times of public emergency that threatens the life of the nation, a list of provisions under the Covenant are made 'non-derogable'. This list however excludes the provisions of article 14.¹⁵⁸ In other words, states may derogate from their obligation to enforce the fair trial rights of the accused, including the right to self-representation, in times of public emergency. More importantly also, the Human Rights Committee's General Comment on Issues Relating to Reservations¹⁵⁹ does not recognise the fair trial rights of the accused under article 14 of the ICCPR as having the character of a peremptory norm under customary international law. What the law prohibits is a general reservation to the right to a fair trial under article 14 of the ICCPR. A specific reservation to the right to self-representation by any country ratifying the Covenant may therefore be justified in law.¹⁶⁰

However, contrary views have been made to the effect that the right to self-representation and other fair trial rights have attained the status of *jus cogens*. Justice Robinson, for example, has

¹⁵⁵ See, e.g., Judge May, in *Prosecutor v. Milošević*, 2001 IT-99-37-PT, Transcript 18, stating that "[w]e have to act in accordance with the statute and our rules which, in any event reflect the position under Customary international law, which is that the [accused] has a right to counsel, but also he has a right not to have counsel. He has a right to defend himself, and it is quite clear that has chosen to defend himself . . . I stress that it would be wrong for the Chamber to impose counsel on the [accused] because that would be in breach of the position under customary law."

¹⁵⁶ In fact, 168 countries of the total number of 196 countries within the UN have ratified the ICCPR and article 14 thereof. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&lang=en (Accessed 15-04-2016)

¹⁵⁷ Scharf 2006 *J. Int'l. Crim. Just.* 35-36; Cerruti 2009 *Geo. J. Int'l. L.* 972; Scharf & Rassi 2005 *Ohio St. L. J. on Disp. Resol.* 14 15, referring to Nowak *U.N. CCPR: CCPR Commentary* (1993) 259 stating that self-representation is not customary international law as the European Court of Human Rights has "taken a relatively restrictive stance and affirmed the right of states to assign a defence counsel against the will of the accused in the administration of justice."

¹⁵⁸ ICCPR, art 4(2) prohibits derogation from arts 6, 7, 8, 11, 15, 16 and 18.

¹⁵⁹ See HRC *General Comment 24 on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or Optional Protocols thereto, or in relation to Declarations under article 41 of the Covenant*, U.N. Doc CCPR/C/21/Rev. 1/Add.6 (1994); see Scharf & Rassi 2005 *Ohio St. L. J. on Disp. Resol.* 15.

¹⁶⁰ HRC *General Comment 24 on Issues Relating to Reservations* para 8.

argued that insofar as fairness remains a vital element for the validation of a criminal trial and for the determination of guilt and conviction, no trial may be legitimately conducted without compliance with all the fair trial rights.¹⁶¹ The argument however flinches before the normative 'derogable' character of the right to self-representation. To that extent, the approach of civil law countries to the right to self-representation finds legitimacy in the text of the Covenant. It may not be contrary to international law for states in the adversarial system to also qualify the right to self-representation and subject its exercise to further requirement of effective defence and fairness of the trial. That way, the wisdom adopted by civil law countries in their implementation of the right to self-representation finds an even greater cause for its application in adversarial criminal proceedings.

Thus, despite the numerous philosophical justifications and widespread recognition of the right to self-representation, the concern of the criminal justice system lies in the question of its suitability within the values of fair trial and procedural equality. The trial procedure must focus on a strategy that ensures that only the guilty unrepresented accused is convicted, and the innocent is acquitted. If the right to self-representation in criminal trials is to retain its legitimacy and reinforce the integrity of the adversarial criminal trial, it must have the quality to contribute to the overall procedural fairness of the trial.

5.5 THE RIGHT TO SELF-REPRESENTATION IN CRIMINAL PROCEEDINGS IN GHANA

5.5.1 Ratification and Application in Ghana

As is the case in several common law jurisdictions, Ghana maintains an unqualified right to self-representation for accused persons in criminal trials. The country's obligation to enforce and promote the right to self-representation for accused persons derives from its ratification of the provisions of article 14 of the ICCPR without any reservations.¹⁶² Ghana also ratified the same right under the African Charter on Human and People's Rights (ACHPR).¹⁶³ Article 7(1) of the Charter, though stopping short of expressly enacting a right to self-representation for accused in criminal trials, inferentially subsumes the right to self-representation under the

¹⁶¹ Robinson "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY" 2010 <http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html#> (Accessed on 20-04-2016)

¹⁶² Ratified on September 7, 2000.

¹⁶³ Adopted in Nairobi on June 27, 1981 and entered into force on October 21, 1986. It was ratified by Ghana on January 1, 1989. See art 7(1) (c).

general right to defence. It provides that every individual has the right to have his/her cause heard in a court of law, which comprises among others, the 'right to defence'.

The African Commission has subsequently elaborated the content of the right. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,¹⁶⁴ the Commission details the accused person's right to defence to include his/her right to defend him/herself in person or through legal assistance of his/her own choosing.¹⁶⁵ Article 75 of the Constitution of Ghana generally characterises Ghana as a dualist nation.¹⁶⁶ By this provision, the applicability and enforceability of international human rights norms within the domestic courts are contingent on the execution of requisite legislative acts of ratification into the national law. The right to self-representation in criminal proceedings is domesticated among the due process rights in article 19 of the Constitution.¹⁶⁷

5.5.2 Nature of the Right

The Constitution of Ghana, similar to all major international human rights instruments, enacts the right to counsel and the right to self-representation as non-exclusive alternatives.¹⁶⁸ It provides 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".¹⁶⁹ According to the Supreme Court of Ghana in the case of *Republic v. High Court (Fast Track Division) Accra, ex parte Tsatsu Tsikata*,¹⁷⁰ the mode of representation of the accused person serves the sole purpose of ensuring that the accused person is enabled to fight his/her case.¹⁷¹ It is for the accused to determine whether s/he is sufficiently enabled to proceed in defence of his/her case personally.

¹⁶⁴ DOC/OS/XXX) 247 (2003).

¹⁶⁵ *Id.*, para N(2)(a).

¹⁶⁶ Ghana Constitution, art 75(2): "A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) an Act of Parliament or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament."

¹⁶⁷ It is a form of 'indirect implementation' as the Constitution was enacted long before the formal act of ratification of the ICCPR by the Government of Ghana. Indirect implementation in this context refers to cases where a legislation gives indirect effect to norms under an international instrument without express or direct reference to the particular international instrument. See Appiagyei-Atua *Ghana at 50: The Place of International Human Rights norms in the Courts* in H. Bonsu et al (eds) *Ghana since Independence: History, development and Prospects* (2007) 118, cited by Quansah *An examination of the Use of International Law* (2010) 40.

¹⁶⁸ See note 51 above. These two rights, though operating on two different paradigms in the making a defence in a trial are not mutually exclusive. An accused person may be allowed to partially represent him/herself, while simultaneously seeking counsel's assistance in respect of some aspects of the defence. See HRC *General Comment* 32 para 37.

¹⁶⁹ Ghana Constitution, art 19(2) (f).

¹⁷⁰ 2007-2008 SCGLR 1200 1221.

¹⁷¹ *Ibid.*

Conversely, the accused person may also decide that s/he will be better protected through legal assistance and therefore opt to be represented by counsel.

The criminal procedural system in Ghana does not however guarantee unlimited access to the right to self-representation to all accused persons regarding all criminal charges. It imposes one practical restriction, which squarely falls within the parameters of enforcement of the right to self-representation as determined by the HRC.¹⁷² The HRC, as earlier stated, allows a lawyer to be assigned to the accused, even against his/her wishes in the interest of justice, in cases where the accused person faces grave charges but may be unable to act in his/her own best interest.¹⁷³ Consequently, the general practice of the courts in Ghana is to guarantee for every accused person, an unrestricted right to self-representation in all cases, with the exception of capital offences.

In fact, all accused persons in trials of offences punishable by death are mandatorily assigned and represented by counsel.¹⁷⁴ The withdrawal of the right to self-representation in such cases is informed by the seriousness of the charge, and most importantly, by the gravity of penalty that is exacted upon conviction. It is the position of the criminal adjudicatory system to ensure that in all such cases, the accused person is effectively defended by a lawyer at the trial. The African Commission, in its Principles and Guidelines on Fair Trial, re-echoes and affirms this legal position adopted by Ghana. In its view, “[t]he interest of justice always requires legal assistance for an accused in any capital case”.¹⁷⁵ Any accused person who is permitted to represent him/herself in a criminal trial in Ghana impliedly vouches for his/her ability to effectively defend him/herself against the Prosecution. It is a personal choice that guarantees his/her autonomy as far the protection of his/her interests at the trial is concerned.

5.5.3 Implementation in Criminal Proceedings

Self-representation as a fair trial right in criminal proceedings is founded on a definite choice. It derives from a voluntary decision of the accused to elect to conduct his/her defence in person. In the core meaning of its application, it takes the form of a liberty right, expressed in the freedom of, or the permission to the accused person, to act without the assistance of counsel. The courts in Ghana have unequivocally emphasised the principle that the decision to proceed

¹⁷² HRC *General Comment* 32 para 37.

¹⁷³ *Ibid.*

¹⁷⁴ See, e.g., Adinyira JSC in *Joanne Gabrielle v. The Republic* 2012 47 GMJ 1 14.

¹⁷⁵ DOC/OS/XXX) 247, para H(c).

without legal representation must be expressed as a clear and unequivocal choice.¹⁷⁶ It is a free choice of the accused person and it ought not to be imposed or influenced by the court.¹⁷⁷

For example, in the case of *Armah Mensah v. The Republic*,¹⁷⁸ the accused/appellant was tried and convicted of stealing by a District Court. When the case was called for trial for the first time, he applied to the court for an adjournment to secure the presence of his counsel. His application was disallowed and he was compelled to represent himself in person. As a result, he was unable to adequately represent himself. On appeal, the High Court held that article 20(2) of the 1969 Constitution, then in force,¹⁷⁹ gave every accused person, the right to defend him/herself in person or to be represented by counsel of his/her choice. However, it is for the accused to voluntarily choose his/her mode of representation. Where the tribunal narrows down the choice to one, by subjecting the accused to an unwanted mode of representation, the accused's constitutional right to decide his/her status of representation is violated.¹⁸⁰ Any attempt by the courts to compel an accused person to represent him/herself in a criminal trial, against his/her clearly expressed wish to proceed through counsel, is therefore unlawful.

The extent of scholarly and judicial considerations of the right to self-representation is in effect limited to the textual postulation of the right among the set of constitutionally guaranteed rights of the accused person at trial. For the most part, the courts have simply affirmed the availability of the right for all accused persons who are desirous of personally defending their cause at their own free will otherwise than through counsel.¹⁸¹ Beyond the characterisation of the exercise of the right to self-representation as a matter of choice for the accused person, no particular attention has been paid to the inherent substance and theoretical values underpinning the right to self-representation in criminal proceedings in Ghana. Furthermore, not much thought has been given to the import of the right to self-representation in achieving the fundamental objective of the trial, in terms of securing just judicial outcomes through a fair trial.

Evidently, the exercise of the right to self-representation is in practice fraught with various procedural difficulties for accused persons. In Ghana, this has necessitated the call on judges to assist self-represented accused while putting their defence(s) before the court in order to

¹⁷⁶ See *Republic v. High Court (Fast Track Division) ex parte Tstatsu Tsikata* 1207; *Hausa v. The Republic* 1981 GLR 840-847; *Joanne Gabrielle v. The Republic* 14.

¹⁷⁷ *Ibid.*

¹⁷⁸ 1971 2 GLR 17-24.

¹⁷⁹ Equivalent of Ghana Constitution, art 19(2).

¹⁸⁰ *Armah Mensah v. The Republic* 19.

¹⁸¹ E.g., *Republic v. High Court (Fast Track Division) ex parte Tstatsu Tsikata* 1200; *Hausa v. The Republic* 840; *Joanne Gabrielle v. The Republic* 1.

ensure a fair administration of criminal justice.¹⁸² There are however no empirical studies on the practical experiences of accused persons in Ghana. The similarities shared by the trial regimes in Ghana with trial procedures in other jurisdictions however justifies the making of some analogies. Generally, the jurisprudence of the American Supreme Court in criminal matters, for the most part, has persuasively influenced the growth of the Ghanaian criminal jurisprudence. The judiciary in Ghana has generally drawn lessons from the rich lessons of the American jurisdiction in criminal law, especially where the local jurisdiction has exhibited a dearth of authority on certain critical subjects.¹⁸³

While reinforcing the character of self-representation as a right, the American Supreme Court in the *Faretta* case attested to the disadvantages of electing to proceed unrepresented in an adversarial criminal trial. The Court acknowledged that the help of a lawyer is essential to guarantee a fair trial to the accused.¹⁸⁴ It also affirmed the undeniable fact that in most prosecutions, accused persons could better defend themselves with the guidance of counsel than on their own unskilled efforts. This notwithstanding, the will of the accused to represent him/herself at the trial must be respected.¹⁸⁵

In allowing the accused person to represent him/herself at the trial however, the *Faretta* Court applied a 'rational understanding standard' in determining the competency of accused persons to represent themselves in criminal trials. By this standard, accused persons will be allowed to proceed without legal representation only when they knowingly, intelligently and unequivocally waive their right to counsel, being aware of the dangers and disadvantages associated with self-representation.¹⁸⁶ The jurisprudence of the American courts also postulates a judicial duty towards assisting the accused to make an informed choice to proceed without legal representation. The trial judge ought to make the accused person aware of the dangers and disadvantages of self-representation. Besides, the records must clearly establish that the accused opted for self-representation in full knowledge of the facts.¹⁸⁷ There must be evidence that the trial judge duly warned the accused person that it could be to his/her disadvantage to act without the assistance of counsel.¹⁸⁸ Even more importantly, the accused must be informed

¹⁸² *Osei-Hwere J in Adusei II v. The Republic* 1975 2 GLR 225 238.

¹⁸³ See, e.g., Azu Crabbe CJ in *Okorie @Ozuzu v. The Republic* 1974 2GLR 272 277; Dotse JSC in *Gabrielle Joanne v. The Republic* 48-49.

¹⁸⁴ *Faretta v. California* 832.

¹⁸⁵ *Id* at 834.

¹⁸⁶ *Id* at 835.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Faretta v. California* 836.

that the status of self-representation does not offer any exemptions from compliance with the procedural rules of the trial.¹⁸⁹

That way, the law describes the competence required of a person to waive the right to the assistance of counsel and to represent oneself at trial, as distinct from the competence to represent him/herself.¹⁹⁰ This standard obviously does not extend to protecting the accused person's ability to secure for him/herself effective representation and participation at the trial. It does however provide a first cover of protection to ensure that the accused fully appreciates the benefits and consequences associated with being self-represented in criminal trials. The courts in Ghana have yet to officially analyse the practical disadvantages associated with the exercise of the right to self-representation. The current position of criminal law and its adjudicatory process is that the courts have no duty to educate the accused of the disadvantages of appearing unrepresented. The Supreme Court of Ghana has only emphasised the point that an accused person who voluntarily chooses to defend him/herself in person must have his/her choice respected and not vilified, irrespective of the attendant consequences.¹⁹¹ Consequently, there are no stated criteria governing the implementation of the right to self-representation in Ghana. The American position thus offers a good reference point from which to learn.

One issue worth discussing, that has also caught the attention of the courts in Ghana, relates to circumstances of change of status of representation. Accused persons who initially proceed through counsel may opt to act in person at a later stage of the proceedings. A problematic situation however arises where the accused person decides to change his/her status from legal representation to self-representation. It is even more crucial when such a decision is taken in court, in the absence and without the knowledge of his/her counsel. In such cases, the determination of whether or not the waiver of counsel and the adoption of the status of self-representation is an intelligent and informed choice remains problematic.

The matter came up for judicial consideration in the Supreme Court case of *Gabrielle Joanne v. The Republic*.¹⁹² The accused person/appellant had in this case earlier asserted her right to

¹⁸⁹ *Ibid.* The Court held that there was no need to make an assessment of how well or poor the accused could deal with the rules of procedure.

¹⁹⁰ See, *Godinez v. Moran* 1993 509 U.S. 389 399, as discussed in Sogabe "Exercising the Right to Self-Representation in *United States v. Farhad*: Issues in Waiving a Criminal Defendant's Sixth Amendment Right to Counsel" 2000 *Golden Gate U. L. Rev.* 129 140.

¹⁹¹ See, e.g., *Owusu JSC*, stating that where an accused chooses to defend him/herself in person, that choice which is completely his/her, "should not be 'criminalized' and used under such circumstances to derail the course of justice." *Joanne Gabrielle v. The Republic* 29.

¹⁹² 2012 47 GMJ 1.

the assistance of counsel of her choice, both at the stage of the pleas and during the trial. She had pleaded not guilty to narcotics related offences charged against her in the presence of her counsel. In the course of proceedings and at a hearing at which her counsel was absent, the accused person elected to personally address the court and proceeded to plead guilty to the charges against her. She was consequently convicted on her guilty plea. In the opinion of the Court, the accused was fully aware of her fundamental right to counsel, which she demonstrably insisted on and exercised at the commencement of proceedings. In the course of the trial however, she opted to conduct her case in person and thus duly and knowingly exercised her right to represent herself.¹⁹³ The Court held that knowledge of the existence of the right to counsel and a deliberate choice to go unrepresented at the trial are sufficient to validate the choice of self-representation. This sufficed in this case because the accused was literate and understood the purpose of the trial.¹⁹⁴ As a person making a valid waiver of her right to counsel, she also intelligently exercised her right to self-representation. The test was whether the accused knew of his/her right to represent him/herself at the trial and whether s/he understood the option of going unrepresented. The minority of the court however raised a critical point, which adds to the duty of the court in cases where the accused suddenly changed her status of representation.

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According to Gbadegbe JSC, where previous proceedings took place in the presence of counsel and in the course of proceedings, the accused person took a completely different line of defence in the absence of counsel, it behoves the trial judge to inquire from the accused of the whereabouts of his/her counsel. This vests the trial judge with a duty to positively determine whether the accused person indeed desires to proceed with the matter on his/her own.¹⁹⁵ Unfortunately, the Court missed another opportunity to clearly lay down the parameters and specific content of the duty of the judge, beyond merely asking of the whereabouts of the lawyer. It would be in line with the good practice in the American jurisdiction under *Faretta*, to bring to the knowledge of the accused person the disadvantages and dangers associated with self-representation.

¹⁹³ *Id* at 14.

¹⁹⁴ *Id* at 32

¹⁹⁵ *Id* at 56.

5.5.4 Limited Exaltation of the Right to Self-Representation in Ghana

Some policy justifications may be advanced with reference to the underdeveloped jurisprudence on the right to self-representation in Ghana. Of note, the objective of the criminal justice system is wholly aligned with the promotion of the right to assistance of counsel in criminal proceedings.¹⁹⁶ Consequently, there has not been any parallel endeavour towards the exaltation of the right to self-representation. There is very little jurisprudence on the implementation and pragmatic realisation of the right to self-representation in Ghana. The disadvantages associated with the right to self-representation, as compared to the benefits to legal representation in criminal trials, are implicitly admitted in the jurisprudence of the courts. Judicial decisions portray the tendency of frowning on self-representation. The jurisprudence of the courts rather emphasises the right of the accused to be represented at the pre-trial and trial stages of the proceedings.¹⁹⁷

Similarly, the African Commission on Human and People's Rights encourages the promotion and exercise of the right to self-representation. While unequivocally according due recognition to the right to self-representation, the Commission emphasises in clear terms, the preference of legal representation over self-representation. It lauds the qualities of legal representation as the best means of legal defence against infringements of human rights and fundamental freedoms in criminal trials.¹⁹⁸ This position of the Commission appears to have influenced the implementation of the right to self-representation in Ghana among other African countries. As far as a good number of accused persons approaching the courts unrepresented by counsel pursuant to their right to self-representation, the need to develop the jurisprudential values of the right within the tenets of fair trial in Ghana remains imperative.

5.6 BALANCING THE RIGHT TO SELF-REPRESENTATION WITH THE RIGHT TO FAIR TRIAL

The right to self-representation prioritises the autonomy of the accused person and subordinates all other issues such as fairness and justice of the trial itself.¹⁹⁹ It is however undisputed that legal practice on the contrary affirms the invaluable role of defence counsel in safeguarding

¹⁹⁶ See, *id* at 59-60.

¹⁹⁷ See, e.g., *Okorie @ Ozuzu v. The Republic* 272; *Amoah v. The Republic* 1989 1 GLR 266; *Hausa v. The Republic* 840; *Tinieye v. The Republic* 1980 GLR 565.

¹⁹⁸ African Commission on Human and People's Rights Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa Doc/OS/ (XXX) (2003) 247 para N 2(a).

¹⁹⁹ *Sabelli & Leyton* 2000-2001 *J. Crim. L. & Criminology* 164.

the interests of the accused, especially in the adversarial trial.²⁰⁰ That notwithstanding, the legal position remains that respect for the personal autonomy and dignity of the accused far outweighs any potential harm that might result from proceeding without legal representation.²⁰¹ Autonomy is so highly revered that little or no consideration is paid to the question whether the exercise of the right to self-representation serves the best interests of the accused.²⁰² This form of exaltation of the right to self-representation through an ill-assessed promotional value of autonomy presents very little substance to the most important question of how to ensure the fairness of the trial of an unrepresented accused. Fairness in this context remains an objective concept, measured by the adequacy of protection of the accused person's trial rights and by his/her ability to put up a legally effective defence to the case of the Prosecution.²⁰³

One must always put into perspective the clearly defined purpose of the criminal justice process, which is to provide a fair and reliable process for the determination of guilt. Securing the fairness of the trial in this context operates not only as a right of the individual accused; it also undergirds the general communal purpose for establishing the criminal justice system. It is a shared societal value deserving of greater priority than the autonomy of the party.²⁰⁴ As a result, the right to self-representation cannot be absolute.²⁰⁵ In its implementation, it must be measured against the overriding procedural right of the accused to a fair trial.²⁰⁶ The benefits of the right to self-representation must necessarily conform to the general policy of ensuring the legitimacy and fairness of the criminal trial process itself. Elevating the right of self-representation over the fairness of the trial is to simply prioritise form over substance.²⁰⁷ In as much as society derives its reassurance of public safety from lawful prosecutions and convictions of accused persons, the trial system must exhibit traits of reliability and efficiency in securing just convictions. Every legal system is duty-bound to promote the distinctive societal value of ensuring the reliability of its guilt-determining process, as well as strengthening the interests and integrity of the criminal justice system as a whole.²⁰⁸ Within the context of this two-pronged logic, it behoves the state to maintain an overriding interest in the fairness of its judicial processes and trials. In the end, one can boldly assert that no particular

²⁰⁰ See, e.g., *Faretta v. California* 832-833.

²⁰¹ *Id* at 833-834; see also Hashimoto 2007 *N.C.L. Rev.* 434.

²⁰² Sabelli & Leyton 2000-2001 *J. Crim. L. & Criminology* 190.

²⁰³ See, e.g., Finegan 2008-2009 *Cath. U. L. Rev.* 448; Bekker 2004 *CILSA* 177.

²⁰⁴ Sabelli & Leyton 2000-2001 *J. Crim. L. & Criminology* 209-210.

²⁰⁵ See, e.g., Judge Reindhart in *United States v. Farhad* 1999 F.3d. 1097.

²⁰⁶ *Id* at 1105.

²⁰⁷ *Id* at 1107.

²⁰⁸ Cerruti 2009 *Geo. J. Int'l. L.* 939.

individual right of the accused person ought to be applied in a manner that could potentially jeopardise the overriding values of decency and fairness of the criminal trial in general.²⁰⁹

The assumption that the fairness of adversarial proceedings may be compromised when accused persons are tried without legal representation was acknowledged in the landmark judgment of the *Faretta* Court. It requires states to implement the right to self-representation in domestic jurisdictions and accord due consideration to the risks of implementing that right. While positing the values of autonomy and personal dignity that are associated with the right to self-representation, the *Faretta* Court unequivocally hinted on the dangers associated with its implementation. The Court minced no words in pointing out that an accused person who elects to conduct his/her own defence ultimately does so at his/her own detriment.²¹⁰ Such an accused person “relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel”.²¹¹ The caveat is thus for the accused to “be aware of the dangers and disadvantages of self-representation”, while consciously and competently making a “knowing and intelligent” waiver of the benefits of the assistance of counsel.²¹² In that sense, as eloquently put by Cerruti, “[t]he court’s caveat emptor philosophy would excuse the state for the almost certain and substantial costs to be imposed on the [accused]”.²¹³ The only safeguard for the accused lies in this note of caution: s/he must know what s/he is doing and his/her choice must be made with eyes open.²¹⁴

Logically therefore, securing the protection of the accused person from the powerful resources and authority of the state, and ensuring the fairness of the proceedings, redirects the discourse back to the importance of assistance of counsel in criminal trials.²¹⁵ It is important to also note that despite their analyses in support of an exclusive recognition of the right to self-representation, proponents of the right do not detract from the fundamental values attached to the role of defence counsel in the conduct of the trial. They ungrudgingly concur with the opinion that a primary function of counsel and his/her assistance in criminal trials is to ensure that accused persons actualise their fair trial rights.²¹⁶ They also recognise that while the accused person remains the primary and ultimate decision-maker regarding the making of

²⁰⁹ Sabelli & Leyton 2000-2001 *J. Crim. L. & Criminology* 209.

²¹⁰ *Faretta v. California* 384.

²¹¹ *Id* at 835.

²¹² *Ibid.*

²¹³ *Faretta v. California* 834.

²¹⁴ *Id* at 835.

²¹⁵ See, e.g., Pearson 1984 *Cal. L. Rev.* 709.

²¹⁶ Hashimoto 2010 *B.U.L. Rev.* 1169.

his/her defence, it is counsel's role to ensure that the accused person can adequately assert his/her rights at the trial.²¹⁷ It is therefore important to recognise that validating the normativity of allowing an accused person to personally assume the conduct of his/her defence is one thing. It is yet another, to achieve through self-representation the vital objective to deliver justice within the principles of procedural fairness in the adversarial criminal trial.

Generally, the due process rights of the accused, including the right to self-representation are deemed to embody values for the protection of the accused person at trial. They are in essence the product of a practical thought, which seeks to infuse a sense of fairness in criminal proceedings. It is also assumed that each and every constituent right within the spectrum of trial rights contributes to the consolidation of the core principle of procedural fairness, which in turn defines the substance of the criminal justice system.²¹⁸ The various rights are deemed to be working together to promote the principle of equality of arms. This ensures that every accused person is given a reasonable opportunity to present his/her case, under conditions that do not place him/her at any substantial disadvantage *vis-à-vis* the state.²¹⁹ In this sense, the rationalisation of self-representation as a right, must of necessity, embody certain key objectives of fair trial, protection of the interests of the accused person, and legitimacy of the criminal adjudicatory process itself.

5.7 CONCLUSION

The right to self-representation in modern criminal trials remains a key procedural entitlement for accused persons. It is in effect justified and legitimated within the cluster of the fair trial rights of the accused. The main question for investigation is how the normative substance of the right to self-representation accedes to the cores objectives of fairness of the trial and the procedural protection of the accused person in the adversarial criminal trial. Clearly, the underlying theoretical values of the right under international law and as ratified and implemented in Ghana exposes its weak foundational substance in the attainment of these core objectives. They raise very deep concerns that relate to matters of fairness of the criminal proceedings. Beyond its historical values expressed in the distrust of lawyers and value of self-

²¹⁷ *Ibid.*

²¹⁸ See, e.g. Tomkovicz *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution* (2002) 45.

²¹⁹ See, e.g., "Fair Trial: The History of an Idea" 2009 *JHR* 37 48.

reliance, the making of the right of self-representation under international law practically reveals no substantial benefits to accused persons beyond the value of personal autonomy.

The ratification and implementation of the right to self-representation in Ghana simply follow the theoretical basis of the right under international law. Beyond the consideration of the right as a procedural choice of the accused, the jurisprudence of the right to self-representation in Ghana bears no substance on the importance of the right in securing the fairness of the trial. Criminal law and practice have not yet developed any guidelines for the exercise of the right by accused persons. The limited jurisprudential consideration of the right to self-representation however, has its reasons in the criminal justice policy that seeks to promote the right to assistance of counsel in all criminal trials. In any case, the right to self-representation will be insufficiently justified and its admission into the *corpus* of fair trial rights will continue to be questioned unless it embodies certain core values that add to the notion of the fairness of the trial. It makes judicial sense to assert that the right to self-representation must be thoroughly configured to take into account the overriding objective of ensuring effective participation of the self-represented accused, fair trial and consequently, criminal justice.

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CHAPTER 6

LEGAL AID AND SELF-REPRESENTATION IN CRIMINAL PROCEEDINGS IN GHANA

6.1 INTRODUCTION

Self-representation in criminal proceedings in Ghana is not always voluntary, or an express realisation of the due process right to self-representation. Beyond the right-theory, the phenomenon is mostly grounded in indigence. A considerable number of poor suspects and accused persons are forced to painfully, unwillingly and desperately represent themselves in court without legal assistance. This is generally the case where such suspects or accused persons have no definite right to state-funded counsel, and equally have no means of personally securing the services of a lawyer. Legal aid therefore plays a very important role as it guarantees access to justice to indigent suspects of crime and accused persons. It is considered an “essential element of a fair, humane and efficient criminal justice system that is based on the rule of law”.¹

This chapter analyses the right to state-funded counsel and its impact on the practice of self-representation in criminal proceedings in Ghana. It also evaluates the various institutional mechanisms of legal aid in criminal proceedings. Part 2 presents the general background and socio-economic realities that justify the implementation of free legal aid for suspects and accused persons in Ghana. Part 3 discusses the general scope of the right to state-funded counsel as enacted under international law and the underlying obligations of States toward addressing the phenomenon of self-representation in domestic criminal proceedings. Part 4 provides the background for assessing the implementation of the right to legal aid in Ghana and its accessibility to indigent suspects and accused persons. Part 5 is an evaluation of the various schemes of legal aid in criminal proceedings and an analysis of the key policy, administrative and financial problems inhibiting access to legal aid by accused persons.

¹ United Nations *Principles and Guidelines on Legal Aid in Criminal Justice Systems*, UN/RES/67/187 (2012), para A (1).

6.2 LEGAL AID IN CRIMINAL PROCEEDINGS IN GHANA

The assertion that access to justice in criminal proceedings “depends on the enforcement of the rights to due process, to a fair trial, and to legal representation”² is a leading principle in modern criminal justice theory. The Constitution of Ghana guarantees a right to assistance of counsel in pre-trial and trial proceedings pursuant to the aforementioned principle, in order to ensure legal representation for all accused persons in criminal proceedings. Firstly, it mandates that suspects of crime be informed immediately upon arrest of their right to a lawyer of choice under article 14(2).³ Secondly, article 19(2) of the Constitution also guarantees accused persons’ right to legal representation and assistance during the trial.⁴

From a policy perspective, the importance of these constitutional guarantees lies in certain social realities. The majority of the population is illiterate in the law; they have very little or no knowledge of the law and of its workings both in practice and in theory. They therefore require the helping hand of counsel to navigate the procedural and evidentiary frameworks that apply to criminal trials in Ghana.⁵ This observation aligns with the opinion that even intelligent and educated laypersons cannot understand the skills of the science of the law.⁶ The need for legal assistance therefore applies with even greater force where the suspect of crime or accused person is an uneducated layperson. With the relatively high level of illiteracy among the Ghanaian population, ensuring legal representation for accused persons in criminal proceedings is an uncompromising necessity.⁷

Further to the significance of the right to assistance of counsel as reinforcing the position of suspects and accused persons in criminal proceedings,⁸ ensuring procedural equality between the Prosecution and accused persons in Ghana is also grounded in the law against discrimination. Article 17 of the Constitution guarantees equality of all persons before the law

² *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (2004), see preamble.

³ Ghana Constitution, art 14(2).

⁴ Para (f).

⁵ See, e.g., Amidu “Right to State Appointed Counsel in Criminal Justice Administration under the Constitution” 1992 *RGL* 166, 174.

⁶ *Powell v. Alabama* 1932 287 U.S 45 68-69, also affirmed in *Gideon v. Wainwright* 1963 372 US 335 344-45.

⁷ Literacy rate varies across the regions in Ghana with a national average ratio of 58%. See Worldreader “Literacy in Ghana” <http://www.worldreader.org/wp-content/uploads/2015/07/Ghana-Literacy.pdf> 1 (Accessed 21-12-2015). Some sources fix a higher literacy rate, for example 76.6%. See “The World Factbook”. <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 21-12-2015). Literacy in this context is simply defined as the ability to read and write a particular language.

⁸ Discussed *supra*, Ch. 3, text at 3.3 & 3.5; see also Krumrey-Quinn “Enhancing ‘Access to Justice’: Recognition of Informal Criminal Justice Mechanisms in International Human Rights Law” 2012 5 http://www.lawfoundationsa.com.au/resources/Winning_Essays/Essay2012.pdf (Accessed 10-04-2017).

and prohibits all forms of discrimination on grounds of economic status, among others.⁹ The argument is sustained by the fact that the legal system generally recognises legal representation and assistance as a means of ensuring that the state does not obtain any undue advantages over the accused person in criminal proceedings.¹⁰ As a constitutional safeguard, the prohibition of discrimination in turn ensures that economic and other factors do not give any advantages to an individual citizen facing criminal prosecution over the other.¹¹ The objective is to make sure that an accused person is not deprived of the benefits of the right to counsel simply because of economic reasons.

Despite the benefits of the aforementioned constitutional guarantees, self-representation remains prevalent among subjects of criminal proceedings in Ghana. The question as to why some accused persons opt to conduct their cases personally, without legal assistance, has not been formally answered. There has not been any scientific research into the driving factors of self-representation in the country. Several suppositions, which speak to the reasons for self-representation in criminal trials, have however been made from observations of the criminal justice system. Anecdotal evidence suggests that the major cause of self-representation in criminal trials is poverty, expressed in the financial inability of indigent accused persons and suspects to secure the cost of hiring counsel. Like in many other countries, a vast majority of persons involved in criminal proceedings in Ghana are poor and the country lacks the necessary resources and capacity to provide legal aid for all of them.¹²

Legal services in Ghana are indisputably expensive and securing legal representation in a criminal trial may be an arduous task for those who are financially deprived and less endowed. The lack of access by indigent accused persons to services of defence counsel in criminal proceedings has indeed been a matter of great concern.¹³ The fees prescribed for professional legal services of practicing lawyers by the Ghana Bar Association (GBA) appear impractical, considering the general socio-economic conditions and high cost of living in Ghana.¹⁴ The GBA recognises that fees may however be waived or reduced in legal aid cases.¹⁵ Initial consultation fees vary between GH¢1000 for lawyers of ten years of practice or more and

⁹ Ghana Constitution, art 17, particularly clause 2: “A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”

¹⁰ Amidu 1992 RGL 163.

¹¹ *Ibid.*

¹² This is a general problem among states and not peculiar to Ghana. See, e.g., UN *Principles and Guidelines* UN/RES/67/187 para A (5); *Lilongwe Declaration*, see preamble.

¹³ Amidu 1992 RGL 159.

¹⁴ See Ghana Bar Association *Scale of Fees* (2015).

¹⁵ *Id* at 1.

GH¢500 for lawyers under five years of practice.¹⁶ For extended initial consultation, hourly rates may range between GH¢1000 – 2000 for lawyers of ten years of practice or more, and GH¢300 – 1000 for lawyers under five years of practice.¹⁷ Brief fees in criminal trials in the High Court and Circuit Courts vary between GH¢2,500 and GH¢15,000 for bail applications; GH¢15,000 – GH¢30,000 for misdemeanour trials; GH¢30,000 – GH¢60,000 for felony trials and GH¢20,000 to GH¢150,000 for trials on indictment.¹⁸ Fees for watching briefs in criminal proceedings range between GH¢10,000 – GH¢30,000.¹⁹ These figures apply against the stark economic realities of a country where 24.2% of the total population live below the poverty line.²⁰ As a result, a great number of criminal suspects and accused persons who are too poor to afford the prescribed fees are left with no option than to represent themselves.

It is a fundamental principle that a trial conducted without defence counsel and without a valid waiver of legal representation, is of itself unfair.²¹ The degree of unfairness is further aggravated in cases where the accused person is deprived of the services of counsel simply because of lack of affordability.²² Eventually, the noble ideal of a fair trial is lost where suspects and accused persons are forced to inadequately defend themselves in person. The general legal presumption is that where the legal system affords a theoretical right to the assistance of counsel, the state is enjoined to provide accused persons with the means to its realisation.²³ In other words, the right to legal representation takes full meaning when interpreted to include an entitlement to a reasonable opportunity of securing it, especially in case of indigence. Denying the poor suspect or accused person of such a reasonable opportunity amounts to a denial of the right to legal representation and thus, of the right to a fair trial.²⁴ The realization of this presumption in practical terms comes through the recognition and guarantee of the right to state-funded counsel of choice, for all indigent suspects and accused persons.²⁵ The right is

¹⁶ The prevailing exchange rate is 1 dollar to 4.2 Ghana Cedis (GH¢).

¹⁷ *Id.* parts A & B.

¹⁸ *Id.* part E (p). Brief fees for District Courts do not exceed 50% of the brief fees charged in the High Court and Circuit Court. See *Id.* at part F.

¹⁹ *Id.* part E (q).

²⁰ “The World Factbook” <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (Accessed on 15-12-2015).

²¹ See, e.g., *Didcott J in S v. Khanyile* 1988 (3) SA 795 (N) 800. See Itoh “Why South Africa Should Embrace Gideon: An Analysis of the Right to Counsel and Why it should be extended to all Defendants” 2012 *Int'l L. & Pol.* 951 963. See *Id.* at 965, claiming that “[s]ince standards for a fair trial include defendant’s right to be represented by counsel, any violation of that right renders the trial unfair regardless of the cause including defendant’s lack of resources”.

²² See, *S v. Khanyile* 810.

²³ Sanders & Young *Criminal Justice* (2000) 25.

²⁴ Bekker “The Right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa” 2004 *CILSA* 173 180.

²⁵ See Amidu 1992 *RGL* 174. It is also known as the right to legal aid.

grounded in international law and it constitutes one of the universally recognised minimum guarantees of protection for accused persons.²⁶ By way of implementation, all member states of the United Nations (UN) are mandated to ensure the availability of free legal services to indigent suspects and accused persons.²⁷

6.3 LEGAL AID UNDER INTERNATIONAL LAW

6.3.1 The Nature of the Right to State-Funded Counsel

The right to state-funded counsel is entrenched among virtually all international human rights instruments.²⁸ It applies within the scope of fair trial rights of accused persons in criminal proceedings. The right essentially dictates mandatory assignment of counsel to accused persons who cannot afford the services of a lawyer. Article 14 of the International Covenant on Civil and Political Rights²⁹ (ICCPR) in that context provides in pertinent part that,

In the determination of any criminal charge against him (...), everyone shall be entitled to [a right] 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.³⁰

Legal aid in this context is defined to expressly include representation by a lawyer, which shall be at no cost, when the suspect or accused does not have sufficient means to personally afford counsel and/or where the interests of justice so demand.³¹

The obligation of States to provide indigent accused persons with free legal assistance insists on certain key standards of professionalism on the part of the assigned counsel for effective implementation of the right. The most important factor is the competency of the appointed lawyer to effectively represent the indigent accused, protect his/her rights and ensure the fairness of the proceedings. This criterion figures among the international standards set by the various human rights bodies, as far as the required aptitudes of state-assigned counsel for purposes of legal aid are concerned.

²⁶ See, e.g., International Covenant on Civil and Political Rights, (ICCPR), art 14(3) (d).

²⁷ *Ibid*; also see Sanders & Young *Criminal Justice* (2000) 25.

²⁸ Most relevant for our study are ICCPR, art 14 (3) (d); European Convention on Human Rights (ECHR), art. 6(3) (c); American Convention on Human Rights (ACHR), art 8(2)(e); paragraph H(a) of the African Commission's Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa 2003; principle 17(2) of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment and rule 93 of the UN Standard Minimum rules for the Treatment of Prisoners.

²⁹ *General Assembly Resolution 2200A (XXI)* (1966).

³⁰ ICCPR, art 14(3) (d).

³¹ U.N *Principles and Guidelines* UN/RES/67/187 (2012) guideline 5(45) (c) & para A (8).

For example, the Human Rights Committee (HRC) has emphasised that state-assigned counsel must be effective and competent in representing the accused.³² The United Nations Basic Principles on the Role of Lawyers³³ (UNBPR) highlights the duty of States to provide lawyers of experience and competence commensurate with the nature of the offence assigned to them.³⁴ The African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa³⁵ prescribe even more, detailed qualifications of the assigned lawyer. Among others, it underscores the need to assign lawyers who have the necessary training and experience corresponding to the nature and seriousness of the matter.³⁶ Consequently, where the state assigns an unqualified counsel, or where the court or any other authority hinders the appointed lawyer from effectively fulfilling his/her duty of representation to the indigent accused, the right to free legal assistance would be deemed violated.³⁷ Beyond the casual restatement of the right to state-funded counsel for indigent accused persons in criminal proceedings, there is a substantive truth; it is to the effect that only a competent and skilled defence counsel can advance a competent defence to a criminal charge. Despite this assumption, the various criteria set by international human rights bodies to govern the implementation of the right to state-funded counsel in cases of indigence do not guarantee the benefit of this right to all indigent accused persons. The implementation of the right essentially targets a much smaller group of the bigger class of persons whose financial status falls short of meeting the high cost of legal services.

6.3.2 Criteria for the Grant of Free Legal Assistance under International Law

The criteria that define the thresholds for qualification for free legal assistance is variedly defined under international law. The American Convention on Human Rights³⁸ (ACHR) presents an all-inclusive standard and stands out of the more common position. It is the only international human rights instrument that guarantees a near absolute right to state-funded

³² Human Rights Committee (HRC) *General Comment 32*, CCPR/C/GC/32 (2007) para 38. It also, specifically refers in part to acts of "blatant misbehaviour or incompetence", including "withdrawal of appeal without consultation in a death penalty case, or absence during the hearing of a witness (...) may entail responsibility for the State concerned for a violation of article 14, para 3 (d), provided it was manifest to the judge that the lawyer's behaviour was incompatible in the interests of justice."

³³ Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. They are formulated to assist member states of the United Nations in their task of promoting and ensuring the proper role of lawyers.

³⁴ *Id.*, principle 6.

³⁵ Adopted in 2003.

³⁶ *Id.*, para H(e)

³⁷ HRC *General comment 32* para 38.

³⁸ Adopted at the Inter-American specialized conference on Human Rights, San José, Costa Rica, 22 November 1969.

counsel for all indigent accused persons. More specifically, it provides an ‘inalienable’ right to free legal assistance for all accused persons, in all cases where they have no financial means to afford a lawyer, and particularly when they do not opt to defend themselves personally.³⁹ Of course, the practical realisation of this obligation for the benefit of indigent accused persons varies depending on the local circumstances of each state.

In all other international and regional human instruments however, legal aid is substantially qualified and is procedurally governed by two main criteria. The first relates to the determination of the standard of indigence and demands an answer to the question of who qualifies as ‘indigent’ for the purpose of free legal assistance. The proper content of this standard is left to States to determine within the exigencies of their local circumstances. Where the status of the accused person as ‘indigent’ is determined, the next consideration is the analysis of the ‘interest of justice’ criterion. This must be positively determined to necessitate the assignment of free counsel. The relevant provisions of the ICCPR, the European Convention on Human Rights⁴⁰ (ECHR), and the African Commission’s Principles and Guidelines on Fair Trial and Legal Assistance in Africa on the right to assignment of counsel in cases of indigence, all accord great prominence to the second criterion.⁴¹ What goes into consideration of the ‘interest of justice’ varies according to the human rights instruments and the various human right bodies. There appears to be a consensus on a more liberal interpretation of the concept regarding capital offences in international law. There is unanimity among States that in all cases involving capital punishment, the interest of justice necessarily demands that States assign counsel to indigent and unrepresented accused persons.⁴² The HRC has unequivocally postulated to the effect that regarding all capital offences, “it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings”.⁴³

In all other cases however, ‘the interest of justice’ criterion is in turn assessed by considering two general standard conditions, among others, being (i) the gravity or seriousness of the

³⁹ See ACHR, art 8 (2) (e) providing that “[d]uring proceedings, every person is entitled, with full equality, to the following minimum guarantees (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.”

⁴⁰ Adopted on November 4, 1950 and in force on September 3, 1953.

⁴¹ These provisions are listed in note 28 above.

⁴² HRC General Comment 32 para 38, citing *Lindon v. Australia*, Comm. No. 646/1995, para 6.5; see also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), para H(c).

⁴³ HRC General Comment 32 para 38, citing *Aliboeva v. Tajikistan* 2001 Comm. No. 985 para 6.4; *Saidova v. Tajikistan* 2001 Comm. No. 964, para 6.8

offence, and (ii) the severity of the punishment.⁴⁴ The United Nations Draft Body of Principles on the Right to Fair Trial and Remedy⁴⁵ unambiguously provides that “[t]he interest of justice in a particular case should be determined by consideration of the seriousness of the offence of which the defendant is accused and the severity of the sentence which he or she risks”.⁴⁶ One striking observation is the fact that these guidelines for interpreting the ‘interest of justice’ criterion under international law do not involve considerations of the indigent accused person’s competency and ability to personally conduct his/her own case. The only international standard, which pays due consideration to this very important factor is the European Court of Human Rights’ interpretation of the right to assignment of state-funded counsel under the European Union.⁴⁷ In addition to analysing the criteria of seriousness of the offence and severity of the sentence, the European Court (ECtHR) further considers the complexity of the case before the trial court *vis-à-vis* the capacity and competency of the accused person to represent and defend him/herself.⁴⁸ In the end, the standards set by the ECtHR for the grant of state-funded counsel sum up into the determination of one main question, namely whether it appears plausible in the particular circumstances that counsel would indeed be of assistance and whether it would be necessary that the accused person be assigned legal representation.⁴⁹

In all other international jurisdictions outside the ECtHR, two major remarks are made from the interpretative guidelines developed around the ‘seriousness of the offence’ and the ‘severity of punishment’. Firstly, using the seriousness of the offence as a criterion serves to restrict the scope of application of the right to state-funded counsel. Mandatory assignment of free legal assistance to indigent accused persons is guaranteed regarding capital and other serious offences. Consequently, all indigent persons suspected or charged with offences, not of the ‘seriousness’ and of the ‘severity’ of the punishment contemplated by the domestic interpretation of the law, may have no right to legal aid. The leading justification for this restriction on the scope of application of the right is primarily financial. In effect, many countries expressed reservations to ratifying the provisions of article 14(3) of the ICCPR on

⁴⁴ HRC *General Comment* 32 para 38, referring to *Lindon v. Australia*, Comm. No. 646/1995, para 6.5; see also African Commission *Principles and Guidelines* para H (b) (i).

⁴⁵ See U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protections of Minorities on its 46th Session, The Administration of Justice and the Human Rights of Detainees*, U.N. Doc. E/CN.4/Sub.2/1994/24 (1994) <http://hrlibrary.umn.edu/demo/subcomm46detainees.html#annexII> (Assessed on 06-06-2016).

⁴⁶ *Id*, para 50 (a).

⁴⁷ The European Court of Human Rights, subsequently abbreviated (ECtHR).

⁴⁸ E.g., *Quaranta v. Switzerland* 1991 Appl. No.12744/87 ECHR 33; *Granger v. UK* 1990 Appl. No. 11932/86; *Pakelli v. Germany* 1983 Appl. No. 83981/78 ECHR 6.

⁴⁹ See *Artico v. Italy* 1980 Appl. No. 6694/74 ECHR 4.

the right to assignment of state-funded counsel.⁵⁰ They expressly advanced the reason that granting free legal assistance to all indigent accused persons would be financially impractical.⁵¹ The general presumption therefore reflects States' inability to meet the huge financial obligations that may arise from an extended application of the right to state-funded counsel to all indigent accused persons.⁵² Countries like Ghana continue to experience chronic underfunding of the indigents' defence and support systems.⁵³ Even in the most advanced and well-resourced countries, including the United States, the overwhelming number of qualified indigent accused persons seeking state-funded counsel continues to strain the already overstretched systems and resources of legal aid.⁵⁴

In the African context, the ostensible impossibility of securing state-funded counsel for all indigent accused persons seems to have been implicitly recognised by the African Commission. While analysing the obligation of States to provide free legal assistance to indigent accused persons, the Commission clearly highlighted the reality that in many member states of the African Union, the number of qualified lawyers is low.⁵⁵ Ghana is no exception.⁵⁶ Thus in Africa in general, Evans and Murray rightly argue that it is practically unrealistic to expect that every accused person would be represented by a lawyer.⁵⁷

Self-representation is a necessity and the only feasible means of accessing the court in cases where the offence charged does not fall within the scope of legal aid protection. In this context, it is imposed by the limits to the right to free assistance of counsel, as determined under international law, and implemented in domestic legal regimes. An accused person cannot be viewed as appearing voluntarily without counsel when compelled by unaffordability. His/her decision to appear by him/herself must also not be presumed to be one of a willing and

⁵⁰ Particularly para (d).

⁵¹ Only very few countries like Bangladesh undertook to ensure that all indigent accused persons are represented at trial. In ratifying ICCPR, art 14(3) (d), it provided that "... a person charged with a criminal offence is statutorily entitled to legal assistance if he does not have the means to procure such assistance." https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en. (Accessed 06-06-2016)

⁵² See, e.g., in the United States, *Argersinger v. Hamlin* 1972 407 U.S 37 and *Scott v. Illinois* 1979 440 U.S. 373 both addressing the issue of potential expense.

⁵³ See generally, Morhe "An Overview of Legal Aid for Criminal Cases in Ghana: The History and Challenge of Providing Legal Aid" 2012 *CLB* 105 <http://dx.doi.org/10.1080/03050718.2012.646737> (Accessed 12-05-2017); see full discussion at 6.5.1 and 6.5.2 below.

⁵⁴ See, e.g., Hashimoto "Defending the Right of Self-Representation: An Empirical Look at the Pro se Felony Defendant" 2007 *N.C.L. Rev.* 423 468, referring to Edwards "Getting around Gideon: The Illusion of Effective Assistance of Counsel" *Champion* 2004 4.4 fn 168.

⁵⁵ African Commission *Principles and Guidelines* para H (g).

⁵⁶ There are less than 3000 lawyers serving the entire country of over 27 million people.

⁵⁷ Evans & Murray *The African Charter on Human and People's Rights, The System in Practice, 1986-2006* (2008) 203.

competent self-represented accused. Financial considerations advanced by states as a legitimate cause to restrict the scope of the right to free legal representation may be politically rationalised. Within the tenets of criminal justice however, this political ideology downplays the more important concern of fairness, which attends to the trial of indigent persons who are mostly led to inadequately defend themselves without legal assistance.

Secondly, the exclusion of critical issues relating to the competency and capacity of the indigent accused person to personally defend him/herself at trial from all considerations of the 'interest of justice' criterion is critical. This concern is justified when analysed from the disadvantaged position of a person without legal skills who is compelled to defend him/herself within the complex procedures of the adversarial criminal trial. Criminal proceedings in such situations raise questions of procedural fairness expressed in the ineffective participation of the accused in his/her proceedings. Interestingly, in some cases, it has been unconvincingly argued that certain offences like misdemeanours do not involve serious legal questions and attract only very light punishment. It has therefore been maintained that even in such misdemeanour cases, accused persons with sufficient means to hire the services of counsel might find it unnecessary to do so. As a result, securing counsel for any indigent accused in a misdemeanour trial at the expense of the state would be aberrant.⁵⁸

It must however be noted that this assertion is not fully verified in all domestic jurisdictions. In the Ghanaian context for example, the offence of corruption of or by a public officer under section 239 of the Criminal Offences Act⁵⁹ (COA) is termed a misdemeanour but attracts a punishment of up to 25 years imprisonment.⁶⁰ Thus, the categorisation of offences does not always match with the degree of punishment assigned to the particular class of offences.⁶¹ Even beyond the limited punishment attached to misdemeanours, the main concern relates to the competency of the self-represented accused to make his/her defence in the adversarial framework. The nature and severity of the punishment speaks little to the issue of the accused person's ability to effectively present his/her defence and protect his/her legal rights at the trial. Unfortunately, with the exception of the ECtHR, the various criteria determining the international standards of qualification for free legal assistance in cases of indigence have woefully failed to consider this very important factor.

⁵⁸ See, e.g., Pearson 1984 *Cal. L. Rev.* 706.

⁵⁹ Act 29 of 1960.

⁶⁰ Criminal and Other Offences (Procedure) Act (COOPA) (Act 30 of 1960), s 296(4).

⁶¹ *Id.*; see s 296 generally.

The determination of the ‘interest of justice’ in cases of indigence, must, as of necessity, be guided by the intellectual competency of the accused to personally make his/her defence within the required professional and legal standards. In other words, the major concern ought to address the question as to whether an accused person, who is excluded from the benefit of state-funded counsel, is in a position to effectively represent and defend him/herself within the tenets of the right to and standards of a fair trial.

In this context, the United Nations Principles and Guidelines on Legal Aid in Criminal Justice Systems adopted in 2012, provides a new perspective on the delivery of legal aid in criminal proceedings. The instrument provides a framework to guide member states of the UN on the principles that should govern the establishment and grant of free legal assistance to indigent suspects of crimes and accused persons. The instrument encourages States to expand the scope of legal aid and make it available to any person “suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty”, at all stages of the proceedings.⁶² It provides that legal aid should be provided in exceptional cases, irrespective of the financial ability of the suspect or accused person, given the “urgency or complexity of the case or the severity of the potential penalty” if the interests of justice so require.⁶³

6.4 IMPLEMENTATION OF THE RIGHT TO FREE LEGAL ASSISTANCE IN GHANA

The Ghana criminal justice system does not guarantee free legal services to all suspects of crimes, and accused persons who are financially unable to hire counsel to represent them in criminal proceedings. It however provides certain schemes of legal services for indigent suspects and accused persons in the form of legal aid.⁶⁴ The country’s obligation to provide free legal assistance to such indigent persons derives from its ratification and domestication of article 14 of the ICCPR.⁶⁵ The mode of ratification and the strategies of implementation of the right to free legal assistance in the criminal justice system however, present certain procedural and practical complexities.

⁶² U.N *Principles and Guidelines* UN/RES/67/187 (2012) principle 3(20) & guideline 5(45).

⁶³ *Id*, principle 3 (21).

⁶⁴ See Latham & Watkins “Pro Bono Practices and Opportunities in Ghana” 2015 *The Pro Bono Institute and Latham and Watkins LL.P* 227 228.

⁶⁵ Discussed *supra*, Ch. 5, text at 5.5.1, fn.122.

6.4.1 The Right to Free Legal Assistance in Ghana

The Bill of Rights of Ghana enacted under Chapter 5 of the Constitution does not include an obligation for the state to provide free legal assistance to indigent suspects and accused persons. Generally, constitutional democracies adopt a variety of strategies to incorporate international human rights norms into their national jurisdictions. In the practices of states, one such method of implementation is by way of 'constitutionalisation'.⁶⁶ Most modern liberal democracies, including Ghana, elevate international human rights to the level of constitutional rights. It is believed that international human rights provisions are most effectively enforced when they are accorded the same status as national constitutional rights.⁶⁷ This procedure of 'constitutionalisation' of legal norms follows the American legal culture of 'higher law', which accords primacy to its Constitution.⁶⁸ The process of constitutionalising human rights in Ghana entrenches human rights provisions into the highest law of the land and reinforces their justiciability.⁶⁹ The Bill of Rights of Ghana is crafted in the ideology of constitutional supremacy. The specialty of criminal law as a public tool to ensure public order and safety intrinsically involves applying punishment upon conviction and depriving suspects, accused persons, and convicts, of a number of personal rights and freedoms. This character of criminal law justifies the adoption of the various procedural protections under the Bill of Rights of Ghana for all suspects and accused persons.⁷⁰

Intriguingly, the implementation of the treaty obligation to provide indigent accused persons with a right to free legal assistance in criminal proceedings falls out of Ghana's conventional approach towards the constitutionalisation of human rights norms. Either by omission or for an unrecorded deliberate reason, the Consultative Assembly that drafted the Constitution of the Republic of Ghana of 1992 failed to domesticate the provisions of paragraph (d) article 14(3) of the ICCPR on legal aid among the defined due process rights of accused persons.⁷¹

⁶⁶ See, e.g., Newman "Human Rights and Constitutional Rights: Harmony and Dissonance" 2002-2003 *Stan. L. Rev.* 1863 1881.

⁶⁷ See, *Id* at 1891.

⁶⁸ See, e.g., Taylor "The Scope of Human Rights in Ghana" Review of Ghana Law" 1993-95 *RGL* 84 94. Specifically, Ghana Constitution, art 1(2) according to which "[the] Constitution shall be the supreme law of Ghana, and any other law found to be inconsistent with any provision of this constitution, shall to be extent of the inconsistency be void."

⁶⁹ See, e.g., Mutungi "Basic Rights – The Constitutionalization of Basic Rights" 2001 *KECKRC* 4. <http://www.commonlii.org/ke/other/KECKRC/2001/4.html> (Accessed 06-08-2016).

⁷⁰ Ashworth & Horder *Principles of Criminal Law* (2013) 3, referring Ashworth "Is the Criminal Law a Lost Cause?" 2000 *LQR* 225.

⁷¹ See note 30 above.

Despite the exclusion of the right to free legal assistance from the scope of fair trial rights in Ghana, the Constitution allows for incorporation of all fundamental human rights and freedoms recognised and applied in other democracies. According to article 33 of the Constitution:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.⁷²

A case can therefore be made for incorporating the right of indigent suspects and accused persons to free legal assistance, as part of the spectrum of due process rights in Ghana. The Supreme Court in *Adjei-Ampofo v. Attorney-General*⁷³ clearly delineated the scope of enforceable human rights in Ghana under article 33(5). While interpreting the aforementioned provision, the Court held that:

reference to ‘others’ referred to in article 33(5) could only be those rights and freedoms that have crystallized into widely or generally accepted rights, duties, declarations and guarantees through treaties, conventions, international or regional accords, norms and usages.⁷⁴

Even though the due process rights of suspects and accused persons could include a right to free legal assistance by virtue of article 33(5), this assumption is not by itself definitive. In practice, judicial pronouncement on the matter may be necessary to give the force of law to a constitutional right to free legal assistance. This matter has not been a subject of adjudication by the courts.

It is however important to note that an implicit rendition of the right to state-funded counsel is unconventionally embodied in the text of article 294 of the Constitution. The provision figures under Chapter 26 of the Constitution entitled ‘Miscellaneous’ and provides as follows:

For purposes of enforcing any provisions of the Constitution, a person is entitled to legal aid in connection with any proceedings relating to this Constitution if he has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.⁷⁵

By this provision, the Constitution guarantees a right to state-funded counsel to indigent persons involved in constitutional proceedings. The provision does not however appear to fully ratify the international right to free legal assistance in all cases of indigence.⁷⁶ Though guaranteeing the provision of legal aid to indigent parties in legal proceedings, the provision does not expressly guarantee that such legal services are indeed free. It simply defines legal aid as “consisting of representation by a lawyer, including all such assistance as is given by

⁷² See Ghana Constitution, art 33(5).

⁷³ 2003-2004 1 SCGLR 411 418, *per* Sophia Akuffo JSC.

⁷⁴ *Ibid.*

⁷⁵ Clause 1.

⁷⁶ See also, United Nations Office on Drugs and Crime *Access to Legal Aid in Criminal Justice Systems in Africa – Survey Report* (2011) 6, stating that the Ghana Constitution’s reference to the right to legal aid is not clear.

a lawyer, in the steps preliminary or incidental to any proceedings, arriving at, or giving effect to a compromise to avoid or to bring to an end any proceedings”.⁷⁷ It does not guarantee in any way that legal aid shall be provided ‘at no cost’ or that legal aid shall be ‘free’. In fact, as discussed below,⁷⁸ the public schemes of legal aid instituted to implement the right to state-funded counsel and regulate the implementation of legal aid in constitutional proceedings involve some levels of financial commitments on the part of the beneficiaries.

6.4.2 A Constitutional Right to State-Funded Counsel in Criminal Proceedings in

Article 294

Article 294(1) clearly provides for a constitutional right to state-funded legal assistance to all indigent persons who institute judicial proceedings for enforcing any provision in the Constitution.⁷⁹ In general terms, it provides institutional support for the exercise of the civic right of every person in Ghana to institute an action in the court for purposes of enforcing of the Constitution itself.⁸⁰ Unambiguously, the purpose of the provision is to guarantee a constitutional right to legal aid in constitutional proceedings only. Indeed, clause 3 of article 294 clearly underlines the distinction between the constitutional right to legal aid in constitutional proceedings and legal aid guarantees in non-constitutional matters. The provision empowers Parliament to separately enact laws regulating legal aid in non-constitutional matters. Presumably, therefore, no constitutional right to legal aid exists in Ghana, except in constitutional proceedings.

Unquestionably, the language of the provision does not make any direct reference to a right to state-funded counsel in criminal proceedings. A strong argument is however made for the recognition of a constitutional right to state-funded counsel in criminal proceedings from the provisions of article 294(1).⁸¹ Proceedings relating to enforcement of constitutional rights have been defined to include actions instituted to enforce due process rights of accused and criminal suspects under the Constitution.⁸² When article 294(1) is read in the context of constitutional

⁷⁷ Ghana Constitution, art 294(4).

⁷⁸ See parts 6.5.1 and 6.5.2 below.

⁷⁹ *Amidu 1992 RGL* 162.

⁸⁰ See Ghana Constitution, art 2(1) granting the right to any person in Ghana to institute legal actions for the enforcement of the provisions of the Constitution.

⁸¹ See *Amidu 1992 RGL* generally.

⁸² *Id* at 162; Ghana Constitution, arts 14 & 19.

rights, it implies that indigent suspects and accused persons have a constitutional right to legal aid for purposes of enforcing their constitutional rights in criminal proceedings.⁸³

The Constitution entrusts the regulation of the constitutional right to state-funded counsel to Parliament.⁸⁴ The Parliament of Ghana has discharged its mandate of securing the implementation of the right to state-funded counsel under two publicly funded schemes of legal aid in force in the country. These include the Court-Appointed Counsel Scheme and the Ghana Legal Aid Scheme.⁸⁵ Under both schemes, assignment of state-funded counsel to indigent parties in proceedings instituted for the enforcement of constitutional rights appears almost automatic. The only requirement is proof that the beneficiary of the right is a person who has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings. Under the Court-Appointed Counsel Scheme, this determination is to be made by the judge or magistrate⁸⁶ while the Legal Aid Board assumes the same responsibility under the Ghana Legal Aid Scheme.⁸⁷ Further, the invocation of the right under the Legal Aid Scheme requires an application to the Legal Aid Board subject to payment of a statutory fee. In contrast, the Court-Appointed Counsel Scheme contemplates assignment of legal assistance subject to a financial contribution by the beneficiary. Although the provision was enacted two decades ago, article 294(1) of the Constitution is yet to find any judicial interpretation. Furthermore, the courts in Ghana have not interpreted article 294(1) to guarantee a constitutional right to free legal assistance for indigent suspects and accused persons in criminal proceedings. The implementation of article 294(1) *vis-à-vis* the stark reality of widespread cases of self-representation in criminal trials in Ghana, has also not been judicially considered.

6.5 LEGAL AID SCHEMES IN CRIMINAL PROCEEDINGS IN GHANA

The Court-Assigned Counsel Scheme was established under the Courts Act and the Ghana Legal Aid Scheme was brought into being by the Legal Aid Scheme Act. These schemes constitute the two comprehensive forms of institutional assistance available to indigent suspects of crime and accused persons involved in criminal proceedings. The courts are tasked to assign state-funded counsel to all qualifying indigent and unrepresented persons facing criminal prosecutions. As an alternative, financially deprived suspects and accused persons,

⁸³ Amidu 1992 *RGL* 174.

⁸⁴ Ghana Constitution, art 294(2).

⁸⁵ Discussed below, see 6.5.1 and 6.5.2.

⁸⁶ Courts Act (Act 459 of 1993), s 114(3).

⁸⁷ Legal Aid Scheme Act (Act 542 of 1997) s 2(1).

may apply for legal assistance under the Legal Aid Scheme Act.⁸⁸ Under both schemes, legal aid is defined to mean:

Representation by a lawyer, including all such assistance as is given by a lawyer, in the steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or to bring to an end any proceedings.⁸⁹

Consequently, the services provided under these schemes are not free or devoid of cost. Legal aid under both schemes covers the entire proceedings. In the first place, suspects of crime in all pre-trial proceedings may qualify for legal aid. Any indigent person who is arrested, restricted or detained regarding a criminal offence, may be given legal assistance in all pre-trial proceedings at the expense of the State. Secondly, legal aid may be provided to accused persons formally standing trial before the court. In practice, the two legal aid schemes apply diverse criteria for determining indigence and for granting legal aid. There is no uniformity among the standards for qualification and grant of legal aid in criminal matters generally. This implementation strategy of the law on legal aid in Ghana is much different from the approaches adopted by countries such as the United States and South Africa, which set very clear standards for qualification for free legal assistance.⁹⁰

6.5.1 The Court-Assigned Counsel Scheme (CACS)

6.5.1.1 Operations of the CACS

The Courts Act of Ghana sets up the hierarchy of courts and determines their respective jurisdictions. It also empowers the various courts, under the legal system, to assign lawyers by way of legal aid, to unrepresented parties before them, where the interests of justice so require. The CACS applies generally to all private litigants in both civil and criminal cases. In criminal proceedings, the scheme applies to both suspects of crime and accused persons. According to section 114 of the Courts Act, the Supreme Court, the Court of Appeal, High Court, and the Regional tribunals of Ghana have authority to assign a lawyer by way of legal aid to any suspect of crime or accused person who is unable to hire counsel and who is facing criminal prosecution

⁸⁸ *Ibid.*

⁸⁹ See, Ghana Constitution, art 294(4), quoted above as re-enacted by the Legal Aid Scheme Act, s 2(3) and the Courts Act, s 114(4).

⁹⁰ In the United States for example, free legal representation is assigned to indigent accused persons in all cases, including misdemeanours cases where the accused person standing trial faces a penalty of a term of imprisonment however short. See *Argersinger v. Hamlin* 1972 407 U.S. 25. South Africa adopts the 'substantial injustice' test which applies three-factor test in determining whether or not to assign counsel in trials of indigent accused persons. Basically these have been enumerated to include the complexity of the case, the level of education and indigence of the accused, as well as the severity of the punishment or sentence. See Schwikkard, *Chapter 1 – A Constitutional Revolution in South Africa Criminal Procedure? In Paul Roberts and Jill Hunter (Eds) Criminal Evidence and Human Rights: Reimagining Common Law Traditions* (2012).

before the Court or Tribunal.⁹¹ Subject to the approval of the Chief Justice, the lower courts, consisting of the District Courts and the Circuit Courts, may also assign a lawyer to indigent suspects and accused persons before them.⁹² This procedural requirement presents another bottleneck in a judicial administrative system that is already engulfed in operational bureaucracies. The majority of criminal cases in the country are brought before and handled by the District and Circuit Courts. A great number of accused persons on trial before these courts appear without legal representation. It is onerous to require Circuit Court judges and District Magistrates to refer every single decision to assign legal aid to an indigent accused person to the Chief Justice for approval, considering the sheer volume of cases involving unrepresented accused persons appearing before them.

Legal aid in this context consists of representation by a lawyer. Lawyers assigned under the CACS do not render legal services *pro bono*. They are paid legal fees from the Consolidated Fund,⁹³ as determined by the Minister of Justice, acting in consultation with the Chief Justice.⁹⁴ It is thus a state-funded scheme. The CACS is essentially a contributory criminal legal aid. Even though enacted to assist the indigent, it contemplates a form of financial contribution from all persons who are granted legal aid by way of assignment of state-funded counsel. It is therefore by design not a wholly free scheme of legal aid.⁹⁵

Assignment of legal representation by the various courts and tribunals is subject to certain standards that are determined by a 'means' test and a 'merit' test. By the 'means' test, the CACS provides legal aid to accused persons who "are financially unable to obtain the services of a lawyer".⁹⁶ Indigence in this context is widely defined. It is measured based on the economic status and financial ability of the accused to secure legal services at the market value. The financial implication for an offence for which an accused person stands trial is determined by the nature of that offence, and the concomitant nature of the proceedings against him/her. The GBA scale of fees, which details the certified legal fees for any particular proceeding, provides

⁹¹ Courts Act, s 114(1).

⁹² *Id.* s 114(2).

⁹³ Defined by Ghana Constitution, art 176(1). It refers to a Fund containing "all revenues or moneys raised or received for the purposes of, and on behalf of the Government and other revenues raised or received in trust, for or on behalf of the Government."

⁹⁴ Courts Act, s 114(5).

⁹⁵ *Id.* s 114(7) (b) & (c).

⁹⁶ *Id.* s 114 (1).

a valuable guide to determining whether an accused person is in the position to personally afford counsel.⁹⁷

The 'merit' test is based on a judicial assessment of the need to assign counsel in any particular case. The law grants discretion to the judge or magistrate to assign counsel only when in his/her opinion, it is in the interests of justice that the indigent party should have legal aid.⁹⁸ The law or courts have not established the factors that must be taken into account in determining the 'interests of justice'. Suffice it to state however, that this factor aligns with the international policy under the ICCPR, which applies a 'merit' test in qualifying indigent persons for free legal assistance.⁹⁹ The purpose of the 'merit test' is to generally ensure "a correct identification of such cases where injustice would arise if legal aid was refused".¹⁰⁰ The courts are vested with wide discretion in applying the 'interest of justice' test. The language of section 114 of the Courts Act on legal aid imposes a permissive duty on the judge, who 'may' only assign counsel within the wide parameters of his/her sole discretion. It is therefore expected that in certain instances, legal aid may be refused even in cases involving difficult points of law and/or facts.¹⁰¹ Unfortunately, there is lack of jurisprudence on the subject matter in Ghana and the text of the law remains the sole reference on the subject.

The reason for subjecting the substantive right to state-funded counsel in cases of indigence to an exercise of judicial discretion by the judge is mainly financial. There is an almost infeasible truth expressed in the country's inability to provide counsel for every deserving indigent suspect or accused person. In fact, there is a limit to both the number of lawyers who can provide legal assistance and the funds that the state can reasonably be expected to make available to sustain this scheme of legal aid. Therefore, guaranteeing an unqualified right to legal representation for all indigent accused persons would certainly paralyse an already overburdened criminal justice system. The legal position in Ghana therefore rejects the view that the state is inherently saddled with responsibility to afford counsel to every accused person who cannot provide one for him/herself. Another underlying justification for the strategic

⁹⁷ Note 14 above.

⁹⁸ Courts Act, s 114(1) & (2).

⁹⁹ See 6.3.2 above.

¹⁰⁰ Sanders & Young *Criminal Justice* 494. Note however the author's contrary view, stating that it "cannot be safely predicted in advance which cases might lead to injustice, if representation was not provided. Good legal representation can lead to the emergence of previously hidden aspects of the case, render problematic the prosecution's version of events, and raise questions about the integrity of the procedures followed." *Id.* at 496.

¹⁰¹ *Id.* at 494, stating a similar observation on the scheme of legal aid in England.

delimitation of legal aid alludes to the fact that legal representation cannot be said to be a necessary condition for the effective defence of every criminal charge.

In the end, the leading objective of the CACS must be to ensure that injustice does not arise through an accused being prevented, by lack of financial means, from effectively defending him/herself before the court. The overriding standard must be that in all cases, the accused person must be given a reasonable opportunity to bring forward and argue all the matters which may constitute a defence to a charge, or which can mitigate the gravity of the offence.¹⁰²

6.5.1.2 Practical Problems Associated with the Operations of the CACS

Generally, the CACS has not been effectively implemented. Since its inception in 1993, the Scheme has not been efficiently used to assist the great number of indigent suspects and accused persons who have no financial means of accessing legal services.¹⁰³ The real problem is an administrative lapse in the process of implementing the Scheme. The Courts Act mandates the Minister of Justice to make regulations for the full operation of the CACS in consultation with the Chief Justice. This legislative instrument is intended to postulate modalities such as (a) the conditions for the grant of legal aid; (b) the assessment of disposable capital, income or property for the purposes of contribution towards legal aid; (c) the extent of contribution to be made by the beneficiary of legal aid; as well as (d) the right to and nature of legal advice.¹⁰⁴ Unfortunately, this statutory directive is yet to be carried through.¹⁰⁵ Presently, courts do assign counsel to deserving indigent and unrepresented accused persons but on a very small scale. This limited practice is in essence more of a call to render *pro bono* service than it is about implementing the CACS.

There are other reasons to account for the non-performing status of the CACS in addition to the administrative lapse. A serious concern exists regarding a general sense of dissatisfaction with the quality of legal services rendered by some lawyers assigned to provide legal aid in Ghana.¹⁰⁶ Not much attention has been paid to the quality of legal services rendered by court-appointed counsel to indigent accused persons. There are no institutional mechanisms to evaluate the efficacy of their assistance to beneficiaries. According to a survey report compiled

¹⁰² See, e.g., Sanders & Young *Criminal* 494-495.

¹⁰³ Amidu 1992 RGL 176.

¹⁰⁴ Courts Act, s 114(6).

¹⁰⁵ *Id.*, ss 114(6) & (7).

¹⁰⁶ See observations by Dotse JSC in *Zainabu Naske Bako-Alhassan v. Attorney-General* [24/04/2012] Suit No. J1/22/2012.

in 2011 on Access to Legal Aid in Criminal Justice Systems in Africa,¹⁰⁷ “[le]ss than 20% of cases assigned to lawyers are successfully completed every year” in Ghana. The study also found that cases assigned to lawyers for legal assistance under the CACS are generally not given the necessary attention. There is equally no proper supervision to ensure effective delivery.¹⁰⁸ As a result, indigent accused persons confronted with a choice between an unavailable and uncaring counsel and self-representation, would opt for the latter as the only real alternative to legal representation. The Bench in Ghana also appears to have generally dampened the rigours of the statutory power to assign counsel to deserving indigent accused persons. The courts seldom exercise their power to appoint counsel for indigent accused persons in the interest of fair trial and justice as the law requires.¹⁰⁹ This attitude of the courts may however be logically defended by the lack of the long awaited regulations needed to fully implement the CACS. Consequently, many poor suspects and accused persons in Ghana continue to personally defend their cause in criminal proceedings. The only exception concerns cases where the accused are charged with murder.¹¹⁰ By the practice of the courts, a person indicted for murder is automatically assigned counsel.¹¹¹

A clarion call made by Taylor J, over three decades ago to stimulate the courts’ exercise of their power to assign counsel to indigent accused persons in deserving cases, remains relevant today. As he stated, it is about time Circuit Court Judges and District Court Magistrates who adjudicate the majority of criminal cases turn their attention to the provisions of section 114 of the Courts Act in order to avoid unnecessary injustices, which have become all too frequent in the operations of the criminal law.¹¹² He held that:

In order to safeguard the liberty of citizens, it was essential that indigent and illiterate persons, ignorant of the legal process and accused of serious crimes carrying harsh penalties, were not left to their own devices but assigned counsel by way of legal aid.¹¹³

Finally, the statutory directive to exert financial contributions on indigent accused persons who have been assigned legal representation may rather stifle the achievement of the noble cause of

¹⁰⁷ See United Nations Office on Drugs and Crime *Access to Legal Aid* 13, referring to the National Development Planning Commission, Government of Ghana, “Poverty Reduction Strategy Paper – 2006, Annual Progress Report, IMF Country Report No. 09/237 (Washington D.C., International Monetary Fund, 2009, www.imf.org/external/pubs/ft/scr/2009/cr09237.pdf. (Accessed 26-08-2016). This is compared to the estimated percentage of legal aid cases completed in 2006, which is about 18%.

¹⁰⁸ *Ibid.*

¹⁰⁹ Amidu 1992 RGL 173.

¹¹⁰ *Id* at 159.

¹¹¹ *Id* at 167

¹¹² Taylor J in *Kpekero v. Republic* 1980 GLR 580 588, *obiter*.

¹¹³ *Ibid.*

the CACS.¹¹⁴ Suspects or accused persons who are assigned counsel also pay the fees prescribed for filing court documents and processes, and for preparing appeal records, in addition to the financial contributions. The CACS remains in essence a scheme of legal aid that is not free. If meaning is to be given to the provision of legal aid within the meaning of article 14 of the ICCPR, then legal steps must be taken to ensure that legal assistance offered under the CACS is provided at no cost to the beneficiary who is unable to pay. It is very important at this stage of the development of the country to align the Ghanaian legal position and court practices with its obligations under international law.

6.5.2 The Ghana Legal Aid Scheme (GLAS)

6.5.2.1 *Nature and Operations of the GLAS*

The Ghana Legal Aid Scheme is a public service body within the country's justice delivery system.¹¹⁵ It is established under the Legal Aid Scheme Act, alongside the CACS, to ensure effective delivery of legal aid to indigent persons both in civil and criminal proceedings in Ghana.¹¹⁶ More specifically, the GLAS is tasked with providing legal assistance to indigent litigants and all such persons who institute proceedings for the prosecution or defence of their rights under the Constitution of Ghana.¹¹⁷ The GLAS is generally intended to assist the poor and downtrodden in Ghana's society. It seeks to ensure that this category of persons, are not denied justice simply because they are unable to personally afford counsel of their choice.¹¹⁸

In criminal proceedings, the GLAS aims to protect indigent suspects and accused persons against the powerful and highly resourced office of the Prosecution represented by the Attorney-General.¹¹⁹ The implementation of the GLAS is fully entrusted to the authority and direction of the Board of Legal Aid, which is tasked with assigning legal aid to deserving indigent persons facing criminal proceedings. Unfortunately, legal aid in criminal trials under the GLAS is a privilege and not a right. Suspects and accused persons have to make an extra-judicial application for legal aid to the Board of Legal Aid, which is vested with the discretion to either grant or refuse an application for legal assistance. An application for legal aid to the

¹¹⁴ Courts Act, s 114(7) (b) & (c).

¹¹⁵ Welcome to Legal Aid Scheme, Ghana. <http://www.legalaidghana.org/web/> (Accessed 26-09-2016).

¹¹⁶ See preamble.

¹¹⁷ Welcome to Legal Aid Scheme, Ghana. <http://www.legalaidghana.org/web/> (Accessed 26-09-2016).

¹¹⁸ *Republic v. Lukman* 2003-2005 1 GLR 125 130.

¹¹⁹ *Id* at 127.

Board of Legal Aid attracts a statutory fee currently pegged at GH¢5.00.¹²⁰ The GLAS, unlike the CACS, is a non-contributory legal aid scheme. In addition to benefitting from free legal assistance of a lawyer, any accused person who qualifies for legal aid under the GLAS is also exempted from paying the fees prescribed for filing court documents and processes, and for preparing records of appeal.¹²¹ The GLAS pays all the expenses related to the case of every accused who qualifies for legal aid.¹²² The case may however be different in civil proceedings; the Board has the discretion to recover any of the expenses incurred on behalf of a beneficiary following an award by the court.¹²³

The GLAS identifies two categories of suspects or accused persons who may be entitled to legal aid. It applies two key alternative criteria in setting up the qualification thresholds for legal aid.¹²⁴ It applies a 'means' test regarding the first category of beneficiaries. These beneficiaries include suspects or accused persons who earn the minimum wage or less, and who desire to be represented by counsel.¹²⁵ The Scheme sets the threshold of indigence at the daily minimum wage. As a result, all persons arrested, detained or accused of a criminal offence and who earn below the minimum wage as determined from time to time by the State, may be granted legal aid for purposes of conducting their defence in criminal trials. The present daily minimum wage in Ghana is GH¢8.00, the approximate equivalent of \$2.00, which makes a total monthly minimum wage of GH¢240, being the approximate equivalent of \$60. By this criterion, legal aid under the GLAS covers all indigent persons irrespective of the nature of the offence charged against them, or the severity of the punishment they are likely to suffer upon conviction. Generally, the grant of legal aid regarding this category of accused persons is determined on a case-by-case basis and subject to the approval of the accused person's application for legal aid by a Selection Committee.¹²⁶ Persons charged with capital offences and first-degree felonies are however given a special dispensation. Under the GLAS, all accused persons charged with offences punishable by death or life imprisonment automatically

¹²⁰ See Legal Aid Scheme Act, s 24(5) which requires payment of a fee by applicants. It is pegged at the equivalent of \$1.25 as at the time of writing.

¹²¹ *Id*, s 25(1).

¹²² *Id*, s 25(2).

¹²³ *Id*, s 25(3).

¹²⁴ *Id*, s 2(2).

¹²⁵ *Id*, s 2(2) (a) (i).

¹²⁶ They are established by the Regional Legal Aid Committee in each of the 10 regions in Ghana. The Selection Committee consists of any three members of the Regional Committee and is responsible for considering and approving applications for legal aid. See *id*, s 15.

qualify for free legal assistance.¹²⁷ The seriousness of the punishment that they stand to suffer gives them certain special considerations. They technically retain a full and unqualified statutory right to free state-funded counsel. They are also exempt from payment of the prescribed application fee.¹²⁸

Unfortunately, setting the minimum wage as threshold for indigence still leaves quite a sizeable number of the population outside the scope of protection. There are individuals who earn the minimum wage but are unable to afford the high cost of legal services.¹²⁹ Indeed, even the monthly minimum wage in Ghana of GH¢240 falls far below the GBA approved fees for initial consultations with lawyers in criminal matters.¹³⁰ As legal services remain expensive, accused persons who are not deemed sufficiently indigent to entitle them to free legal aid, but who are unable to afford legal services, will continue to appear unrepresented in criminal proceedings.¹³¹ The standard of determining indigence remains one of the key causes of the high rate of self-representation in criminal trials in Ghana today. The law in Ghana may take a cue from the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems in remedying the weakness of the 'means' test. Guideline 1 provides, to that effect, that:

Whenever States apply a means test to determine eligibility for legal aid, they should ensure that persons whose means exceed the limits of the means test who cannot afford, or do not have access to a lawyer in situations where legal aid would otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance.¹³²

This concern with the 'means' test seems to have influenced the enactment of the second benchmark for qualification for legal aid under the GLAS, referred to as the 'discretion test'. This test in effect defines the second category of suspects and accused persons entitled to legal aid. This criterion provides an expansive coverage by simply vesting the Legal Aid Board with wide discretion to provide legal assistance to any group of persons who "in the opinion of the Board, require legal aid".¹³³ In this regard, the Board retains and exercises total discretion in deciding which suspects of crimes, or which accused persons should receive legal aid. There are no legal instruments or regulations guiding the exercise of this discretion.

¹²⁷ Legal Aid Scheme Act, s 24(2). These offences include treasonable offences and murder punishable by death, as well as manslaughter, which is punishable by life imprisonment.

¹²⁸ *Id*, s 24(3).

¹²⁹ United Nations Office on Drugs and Crime *Access to Legal Aid* 20.

¹³⁰ See note 16 above.

¹³¹ See notes 17 & 18 above. See also Harvey *Law and Social Change in Ghana* (2015) 192-193, indicating also that indigent accused persons have no assistance, except sometimes benefiting from the charitable works of individual lawyers.

¹³² Para 41(a).

¹³³ Legal Aid Scheme Act, s 2(2) (a) (ii).

It is worth noting however that the power of the Board of Legal Aid is expected to be exercised in compliance with the constitutional guidelines on the exercise of discretion in Ghana. The Board is required to be fair and candid in exercising a discretionary power. It is equally enjoined to ensure that the exercise of the power is not arbitrary, capricious, or biased by way of resentment, prejudice or personal dislike.¹³⁴ Of note, the process of vetting legal aid applications by Selection Committees of the Board of Legal Aid is insufficiently regulated. In addition to determining the threshold of indigence in this context, the guidelines for approval or rejection of applications are unknown and rest purely within the discretion of the Committee.¹³⁵ The entire process of considering legal aid applications therefore lacks the needed transparency.

6.5.2.2 Challenges Faced by the GLAS

The GLAS has been largely ineffective and fraught with practical and operational difficulties. It generally takes little commendation, beyond the letters of its mission statement and enacting provisions. The GLAS is funded by monies provided by Parliament, donations, gifts and fees paid by applicants.¹³⁶ Unfortunately, the problem of chronic underfunding has paralysed the efficiency and effective operations of the scheme.¹³⁷ The GLAS is poorly funded and its budget is woefully inadequate to sustain its operations.

Further, the GLAS works with legal personnel consisting of selected legal practitioners.¹³⁸ Every lawyer assigned to provide legal aid under the scheme is entitled to remuneration as the Board may determine from time to time. Unfortunately, the GLAS has been unable to fully settle its financial obligations to legal practitioners selected to work for it.¹³⁹ The magnitude of cases involving self-represented illiterate and indigent accused persons pending before the various courts, across the length and breadth of the country, attests to the financial struggles and failings of the Scheme. The GLAS is understaffed and ill equipped. There is a shortage of

¹³⁴ Ghana Constitution, art 296.

¹³⁵ Legal Aid Scheme Act, s 15. The GLAS appoints a Selection Committee as being responsible for considering and approving applications for legal aid. See also Amidu 1992 RGL 180: "The cumbersome process and requirements involved do not make it useful to many indigent arrested, restricted, detained or accused persons as it is dependent on an extra judicial application to a Board by the affected person. His case may have been disposed of before it is granted"

¹³⁶ Legal Aid Scheme Act, s 26.

¹³⁷ See Latham & Watkins 2015 *The Pro Bono Institute and Latham and Watkins LL.P* 230, fn. 14.

¹³⁸ Legal Aid Scheme Act, s 22(1). The personnel is selected by the Bar Association of each region in Ghana, who shall subject to approval by the Board of legal aid, make their services available to the scheme. See *id*, s 22(3).

¹³⁹ Legal Aid Scheme Act, s 22(4). See also <http://www.legalaidghana.org/web/index.php/news/latest-news> (Accessed 13-02-16)).

experienced lawyers working for the Scheme, generally due to low remuneration and poor access to legal aid offices.¹⁴⁰ The number of suspects and accused persons who require legal aid has overwhelmed the Scheme, which already lacks the systems and resources to ensure adequate legal representation for the indigent. As of the year 2018, the GLAS could only boast of a paltry number of twenty-three lawyers (23) serving a whole country of over twenty-eight million people, both in civil and criminal cases.¹⁴¹ There is therefore a relatively small number of lawyers in the country, to attend to the needs of the growing population.¹⁴²

The GLAS intends to consolidate a pool of lawyers across the country to work as its legal personnel and provide legal aid to the poor. The National Service Board¹⁴³ is mandated to assign to the GLAS, a number of lawyers who will complete their national service with the Scheme. In addition, the Bar Association in each region is expected to select lawyers who shall make their services available to the scheme.¹⁴⁴ It is obvious that this plan, under the GLAS, has not yet materialised, twenty years after the enactment of the Legal Aid Scheme Act. As a result, many suspects and accused persons who would otherwise benefit from legal aid appear unrepresented in criminal proceedings.

It is therefore not surprising that in the year 2012, a Ghanaian citizen issued a writ of summons in the Supreme Court of Ghana, asking for a formal recognition of the legal status of laypersons in representing him/herself in court.¹⁴⁵ She requested that the Court gives due recognition to the right of private individuals who are non-professional lawyers to access the law courts in all manner of cases and to have equal treatment with lawyers, when conducting their own cases. She further sought a formalisation of the rights of unrepresented litigants such that the rules of procedure do not create any hardship and/or prejudice against this category of litigants. Her reliefs also included the simplification and streamlining of the rules of procedure to help such self-represented persons prosecute their cases effectively, even if not professionally.¹⁴⁶

Much to the chagrin of the Plaintiff and all persons unable to afford counsel and desirous to represent themselves in legal proceedings before the courts, the Supreme Court dismissed her

¹⁴⁰ Generally, see Morhe 2012 *CLB* 105.

¹⁴¹ <https://www.amnesty.org/en/countries/africa/ghana/report-ghana/> (Accessed 24-02-2018). They were 14 in 2013. See Access to Justice in Africa: The Experience of the Legal Aid Scheme in Ghana. <http://www.leitnercenter.org/news/94>. (Accessed 25-08-2016).

¹⁴² United Nations Office on Drugs and Crime *Access to Legal Aid in Criminal Justice* 11.

¹⁴³ Established under the Ghana National Service Act (No.426 of 1980) in charge of control and management of the National Service Scheme.

¹⁴⁴ Legal Aid Scheme Act, s 22.

¹⁴⁵ *Zainabu Naske Bako-Alhassan v. Attorney-General*, (unreported). see note 106 above.

¹⁴⁶ *Ibid.*

claims. The Court held that the legal system in Ghana could not have a pluralistic or dualist system of procedure for self-represented and represented litigants. In brief, there can be no provision for special concessions for self-represented non-professional litigants within the general framework of the rules of procedure. Dotse JSC observed in his introductory remarks that the suit was, in a way, a condemnation of the legal aid system in Ghana. He noted that the GLAS appears not to have any regulatory framework to ensure that persons who benefit from legal aid are given competent legal advice and service. The Supreme Court recommended a review of the Legal Aid Scheme Act to ensure that the conduct of legal aid cases is monitored by authorities of the Scheme. This prevents situations where accused persons would desire to personally handle their briefs in court, rather than through counsel assigned under legal aid. The Supreme Court reiterated the call for the Ghana Bar Association to consider institutionalising a mandatory *pro bono* legal scheme for indigent litigants. There is no formalised *pro bono* system in Ghana and few lawyers actually provide *pro bono* services in Ghana.¹⁴⁷

A few civil society organisations also volunteer to provide free legal assistance to indigent accused persons. Though their contributions are very much lauded, these private organisations generally face financial and logistical challenges in meeting the growing demand for free legal services in criminal matters in the country.¹⁴⁸ The way out of this impasse is government's rededication to the values of fair trial and criminal justice for all indigent accused persons.

6.6 CONCLUSION

Self-representation in criminal trials in Ghana is largely motivated by indigence. It most commonly involves accused persons and criminal suspects who do not have the financial means to afford legal representation and yet do not have or cannot access a claim right to state-funded counsel. Ghana has long ratified the relevant international provisions on the assignment of free legal aid to accused persons who do not have the financial means to secure legal services. The most important provision is paragraph (d) of article 14(3) under the ICCPR. However, the domestic incorporation and implementation of this right has been problematic and the existing

¹⁴⁷ See Latham & Watkins 2015 *The Pro Bono Institute and Latham and Watkins LL.P* 2015 231.

¹⁴⁸ A few include, Help Law Ghana, Legal Resource Center Women's Initiative for Self-Empowerment, International Federation of Women Lawyers, Ark Foundation, Access to Justice under the African Center for Development and Policy, *Pro Bono Lawyers Network*.

schemes of legal aid have been fraught with various operational, logistical and financial challenges.

Great opportunities do exist to reinforce the general scheme of legal aid in Ghana in order to redress the degenerating trends of involuntary self-representation arising from the sole factor of poverty of the accused or criminal suspects. The first crucial step falls on the country to take a bold step for the full implementation of paragraph (d) of article 14(3) regarding the provision of free legal assistance to all accused persons who do not have the financial means to secure legal representation. The remaining remedial measures must take the form of policy changes and financial commitments towards revamping the operations of legal aid under the current schemes of legal aid.



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PART 3

PROCEDURAL RIGHTS OF SELF-REPRESENTED ACCUSED PERSONS IN THE PRE-TRIAL PHASE, PROFESSIONAL AND ETHICAL OBLIGATIONS OF PUBLIC PROSECUTORS, AND JUDICIAL ENGAGEMENT IN PROCEEDINGS INVOLVING SELF- REPRESENTED ACCUSED PERSONS



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CHAPTER 7

DUE PROCESS RIGHTS OF SELF-REPRESENTED CRIMINAL SUSPECTS AND ACCUSED PERSONS IN THE PRE-TRIAL PHASE OF CRIMINAL PROCEEDINGS IN GHANA

7.1 INTRODUCTION

The criminal justice system of Ghana adheres to the constitutional principles of due process and rule of law. It attaches great importance to the concept of fair trial through compliance with the cluster of rights enacted for the protection of suspects and accused persons. The formal validity of criminal trials rests on compliance with these due process requirements.¹ In particular, the pre-trial stage of the criminal proceedings remains a complex procedural process, which involves the interplay of a broad range of due process rights. These rights protect suspects and accused persons in extra-judicial investigative procedures and pre-trial proceedings. This chapter analyses the system of compliance with, and the state of realisation of, pre-trial rights of self-represented suspects and accused persons. The focus is essentially on those rights that play a key role in securing the protection of suspects and accused persons in pre-trial proceedings, and which require legal assistance for their effective realisation and enforcement. In this chapter, the pre-trial rights to counsel and to silence, the right to information on charges, the pre-trial right to bail, and the right to adequate time and facilities for the preparation of a defence are discussed.

7.2 PRE-TRIAL INVESTIGATION RIGHTS

Criminal prosecutions in Ghana are borne out of facts and evidence elicited by state investigators and law enforcement agencies, in furtherance of their statutory duty to investigate crimes reported to them. There are a number of law enforcement agencies with powers of investigations and/or arrest for violation of specific laws applicable within their scope of operations. The Ghana Police Service (GPS) is the most important investigative body in matters of criminal prosecutions. Its mandate to investigate crimes is inferred from its statutory function to prevent and detect crimes, as well as to apprehend offenders, among other duties.²

¹ See, e.g., Gbadegbe JSC in *Gabrielle Joanne v. The Republic* 2012 GMJ 1 53.

² The mandate is inferred from the duty to prevent and detect crimes and also apprehend offenders, among other duties. See Ghana Police Service Act (No. 350 of 1970), s 1(1). The Police operates as a key adjunct institution

The Criminal Investigative Department (CID) is the division of the GPS in charge of crime investigations. The Bureau of National Investigations (BNI) and the Economic and Organised Crime Office (EOCO) are also specialised state agencies with powers to investigate crimes falling in their specific jurisdictions. They focus on state and national security issues, and on economic and organised crimes respectively.³ In the discharge of their investigative duties in criminal matters, the BNI and EOCO are vested with the same rights, powers and protections as conferred on police officers by the laws of Ghana.⁴ The pre-trial right to counsel applies to all these state investigative agencies within the criminal justice administration.

Criminal investigation officers are vested with powers to interrogate any persons, including suspects and accused persons, in order to obtain information for purposes of criminal investigations.⁵ The procedure for interrogation is subject to certain legal standards for the protection of suspects and accused persons, which, in addition to other rights, secure the fairness of the pre-trial process. For any person subject to criminal interrogation regarding an alleged crime, the law guarantees a procedural prerogative to be informed of the rights to remain silent and to the assistance of an attorney, either retained or appointed by the state.⁶ These rights jointly provide the necessary safeguards for the protection of the constitutional right to be presumed innocent and of the right against self-incrimination. The objective of this procedure is to ensure that suspects and accused persons are aware and have a real understanding of these pre-trial rights, as well as their attendant privileges. The expectation of the criminal justice system is to have these persons better informed to intelligently exercise these rights, while creating an awareness of the consequences of foregoing them.⁷ In cases where the suspect or accused person is not represented by counsel, the main concern borders on the adequacy of the procedural mechanisms to enforce these rights. One other issue that is of concern is the question of 'intelligibility' of a waiver of these rights, when it is made by an accused person or suspect acting without the guidance of a lawyer.

to the office of the Prosecution in the administration of criminal justice in Ghana. See Amissah *Criminal Procedure in Ghana* (1982) 30.

³ See, Securities and Intelligence Act (Act 526 of 1996), s 12, and Economic and Organized Crime Office Act (Act 804 of 2010), s 3 respectively.

⁴ Economic and Organized Crime Office Act, s18; Securities and Intelligence Act, s 40.

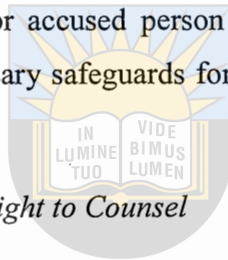
⁵ See Home Office Circular No. 31/1964, *Judges' Rules* (1964) (as adopted in Ghana) rules 1-3, as applicable to the Ghana Police Service (GPS).

⁶ See *Okorie @ Ozuzu v. The Republic* 1974 2 GLR 272 278, referring to adopted from the dictum of Chief Justice Warren in *Miranda v. Arizona*, 1966 384 U.S. 436 444-445.

⁷ *Okorie v. The Republic* GLR 278.

7.2.1 The Right to Counsel in Pre-trial Proceedings

The philosophy of the criminal justice system of Ghana aligns with the principle that a suspect or an accused person involved in extra-judicial proceedings, such as criminal interrogation in custody, finds him/herself at a stage of the criminal process where legal assistance is considered most vital.⁸ The right to counsel at the pre-trial phase of criminal proceedings, for ease of reference described as the pre-trial right to counsel, is guaranteed under article 14(2) of the Constitution of Ghana. This provision guarantees the right of the suspect or accused person who is restricted, arrested or detained, to be informed of the right to counsel.⁹ The law is designed to ensure that the state, as a generic entity, does not exercise undue advantage over the individual in defence of his/her person and liberty.¹⁰ In essence, the pre-trial right to counsel reinforces the privilege of the suspect or accused person who is in custody, against self-incrimination. It also provides the necessary safeguards for the protection of his/her right to silence during criminal investigations.



7.2.1.1 Characteristics of the Pre-Trial Right to Counsel

The right to counsel at the pre-trial phase of criminal proceedings carries distinct characteristics from the right to counsel at the trial. It specifically governs and regulates the procedure for conducting criminal interrogations. The pre-trial right to counsel operates on the principle that suspects and accused persons involved in proceedings of an adversarial nature against the state must be protected. It is automatically triggered before and during criminal interrogations, in all instances where the investigation process mutates into an accusatorial procedure. The stage of mutation from a mere investigatory process to a core accusatorial procedure occurs as soon as criminal investigators form an intention to elicit potentially incriminating statements from the accused or suspect and to charge him/her with an offence.¹¹ In addition to the obligation of the arresting officer to inform the suspect or the accused of his/her right to counsel, the courts have also given a very rational interpretation of the content of the pre-trial right to counsel. This right directs the criminal investigator to permit suspects and accused persons to consult with a

⁸ *Ibid*, referring to *Massiah v. United States* 1964 377 U.S. 201 204.

⁹ Ghana Constitution, art 14(2).

¹⁰ See Amidu "The Right to State Appointed Counsel in Criminal Justice Administration under the Constitution" 1992 RGL 159 163.

¹¹ *Okorie v. The Republic* 281, referring to the American case of *Escobedo v. Illinois* 1963 378 U.S. 478 492.

lawyer before interrogation. It also mandates the actual presence of counsel during the process of custodial interrogation.¹²

While emphasising the substantive value and procedural significance of the pre-trial right to counsel in criminal proceedings, the Court of Appeal¹³ in the case of *Okorie alias Ozuzu v. the Republic*,¹⁴ persuasively relied on a principle enunciated in the American case of *Massiah v. United States*.¹⁵ This principle is to the effect that a Constitution, which guarantees the right to counsel during the trial, should provide a greater protection to a person either accused of a crime, or arrested, restricted or detained, who is under interrogation by a criminal investigator in a wholly extra-judicial proceeding.¹⁶ In practical terms, the presence of counsel remains the sole protective measure to ensure that persons subjected to pre-trial interrogatories are not induced to incriminate themselves in violation of their right to be presumed innocent and their privilege against self-incrimination.

This requirement to provide counsel during criminal interrogation does not suggest that each police station should maintain a 'station house lawyer' present at all times to advise prisoners.¹⁷ The hands-on procedure primarily involves a duty of the investigative officer to inform the accused or the suspect of his/her right to a lawyer before the interrogation. Where a suspect or an accused person demands to be assisted by counsel before and/or during custodial interrogation, the criminal investigator will have no right to proceed with questioning unless in the presence of such counsel.¹⁸

The right to counsel applies to all forms of pre-trial communication between the investigative officer and the suspect or accused person. The Human Rights Division of the High Court of Ghana has unambiguously upheld the unqualified right to counsel for all persons under arrest, detention or restriction, who are subject to police administrative procedures. These procedures include criminal investigative practices under such common designations as 'police invitation', 'having a friendly chat with the suspect', 'meeting with the suspect', 'having a conversation

¹² *Okorie v. The Republic* 281, referring to *Miranda v. Arizona* 473-475.

¹³ The Court of Appeal operated as the highest court of the land. The Court (Amendment) Decree (NRCD 101 of 1972) 101 abolished the Supreme Court established under the 1969 Constitution. The Supreme Court was restored as the highest court of the land with the coming into force of the 1979 Constitution of Ghana. See, Amissah *Criminal Procedure in Ghana* 7.

¹⁴ 1974 2 GLR 272 281.

¹⁵ 1964 377 U.S. 201 204.

¹⁶ *Okorie v. The Republic* 277-278.

¹⁷ *Id* at 279.

¹⁸ *Id* at 278-279, referring to *Miranda v. Arizona* 773; Amidu 1992 RGL 161.

with the suspect', 'interrogation of the suspect' or any other forms of communication with the suspect or accused.¹⁹

7.2.1.2 The Pre-Trial Right to Counsel in cases of Self-Representation

The criminal justice system of Ghana has not succeeded in ensuring effective compliance with the procedural right to counsel for suspects and accused persons in pre-trial proceedings. It presents very limited opportunities for enforcing the pre-trial right to counsel, without institutional assistance. A report of a study published in 2013 by the Open Society Foundations on the Socio-Economic Impact of Pre-Trial Detention in Ghana suggested that nearly half of the number of accused persons remanded in custody were not informed of their right to legal representation.²⁰

Generally, the penalty for violation of the pre-trial right to counsel is the exclusion from evidence and inadmissibility of statements elicited from suspects or accused persons during interrogation.²¹ In the *Okorie* case, the highest court of the land considered the validity of investigative statements made by unrepresented accused persons during police investigations, in breach of their right to be informed of the pre-trial right to counsel. In the reasoning of his Lordship Azu Crabbe CJ, the right to be informed of the pre-trial right to counsel is so fundamental that its violation renders all statements and confessions inadmissible. It does not matter that the infringement of this constitutional right did not occasion a miscarriage of justice.²² The general position of the law is that a breach of a constitutional right amounts to a violation of the fundamental law of the land. It also constitutes an act of illegality, impropriety, arbitrariness and dictatorship.²³ A violation of a constitutional right can be raised at any time, even on appeal, to invalidate the proceedings.²⁴ Subsequently, in *Republic v. Akosah*,²⁵ Taylor J held that pre-trial statements or confessions extracted by the police from any suspect or accused person in violation of his/her right to be informed of the pre-trial right to counsel of his/her choice, even if voluntarily made, were inadmissible in court.

¹⁹ *Sammy Crabbe v. Attorney-General* [18-08-2009] Suit No. HRCM/04/09 (unreported).

²⁰ Commonwealth Human Rights Initiative, UNDP & Open Society Justice Initiative *Socio-Economic Impact of Pre-Trial Detention in Ghana* (2013) 35.

²¹ See *Okorie v. The Republic* 278, referring to *Escobedo v Illinois* 490-491.

²² *Okorie v. The Republic* 282.

²³ *Ibid*, referring to the Proposals of the Constitutional Commission for a Constitution of Ghana (1968) 22, para 88.

²⁴ *Ibid*.

²⁵ 1975 2 GLR 406.

The policy of inadmissibility and exclusion of evidence as a penalty for violation of the pre-trial right to counsel does not however appear to provide adequate protection for self-represented accused persons in trials that summarily end with a guilty plea. The procedural rule of exclusion of illegitimate evidence operates only in cases that ultimately make it to full trial. In cases where an unrepresented accused person pleads guilty to the offence charged, statements or confessions obtained in violation of his/her pre-trial right to counsel may escape judicial scrutiny.²⁶ Guilty pleas dispense of the need for trial and take away the opportunity to assess the procedural irregularities associated with pre-trial investigative procedures.²⁷ It is therefore beyond doubt that, without investigating compliance with all pre-trial rights of the accused, the fairness of the proceedings leading to the conviction of an unrepresented accused person who pleads guilty to the offence charged may be compromised.

A great number of criminal appeals such as *Okorie v. The Republic* and *Republic v. Akosah*, invoke a violation of the constitutional right to counsel at the pre-trial stage as a ground to reverse convictions. In practice, it takes a lawyer's intervention and assistance to successfully file an appeal on behalf of a self-represented accused person who is wrongly convicted in violation of his/her pre-trial right to counsel. The ineptitude of most self-represented accused persons to defend their rights in person is a stark reality.²⁸

Legal assistance equally plays a key role in averting wrongful convictions.²⁹ In the absence of counsel, the criminal procedure system must institute a reliable and efficient mechanism for ensuring that every self-represented accused person is indeed informed of the right to counsel prior to police interrogation. The system must guarantee access to legal representation to all accused persons who desire to be legally advised in all pre-trial interrogation sessions. To that end, legal aid services must be improved to provide prompt pre-trial assistance to all indigent unrepresented suspects and accused persons. Criminal investigation officers must ultimately be fully responsible for ensuring that suspects and accused persons under their authority, and who are indigent and cannot afford legal representation, are provided with legal aid.³⁰

²⁶ See similar comment on the right to silence by McBarnet "The Royal Commission and the Judges' Rules" 1981 *Brit. J. L & Soc'y*. 109 110.

²⁷ Discussed *infra*, Ch.10, text at 10.3.3.

²⁸ See, Amidu 1992 *RGL* 164.

²⁹ *Ibid*.

³⁰ See, e.g., United Nations *Principles and Guidelines principle on Access to Legal Aid in Criminal Justice Systems UN/RES/67/187* (2012) 3(23).

7.2.2 The Pre-Trial Right to Remain Silent

The realisation of the pre-trial right to silence begins with an awareness of its existence by, and its accessibility to, the suspect or accused person. When a police officer has sufficient evidence that would justify the arrest and subsequent charging of a suspect with an offence for purposes of prosecution, the accusatorial process begins. The police officer is thus mandated to caution the suspect before questioning him/her.³¹ The caution informs the suspect or the accused of his/her right to refuse to answer any questions put to him/her during interrogation. It also informs the suspect of the evidential value of any statements made by him/her regarding the alleged offence.³² This is the essence of the right to silence as it applies in pre-trial police interrogations in Ghana. The aforementioned is a key protector of the suspect or the accused against wanton interference with his/her right to the presumption of innocence, as well as the overriding privilege against self-incrimination. It is also generally protected as a fundamental element of the right to a fair trial.³³ However, the lack of constitutional and statutory recognition of the right in Ghana has hindered the necessary impetus to ensure its compliance in criminal trials.

7.2.2.1 Sources of the Pre-Trial Right to Silence

A time-honoured precept of the adversarial philosophy of proof in Ghana is that, guilt need not be established with the involvement of the accused.³⁴ Thus, the law establishes the principle that the suspect or accused person has no legal duty to answer any interrogatories or give any statement to the police, whether incriminating or not.³⁵ This principle reinforces the criminal justice system's aversion of processes that either expressly or insidiously compel suspects and accused persons to "condemn themselves out of their own mouths".³⁶ Section 97(1) of the Evidence Act³⁷ of Ghana unambiguously guarantees the procedural privilege of any person in any proceedings to refuse to disclose a matter or to produce any object or writing that would incriminate him/her in any offence.³⁸

³¹ See, Judges' Rules, rules 2 & 3; also Police Standing Order 184, Voluntary Statement: Procedure, rule 1.

³² *Ibid.*

³³ See, e.g., Van der Walt "The Right to Pre-Trial as Part of the Right to a free and Fair Trial. An Overview" 2005 *AHRLJ* 70 71. See *Murray v. UK* (1996) 22 EHRR 29.

³⁴ Amissah *Criminal Procedure in Ghana* 31.

³⁵ Amissah "Police and the Courts" 1969 *RGL* 31-44

³⁶ *Ibid.*

³⁷ NRC 323 of 1975.

³⁸ The law defines an incriminating matter, object or writing as any matter, object or writing which "constitutes, or forms an essential part of or taken in connection with other matters already disclosed, is a basis for a reasonable inference of a violation of the criminal laws of Ghana". See Evidence Act, s 97(4).

As earlier alluded to, there are no constitutional or statutory postulations of the pre-trial right to remain silent in Ghana. The recognition of the right within the criminal justice system principally derives from the adoption of the English Judges' Rules³⁹ as guiding principles regulating the admissibility of investigative statements of suspects and accused persons at trial.⁴⁰ The rules constrain police interrogation in custody from forcing or inducing a confession against the will of the suspect or the accused person, whether by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression.⁴¹ They equally direct the procedure of pre-trial police interrogations and describe the manner of conducts, which would cause judges to exercise their discretion to exclude otherwise relevant evidence in the interest of fair trial.⁴²

Furthermore, the courts of Ghana have also sought to fine-tune the constitutional regime of protection for suspects and accused persons with international best practices. They have explicitly recognised and adopted the right to remain silent as part of the procedural protections of individuals involved in criminal proceedings. The Court of Appeal, in the *Okorie* case, again persuasively relied on the American case of *Miranda v. Arizona*⁴³ to consolidate the basis of the domestic law on the pre-trial right to silence for suspects and accused persons in Ghana. Since then, the courts have adopted the *Miranda* rules, rights and warnings as binding. Consequently, all criminal suspects have the benefit of the following procedural safeguards prior to questioning by the police. (i) The suspect must be informed of his/her right to silence; (ii) S/he must be informed that any statement s/he makes may be used as evidence against him/her, and (iii) S/he has the right to the presence of an attorney, either retained or appointed.⁴⁴

Despite its procedural advantages for self-represented accused persons, the exercise of the pre-trial right to silence is also subject to one major delimitation in its scope of application in

³⁹ *Home Office Circular No. 31/1964*.

⁴⁰ Amissah stipulates that there is no legal basis for the practice of these rules in Ghana but "they seem to have accepted by our judges as applicable without much question." See. Amissah 1969 *RGL* (electronic file); see also Taylor JSC in *Bilson v. Apaloo* 1981 GLR 24 89. This is contrasted with the position in South Africa that expressly transplanted the Judges' Rules from England into the South African legal system. See Hoffman & Zeffert *South African Law of Evidence* (1988) 221.

⁴¹ *McBarnet* 1981 *Brit. J. L & Society* 109. The rules also stand primarily for the position that a statement extracted from an accused person by the police may only be admissible at trial if voluntarily given by the accused, without inducement, threat, tricks or force. See St. Johnson "Judges' Rules and Police Interrogation in England Today" 1966 *J. Crim. L & Criminology & Police Sci.* 85 85.

⁴² See, e.g., St. Johnson 1966 *J. Crim. L & Criminology & Police Sci.* 86. Also Amissah 1969 *RGL* (electronic file). The Rules are directly incorporated into the guidelines for police interrogation in Ghana. See, e.g., Ghana Police Handbook (2010) rule 2(1) (C).

⁴³ 1966 384 U.S. 436.

⁴⁴ See, *Okorie v. The Republic* 278, referring to Chief Justice Warren in *Miranda v. Arizona* 444-445.

Ghana. During investigation of offences against the safety and security of the state, the Attorney-General may compel the disclosure of any information, knowledge, or documents in the control or possession of the suspect or accused person.⁴⁵ The refusal of any such person under interrogation to disclose the required information or to produce any required documents, whether or not incriminating in substance, is punishable at law as a criminal offence by a term of imprisonment of up to three (3) years.⁴⁶

7.2.2.2 Compliance with the Pre-Trial Right to Silence in Criminal Proceedings in Ghana

The courts and legal scholars have given very little attention to the level of compliance and enforcement of the pre-trial right to silence in judicial proceedings in Ghana. The criminal justice system is certainly not devoid of cases where self-represented suspects, and accused persons in particular, are not informed of the right to silence prior to criminal interrogation. The fact that the procedural right to silence has not been raised to the level of a constitutional right in Ghana cannot be ruled out as a contributing factor. Unfortunately, however, there is a dearth of reported judicial decisions on the infringement of this procedural guarantee.

There is also very little said about the inadmissibility and exclusion of statements and confessions obtained in breach of the procedural obligation to inform the suspect or accused person of his/her right to silence in pre-trial criminal interrogations. In the *Okorie* case, the Court of Appeal gave a rather implicit recognition to the exclusionary doctrine for violation of the pre-trial right to silence in Ghana.⁴⁷ To that effect, any statements elicited from a suspect or an accused during pre-trial interrogation by the police or any other investigative agency, where s/he has not been warned of the procedural right to remain silent, may not be used against him/her at the trial.⁴⁸ Such statements obtained in violation of the right to silence would be inadmissible in evidence.⁴⁹

7.2.2.3 Scope of Protection for Self-Represented Suspects and Accused Persons

Silence in a civil trial may amount to an admission of fact when a reply or answer is expected from the person against whom an allegation of fact is made.⁵⁰ The criminal justice system

⁴⁵ Criminal and Other Offences (Procedure) Act, (Act 30 of 1960) (COOPA), s 50. These include such offences as treason, misprision of treason, treason felony.

⁴⁶ *Id*, s 53.

⁴⁷ See, *Okorie v. The Republic* 278, *obiter* consideration of the right to silence.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Mensah v. Chronicle Media*, [7/11/2004] Suit No. AD 12/ 2003 (unreported).

however operates a contrary theory. As Amissah states, “[n]o man, innocent or guilty, need reproach himself for keeping silent, for that is what the police have just told him he may do”.⁵¹ Thus, in Ghana, no adverse inference of guilt can be drawn from the mere silence of a suspect or an accused person. It is for the state to prove its case beyond all reasonable doubt. The accused person bears no such duty to assist the Prosecution during investigations in order to prove the case against him/her.⁵² The courts in Ghana have therefore adopted and applied the common law position on the right to silence as enunciated by Lord Atkinson in *R v. Christie*.⁵³ The learned judge articulated what today stands as the lead proposition on the right to silence in Ghana. He held that unless otherwise expressly admitted,

A statement made in the presence of an accused person, even upon an occasion, which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated.⁵⁴

A number of court decisions have affirmed this position of the law in Ghana and have sought to protect the benefit of the right to silence to suspects and accused persons, irrespective of their status of representation. In *Teye alias Bardjo v. The Republic*⁵⁵ for example, the Court of Appeal reiterated the legal principle that the silence of an accused cannot be regarded or considered as a fact inconsistent with his/her innocence.⁵⁶ The only instance in which an adverse inference may be drawn from the accused’s silence is where after the close of the Prosecution’s case, a *prima facie* case has been established against the accused person. In such a case, the conviction of the accused will be grounded in the un rebutted evidence of the Prosecution that establishes the guilt of the accused beyond reasonable doubt.⁵⁷

⁵¹ Amissah 1969 RGL (electronic file). Failure to give a statement to the police when cautioned will not constitute evidence of guilt. The principle is inferred from the words employed to caution a person suspected of a crime. See *Moro v. The Republic* 1979 GLR 256 258, per Korsah J.

⁵² This common law rule adopted in Ghana originates from the English decision in *Republic v. Leckey* 1943 All ER 665, where Tindall J.A formulated the rule as follows: “[If the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril; for an innocent person might as well, either for excessive caution or for some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination. It would also in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted.” See also oft-quoted *dictum* by Viscount Caldecote CJ in *Republic v. Lekey* 1944 K.B 80 86 “a caution might obviously be a trap instead of the means for finding out the truth in the interest of justice. An innocent person might as well, either from excessive caution or for some other reason decline to say anything when charged or cautioned, and if that could be held out to a jury as a ground on which they find guilt, he might obviously be in great peril.” See also *Teye @ Bardjo v. The Republic* 1974 GLR 438; *Commissioner of Police v. Donkor* 1961 GLR 6.

⁵³ *Republic v. Christie* 1914 AC 545, cited in *Moro v. The Republic* 258.

⁵⁴ *Republic v. Christie* 554.

⁵⁵ 1974 2 GLR 438.

⁵⁶ *Id* at 444.

⁵⁷ *Moro v. The Republic* 261.

For self-represented accused persons, insisting on the exercise of the pre-trial right to silence carries an even more protective effect. Enforcing the right to silence limits the dangers associated with an uninformed waiver of the right, which include the potential of self-incrimination. The courts of Ghana have therefore not hesitated to set aside convictions and sentences of self-represented accused persons who are wrongfully convicted for invoking and enforcing their right to remain silent. In *Moro v. The Republic*,⁵⁸ the accused, who was unrepresented during pre-trial proceedings, was charged with possession of Indian hemp contrary to section 47(1) of the Pharmacy and Drugs Act.⁵⁹ In an appeal following his conviction by the trial court for failure to give his statement to the police, Korsah J emphasised the principle that it is not the law that an accused person ought to put his version of the case to the police during interrogation. Where the accused is unrepresented, the exercise of the right to silence rather triggers a procedural obligation on the part of the trial judge to thoroughly investigate all matters and allegations raised against the accused.

Similarly, in the case of *Nsor Ayine v. The Republic*,⁶⁰ the accused person was charged with the offences of unlawful entry, unlawful damage and stealing, contrary to sections 152, 172(1) and 124(1) respectively of the Criminal Offences Act. (COA).⁶¹ He was unrepresented during pre-trial investigations and during the trial itself. He made no incriminating or confession statements. He also gave no responses to the charges against him both during police interrogation and in court. On appeal from his conviction by the trial court, Richardson J held that no presumption of guilt could be deduced from the accused's silence. His lordship developed the proposition that where the self-represented accused invokes his/her right to silence, the duty arose for the trial judge to construe the silence as a non-admission of facts. It then behoves the trial judge to rather enquire about the material facts and matters about which the accused person remained silent and to prise the accused's position out of him/her during the trial.⁶²

The judiciary has not meaningfully propagated the right to silence for the benefit of suspects and self-represented accused persons. Instances of wrongful convictions arise from the lawful exercise of the pre-trial right to silence. Many self-represented suspects and accused persons continue to lose this procedural protection against self-incrimination at the hands of some

⁵⁸ See note 51 above.

⁵⁹ Act 64 of 1961.

⁶⁰ [7/05/2010] Case No. D15/10/2010 (unreported).

⁶¹ No. 29 of 1960.

⁶² *Nsor v. Ayine*, see note 60 above.

judicial officers. Further, the formalistic process of instituting appeals against such convictions raises a number of procedural difficulties for self-represented accused persons. Practically, all enforcement processes as gleaned from the cases on appeal, are initiated by, or with the assistance of counsel. The key remedy to this phenomenon lies in the sensitisation of the judiciary on the effects of the exercise of the right to silence. In all cases where the accused person is unrepresented, no judge or magistrate should convict an accused person on the sole ground that s/he has acted in furtherance of the right to remain silent. Above all, there is the need to raise the pre-trial right to silence to the level of a constitutional or statutory right to reinforce its status within the scope of due process rights in Ghana.

7.2.2.4 The Pre-Trial Right to Silence in Committal Proceedings

The right of the accused person to remain silent during pre-trial proceedings bears distinct values and connotations in committal proceedings in Ghana. Committal proceedings are an integral part of the proceedings in trials on indictment.⁶³ This stage of the proceedings involves producing the accused person before a District Magistrate whose duty is to conduct a preliminary factual and evidentiary enquiry into the case.⁶⁴ His/her main role is to determine whether the Prosecution has a case, for which the accused must be made to stand trial and answer before a higher court. Even though the proceedings take place before the District Court, they are pre-trial in nature, as they precede the main trial before the Circuit Court or the High Court.

The procedure at the committal proceedings exhibits a unique approach. It focuses on getting the accused person to waive his/her right to silence by getting him/her to disclose all material information and facts in support of his/her defence. It more or less leans towards assisting the accused person to secure the benefits of the actual and potential defences that s/he intends to put up at the trial. The Criminal and Other Offences (Procedure) Act (COOPA)⁶⁵ mandates the District Magistrate, during committal proceedings, to take statutory statements from accused persons, which may be recorded and tendered in evidence at trial. The Magistrate is enjoined to address the accused on the consequences of failing to give the statement. Section 187 of the COOPA, which governs this procedure, moves away from the conventional form of warning, which is tailored to preserving the silence of the accused. It adopts a reverse approach towards

⁶³ Discussed *supra*, Ch. 2, text at 2.4.4.3.

⁶⁴ *Ibid*; see also Amissah *Criminal Procedure in Ghana* 98.

⁶⁵ Act 30 of 1960.

persuading him/her to disclose facts and to put forward his/her version of the story. In other words, the provision underscores the need for the accused person to speak up. It also infers potentially negative comments and adverse findings from a decision of the accused person to remain silent.⁶⁶ Of note, committal proceedings are in the nature of an inquisitorial process with the judge at the centre of questioning. The process is generally devoid of the use of illegal means for extracting otherwise involuntary statements from the accused, as commonly associated with criminal investigations by state investigative agencies. It is a safer avenue for a self-represented accused person to make voluntary and self-motivated statements, for an independent judicial evaluation of the propriety of the charges against him/her.

Another notable procedural advantage of waiving the right to silence at the committal proceedings lies in the opportunity for the accused person, represented or otherwise, to revisit all previous investigative statements and to synchronise them. The procedure allows the judge to draw the attention of the accused person to any inconsistencies in his/her statements to the police, for careful consideration. The Magistrate may also invite the accused to make any desired corrections in the statutory statement itself.⁶⁷ In view of the explanation that the accused person may give in his/her statutory statement, the Magistrate may direct the Prosecution to further consider its decision to prosecute the accused person altogether, in instances where the exigencies of the case so demand.⁶⁸ The self-represented accused person also has the benefit of an informal pre-trial evaluation of the Prosecution's case against his/her defence through the aforementioned processes.

7.2.3 Waiver of Pre-Trial Investigation Rights by Self-Represented Suspects and Accused Persons

Self-represented suspects and accused persons may give valid statements and confessions to the police or any other state investigative agency, upon an unequivocal waiver of their pre-trial rights to silence and to counsel. An express statement to the effect that the suspect or the accused is willing to make a statement and that s/he does not need the assistance of counsel during interrogation could constitute a valid waiver.⁶⁹ The courts in Ghana have adopted a very high standard of a valid waiver of the constitutional rights that apply to custodial interrogations.

⁶⁶ *Id.*, s 187. It states in material part that "you are not obliged to say anything but if you have an explanation, it may be in your interest to give it now.....If you do not give an explanation your failure to do so may be the subject of comment by the judge, the Prosecution or the Defence."

⁶⁷ *Id.*, Sixth Schedule, rule 3 (Rules as to Taking of Statement of Accused Person).

⁶⁸ *Id.*, Sixth Schedule, rule 4.

⁶⁹ *Oborjie v. The Republic* 279, referring to Lord Chief Justice Warren in *Miranda v. Arizona* 473-475.

Such a waiver would however not simply be presumed from the mere silence of the suspect or the accused person.⁷⁰

The principles governing the waiver of a fundamental constitutional right have been given in the *Okorie* case. The Court held that “[a]n accused person cannot be held to have easily acquiesced in the loss of his fundamental rights, and the Prosecution must prove that he knowingly waived those rights”.⁷¹ Building the Ghanaian position on the model of American criminal law, the court aligned with the American legal proposition that a waiver cannot be presumed from a silent record.⁷² The evidence on the record must show that the suspect or accused was offered counsel but intelligently and understandingly dispensed of the need to take advantage of his/her right. Anything less is not a waiver.⁷³ There must be proof that the statement was voluntarily made upon a valid waiver of the pre-trial rights to silence and to counsel.

Two major observations are made regarding the waiver of these pre-trial rights. First of all, a voluntary waiver of the pre-trial right to silence may generally render statements and confessions obtained from self-represented suspects and accused persons admissible in evidence at trial. In fact, in the majority of cases in Ghana, the state criminal investigative agencies and the Prosecution generally elicit presumed ‘voluntary’ information, including incriminating material and confession statements from self-represented accused persons in custody to secure their convictions. This practice of the Prosecution clearly reveals that the criterion of ‘voluntariness’ as a standard for establishing a valid waiver, and for validating criminal interrogation of suspects and accused persons may not be necessarily beneficial to an unrepresented suspect or accused in custody.

Over and above desisting from the use of torture and other forms of coercion and influences to obtain statements from suspects and accused persons, other important factors must be considered. The psychological effects of a custodial interrogation process and how these effects otherwise influence accused persons into easily and voluntarily waiving their right to remain silent is yet to be subjected to scrutiny by the courts of Ghana. An empirical study was however conducted on the Judges’ Rules in England by the Royal Commission.⁷⁴ The research found

⁷⁰ *Ibid.*

⁷¹ *Okorie v. The Republic* 282.

⁷² *Ibid.*, referring to *Carnley v. Cochran, Corrections Director* 1961 369 U.S. 506 516.

⁷³ *Ibid.*

⁷⁴ Irving & Hilgendorf *Royal Commission on Criminal Procedure, Research Studies 1 and 2 Police Interrogation* (1980) 473, cited by McBarnet 1981 *Brit. J. L & Soc’y.* 110.

that using the sole criterion of voluntariness in determining admissibility of evidence and statements obtained during criminal interrogations does not sufficiently preserve the privilege of the suspect or accused to remain silent. In the wording of the Commission's report:

[w]hat our research suggests is that in psychological terms, custody itself, and questioning in custody develops forces upon many suspects, which in Lord MacDermott's words, so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent.⁷⁵

Secondly, it is also worth noting that what amounts to an 'intelligent' and 'voluntary' waiver has not been specifically defined in the Ghanaian criminal jurisprudence. The criminal adjudicatory system is yet to develop safeguards and procedural standards that guarantee effective realisation of pre-trial rights to counsel and to silence in criminal proceedings. The American jurisprudence on the Bill of Rights, especially as it applies to criminal trials, has largely influenced the growth of the jurisprudence on due process rights in Ghana. Thus, a step towards considering the American legal position enunciated in *Faretta v. California*⁷⁶ as a form of persuasive authority for future consolidation of the position of the law in Ghana, is in order in that regard. The court in *Faretta* held that an accused person could waive a constitutional right, in the exercise of a free, voluntary and intelligent choice. However, it remains the duty of the court to ensure that the accused person is made aware of the dangers and disadvantages of waiving the rights, so that the records will establish that s/he "knows what [s/he] is doing and [his/her] choice is made with eyes open".⁷⁷

In the current practice of the law in Ghana, state criminal investigative agencies and the Prosecution have no obligation to explain the intricacies of a waiver of the pre-trial investigative rights to the self-represented suspect or accused person in pre-trial proceedings. To ensure that the unrepresented suspect or self-represented accused is not unlawfully deprived of his/her pre-trial rights to counsel and to remain silent, certain strict procedural safeguards must be adopted. These may include the need for the prosecutor to prove by way of record, that the self-represented accused or suspect intelligently and knowingly waived the pre-trial right to counsel. The same standard must also apply in instances where the prosecutor alleges a waiver of the pre-trial right to silence.

⁷⁵ *Ibid.*

⁷⁶ 1975 U.S. 422 806.

⁷⁷ *Id* at 835, referring to *United States ex. rel MacCann* 317 US 279.

7.3 THE RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGE

The right to information on the nature of an offence is an important procedural guarantee in criminal proceedings in Ghana. Every suspect and accused person is entitled to be promptly informed in the language that s/he understands, either upon arrest or upon being charged (as the case may be), of the nature of the offence against him/her.⁷⁸ This procedural guarantee also underscores the fact that the required information can only be efficiently transmitted in a language that the suspect or accused person clearly understands.⁷⁹ In practice, the right to information on the charges applies at two main stages of the proceedings. Firstly, it applies to suspects in pre-charging procedures and operates as a procedural requirement for a legitimate deprivation of the right to personal liberty. Any person arrested on suspicion of crime must be informed of the nature of the offence justifying his/her arrest. Secondly, the right to information on the charge applies upon the accused person being formally charged with an offence. As far as the trial process itself is concerned, this second form of the right operates as a due process guarantee that goes to the root of the fairness of the trial. The nature and content of the information to be provided at each of these stages of the proceedings are quite distinct.

7.3.1 The Right to Information on the Charge upon Arrest

The Constitution of Ghana guarantees for every person who is arrested, restricted or detained, a right to be informed immediately and in a language that s/he understands, of the reasons of his/her arrest.⁸⁰ The reasons of arrest are defined to mean the nature of the offence that initiated the arrest.⁸¹ The right to information on the charge at the time of arrest, is not essentially a fair trial requirement. It fulfils the need to ensure that a suspect of crime is not deprived of his/her personal liberty, except in accordance with procedure permitted by law.⁸² Every arresting officer is bound to comply with this requirement of the law in order to legitimise a suspect's arrest. At this stage of the criminal process, the information to be given to the suspect is brief. As the COOPA clearly states, the obligation of the arresting officer is to simply inform the suspect of the cause of arrest, in clear terms and in a language that s/he understands.⁸³

⁷⁸ Ghana Constitution, arts 14(2) and 19(2) (d).

⁷⁹ See, e.g., Namakula "Language Rights in the Minimum Guarantees of Fair Criminal Trial" 2012 *IJSL* 73 75.

⁸⁰ Ghana Constitution, art 14(2).

⁸¹ COOPA, s 9 (1).

⁸² Ghana Constitution, art 14(1).

⁸³ COOPA, s 7. It provides in material part that "... a police officer or a person making the arrest shall inform the person arrested of the cause of the arrest, and, if the police officer or other person is acting under the authority of a warrant shall notify the person to be arrested of the content of the warrant and, if so required, shall show the warrant to the person to be arrested."

In *Asante v. The Republic*,⁸⁴ the court held that it generally suffices that the person arrested is simply told 'a reason' or 'the true reason' justifying his/her arrest.⁸⁵ Failure on the part of the arresting officer to comply with this procedural requirement gives the suspect a cause to challenge his/her arrest and defend his/her right to personal liberty. In this case, the accused/appellant assaulted a police constable who was sent to invite him to the police station upon a complaint of assault lodged against him. The police constable met the accused and showed him his identity card but never informed him of the reason he was wanted at the police station. Upon the accused's refusal to respond to the call at the police station, the police constable seized the ignition key of his car to prevent him from driving away. The accused person however used force to retrieve his key, while physically assaulting the officer in the process. On appeal against his conviction for assault of a police officer, the court held that by failing to inform the accused of the cause of the arrest, the police officer was not acting lawfully in execution of his duty to effect an arrest. The act of using force on the police officer to retrieve his key and to free himself from the unlawful arrest was held to be an act of self-defence. In cases of self-representation, strict compliance with this constitutional guarantee is an important means of ensuring that a suspect is not unlawfully restricted and detained.

7.3.2 The Right to Information on the Charge at the Charging Stage

7.3.2.1 Nature of the Right

Every accused person is entitled to receive the details of the offence with which s/he is charged. Clause (d) of article 19(2) of the Constitution, on that note, provides that "any person charged with a criminal offence shall be informed immediately in a language that [s/he] understands, and in detail, of the nature of the offence charged".⁸⁶ The language of the law is similar to the text of the right to information on the nature of the charge upon arrest. The content of this procedural obligation however goes beyond the arresting officer's act of informing the suspect of the reasons justifying the arrest.⁸⁷ It seeks to provide the accused person with reasonable details of the offences charged against him/her.⁸⁸ According to the Court of Appeal in *Isa v.*

⁸⁴ 1972 2 GLR 177.

⁸⁵ *Id* at 192.

⁸⁶ Ghana Constitution, art 19(2) (d).

⁸⁷ See Kpegah JSC in *Republic v. Nana Osei Kwadwo II* [11/07/08] CA No. 2/2002 (unreported) stating that the Constitution is not concerned with what a police officer might have told the accused at the police station or any other authority might have said to him at one time or other; also Hayfron-Benjamin J in *Osei v. The Republic* (No.2) 1974 1 GLR 449 451.

⁸⁸ Brobbey *Practice and Procedure in the Trial Courts and Tribunals of Ghana* (2011) 66.

The Republic,⁸⁹ the essence of this constitutional guarantee is to provide the accused with detailed information, so that s/he knows the nature of the offence against him/her and can adequately prepare his/her defence to it.⁹⁰

In summary offences, the information as to the nature of the offence charged is delivered to the accused person through the content of the charge sheet. In indictable offences however, the requisite details are contained in the bill of indictment.⁹¹ In both proceedings, the information required to be delivered to the accused is a technical statement, the parameters of which are defined by law. According to the COOPA, the information contained in a charge sheet or bill of indictment shall be sufficient, if it contains a statement of the offence with which the accused person is charged, together with the particulars necessary for giving reasonable information as to the nature of the charge.⁹² It shall not contain any further particulars⁹³ and need not state all the essential elements of the offence.⁹⁴ In short, the information must be enough for the accused to be sufficiently informed of the offence charged.⁹⁵ It need not contain a full explanation of the details of the charge. For purposes of simplicity, the statement of the offence is required to be in ordinary language, devoid of any technical terms. The particulars describing the offence are equally required to be stated in ordinary language devoid of technicalities.⁹⁶ The particulars 'necessary for giving reasonable information' are objectively determined on a case-by-case basis.⁹⁷

7.3.2.2 Content of the Information Disclosable

In indictment trials, it is assumed that the statement of offence together with the particulars and summary of the evidence of Prosecution's witnesses, provide accused persons with information adequate for them to prepare their defence.⁹⁸ The scope of information on the nature of the charge, as statutorily defined by the COOPA, has however been a subject of concern for legal practitioners, especially in the area of summary trials. Defence lawyers have sometimes challenged the position of the law on the scope of disclosable information in the charge sheet, although most of the time, unsuccessfully. The main issue revolves around the perceived

⁸⁹ 2001-2002 2 GLR 298.

⁹⁰ *Id* at 309.

⁹¹ COOPA, ss 181-182.

⁹² *Id*, s 112(1); Brobbey *Practice and Procedure* 63.

⁹³ COOPA, ss 112(1) & 202(3).

⁹⁴ *Id*, ss 112(2) & 202(7).

⁹⁵ See, e.g., *Nkansah v. The Republic* 1980 GLR 184 186.

⁹⁶ COOPA, s 112(4).

⁹⁷ Brobbey *Practice and Procedure* 63, referring to *Nkansah v. The Republic* 1980 GLR 184.

⁹⁸ See 7.3.2.3 below.

limited scope of the particulars of offence, which they claim, limits the ability of accused persons to prepare their defence. The subject has far-reaching importance for self-represented accused persons. There are no judicial records of complaints lodged by self-represented accused persons about the inadequacy of the particulars of the charges against them. Obviously, their ineptitude to raise and engage in legal arguments cannot be ruled out as a cause.

The issue of inadequacy of the particulars of the offence charged was the substance of appeal in the *Isa* case.⁹⁹ The appellant, a former Minister of Youth and Sports, was charged with the offences of stealing and fraudulently causing financial loss to the state. Upon conviction, he appealed, *inter alia*, on the ground that the charge of causing financial loss to the state did not contain sufficient details as would enable him to adequately prepare his defence. The court dismissed the ground of appeal and held that what would indeed amount to evidence cannot be included in the charge sheet and neither are the brief facts in support of the charge part of the charge sheet. The court again ruled that information contained in the particulars of the offence must simply be reasonable enough for the accused person to know why s/he has been charged in court. Once that is satisfied, no more detailed particulars are required for laying the charge.¹⁰⁰

The same position was reiterated in the case of *Republic v. Selormey*.¹⁰¹ The learned Judge Baddoo JA underscored the principle that the “particulars of an offence are not expected to set out all the ingredients of the offence, but rather to give an accused person, reasonable information as to the legal nature of the charge”.¹⁰² In the Ghanaian criminal jurisprudence therefore, the restricted scope of disclosable information on the charge is deemed consistent with the requirements of the accused person’s constitutional right to be informed of the nature of the charge. It would not be necessary to provide additional details if the particulars of the offence are enough to inform the accused of the nature of the offence charged.¹⁰³

Further to the limited scope of disclosable information, non-disclosure of particulars of the offence, which otherwise ought to be provided to the accused person, does not necessarily invalidate the charge or the trial. A failure to include key details of the offence in the charge sheet or bill of indictment does not automatically render the charge incurably bad. The law is that, once the statement of offence is correctly laid by stating the particular provision of the

⁹⁹ See note 89 above.

¹⁰⁰ *Isa v. The Republic* 308, also holding (3).

¹⁰¹ 2001-2002 2 GLR 424.

¹⁰² *Id* at 446.

¹⁰³ Brobbey *Practice and Procedure* 66.

law that is breached defective details of the offence are not fatal to the charge.¹⁰⁴ This is particularly the case where there is evidence adduced at the trial to support the charge, and the omission to provide the details of the offence does not occasion any substantial injustice.¹⁰⁵ Consequently, where the Prosecution's evidence supplies any deficiencies in the particulars of the charge during the trial, the accused cannot argue that s/he did not know the charge s/he has to defend when s/he comes to make his/her defence.¹⁰⁶

The Supreme Court in *Alan William Hodgson v. Republic*¹⁰⁷ reaffirmed this position of the law. In this case, the appellant was convicted on narcotic drug related offences under the Narcotics Drug (Control, Enforcement and Sanctions) Law.¹⁰⁸ On appeal to the highest court of the land, counsel for the appellant argued that the charge did not disclose the specific nature of the crime or the particular narcotic drug offence committed. He also argued that the content of the charge sheet violated the constitutional right to information on the nature of the offence charged. The crux of his argument was that the particulars of the offence were insufficient to give the appellant appropriate and adequate notice as to the specific offence he was called upon to defend. The Court admitted that the particulars of the offence should have included the specific narcotic drug offence. It was however quick to reiterate the position that where there is a default by way of omission in the particulars of the offence charged and evidence is given to establish the omitted particulars, the charge remains valid.¹⁰⁹ Thus, the judiciary in Ghana has not insisted on a strict enforcement of the pre-trial right of the accused to be fully informed of the nature and details of the offence charged. On the contrary, its policy has been to ensure that the purpose of the right is eventually achieved at the close of the case of the Prosecution during the actual trial.

7.3.2.3 Procedures for Implementing the Right to Information on Charges

The procedure for giving effect to the right to information on the charge at the charging stage varies depending on the nature of the proceedings instituted against the accused. Trials on indictment generally present an opportunity for a fuller realisation of the right than it is the case in summary trials. In trials on indictment, the process of informing the accused person of the

¹⁰⁴ *Republic v. Selormey* 448; Amissah *Criminal Procedure* 81-82.

¹⁰⁵ *Republic v. Selormey* 448.

¹⁰⁶ Amissah *Criminal Procedure in Ghana* 82. cf. earlier position of the law by Hayfron-Benjamin J in *Osei v. The Republic No.2* 1971 1 GLR 449.

¹⁰⁷ [15/07/2009] No. J3/1/2009 (unreported).

¹⁰⁸ PNCDCL 236 of 1990.

¹⁰⁹ *Alan William Hodgson v. Republic*, see note 107 above.

nature of the offence begins with the committal proceedings. At this stage of the proceedings, the law mandates the Prosecution to furnish the accused person with a copy of the bill of indictment, which states in writing the charge against the accused.¹¹⁰ In addition, the Prosecution is required to provide the accused with a list of all prosecution witnesses, the summary of each prosecution witness' evidence, as well as the list of documents and materials that the Prosecution intends to tender in evidence in court.¹¹¹ These particulars give the accused person a bigger picture of the nature of the charge and of the case of the Prosecution. In the end, the accused person is better positioned to fully appreciate the case against him/her before the commencement of the trial.

In summary trials,¹¹² the procedure is quite different. Unlike in trials on indictment, there is no statutory obligation on the part of the Prosecution to furnish the accused with a copy of the charge sheet. In practice however, upon being arraigned before the court, the Defence may make an application to be furnished with a copy of the Prosecution's charge sheet, if it so desires. Generally, where the accused person is unrepresented, s/he may hardly possess the knowledge, skills and courage to apply to the court for a copy of the charge sheet. For purposes of establishing parity in the treatment of accused persons in criminal proceedings, this procedure ought to be reviewed. The right to information on the charge in summary trials will be effectively realised if the Prosecution is compelled to furnish the accused, whether represented or unrepresented, with a copy of the charge sheet before the first appearance before the court. This process may assist the accused, especially when unrepresented, to be duly informed of the charges and particulars of the offence, before his/her arraignment in court for consideration of such preliminary matters as bail applications and pleas.

Under the COOPA, the stage of arraignment provides the avenue for full implementation of the right to information on the charge, both in summary trials and in trials on indictment. This stage marks the commencement of the trial. The legal requirement is the same in both trials: the substance of the charge, as contained in the charge sheet or the bill of indictment, must be read and explained to the accused person in the language that s/he understands, at the time when s/he is called upon to plead to the charges.¹¹³ The information given to the accused is therefore limited to the content of the bill of indictment and the charge sheet. The full details

¹¹⁰ COOPA, s 182(1).

¹¹¹ *Ibid.*

¹¹² Discussed *supra*, Ch. 2, text at 2.4.4.3.

¹¹³ COOPA, ss 171 & 198.

of the charges are only made available to the accused as the Prosecution begins the process of presenting its case.

The standard question that arises relates to the practical and procedural value given to the sense of urgency attached to the substance of the right to information on charges. The Constitution indeed insists on the need to inform the suspect or accused person ‘immediately’ upon being charged of the nature of the arrest.¹¹⁴ A more legitimate realisation of this right will require that once the bill of indictment or the charge sheet is ready, the Prosecution must thoroughly read and explain its content to the accused, long before the accused is arraigned before the court. Ultimately, ensuring that the accused person is fully aware of the particulars of the offence before his/her appearance in court, gives him/her the opportunity to adequately prepare in order to intelligently plead to the charge on arraignment.

7.3.2.4 *Implementing the Right to Information on the Charge for Self-Represented Accused Persons*

The right to information on the nature of the charge is a duty of the Prosecution. It should not matter whether the accused is represented or not. In practice however, it requires the assistance of the trial judge to ensure that an unrepresented accused person is duly informed and indeed understands the charge for which s/he is standing trial. In the case of *Mohammed Abdulai v. The Republic*,¹¹⁵ the High Court took the opportunity to judicially examine and outline the specific obligation of the court in this regard. His Lordship Suurbaarreh J held to the effect that the duty of the court is to ensure that the self-represented accused not only understands, but also appreciates the charges levelled against him/her, so that s/he knows what s/he is dealing with.¹¹⁶ In so doing, the judge is also expected to ensure that the details of the nature of the charges are indeed given to the unrepresented accused in a language that s/he understands. The records of the court must capture the details of the explanation, including the language used and the manner in which the explanation was given. The procedure is even more essential where the self-represented accused facing trial is illiterate and does not understand the English language, and therefore does not know the factors that constitute the elements of the charge.¹¹⁷

¹¹⁴ Ghana Constitution, art 19(2) (d).

¹¹⁵ [17/09/2007] Case No. F22/6/07 (unreported).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

Failure to fully record the specified details of the process is a procedural error that may affect the validity of the trial.¹¹⁸

Whereas the Prosecution's statement of the facts of the case provide the needed information in support of the offence with which the accused is charged. The procedure in criminal proceedings in Ghana is to have the accused person plead to the charge against him/her before the Prosecution presents the facts of the case to the court for the first time.¹¹⁹ The law provides some guarantees against wrongful convictions, especially in cases where the accused pleads guilty to the charge not supported by the Prosecution's facts. Upon a guilty plea to a criminal charge, the particulars of the offence and the Prosecution's facts of the case must necessarily justify and support a presumption of guilt before the trial court can convict the accused.¹²⁰ A genuine concern arises regarding a procedure that deprives the accused person the opportunity of knowing the full facts in support of the Prosecution's case before pleading to the charge against him/her. There is a high possibility of erroneously pleading guilty to a charge unsupported by the Prosecution's facts. It is therefore important to ensure that the reading and explanation of the Prosecution's facts precedes the plea-taking stage. The High Court, *per* Richardson J, has to that effect held that the full facts of the case must be disclosed to the accused person to enable him/her to acquire full knowledge of the case against him/her. Commenting on the accused person's right to be informed in detail of the nature of the offence charged, he held that:

[t]he nature of the offence comes in the charge levelled, particularly in the particulars of offence. But in addition to that, the facts of the case ... add flesh to the bones, i.e. the particulars of the offence, thereby ensuring that the accused is informed in detail of the offence. And it will enable him to plot whatever defence he has to put up. It ensures that both sides are certain about the Prosecution's case against the accused.¹²¹

In summary, full realization of the right to information on the charge requires prompt delivery and explanation of the content of the bill of indictment or charge sheet to the accused, especially when unrepresented. S/he may however have a more complete knowledge of the case against him/her, if a further requirement is imposed, which mandates the Prosecution to furnish the accused with details of the facts advanced by the Prosecution in support of the charge.

¹¹⁸ See, *James Awuku v. The Republic* [21/06/2010] Case No. F22/24/2010 (unreported), *per* Kossi Efo Kaglo J.

¹¹⁹ COOPA, ss 171 & 198.

¹²⁰ *Brobbey Practice and Procedure* 66.

¹²¹ *Wewura Felli v. The Republic* [02/07/2010] Case No. D16/21/09 (unreported).

7.4 THE RIGHT TO SEEK BAIL

Bail operates within the parameters of the individual's constitutional right to free movement and personal liberty, as well as his/her right to be presumed innocent.¹²² Every suspect or accused person who is remanded in custody pending, or in the course of trial, has the right to seek a conditional release by applying for bail. There is generally one procedural regime governing bail application processes for all suspects and accused persons, whether represented by counsel or not.

7.4.1 Fundamentals of the Bail Regime in Ghana

The personal liberty of the individual as guaranteed under article 14 of the Constitution of Ghana is of fundamental importance within the cluster of fundamental human rights. Its deprivation is considered as limiting the possibility of achieving the full gratification of other rights guaranteed under the Constitution.¹²³ However, like other constitutionalised human rights, the right to personal liberty is balanced against the legitimate interests of the community, taking into account the public interest and the protection of the community in general.¹²⁴ As a result, article 14 permits instances of deprivation of the individual's liberty when informed by constitutional considerations, which are only relevant for certain judicial and social purposes.¹²⁵ It is in that vein that clause 1(g) of article 14 sanctions the deprivation of the individual's personal liberty upon reasonable suspicion of having committed or being about to commit a criminal offence under the laws of Ghana.¹²⁶ By this provision, state investigative agencies, and the courts, are vested with power to remand accused persons and suspects in custody in appropriate cases during investigations, arraignment and/or trial.

Restricting the liberty of the suspect or accused person before his/her conviction is in turn balanced against other underlying policies of the criminal justice system. These majorly include the right of the suspect under investigation or of an accused person at trial to be considered innocent until s/he has pleaded guilty to a charge or been found guilty after a trial.¹²⁷ The

¹²² *Republic v. Isaac Taye* [19/6/2008] No. F.12/67/08 (unreported) relying on *Gorman v. The Republic* 2003-2004 SCGLR 784. See Ghana Constitution, art 14 on right to personal liberty; art 21(1) (g) on the freedom of movement and art 19(2) (c) on presumption of innocence.

¹²³ See Bamford-Addo JSC in *British Airways & Another v. Attorney-General* 1997-1998 1 GLR 55 65.

¹²⁴ See Ghana Constitution, art 12(2).

¹²⁵ Ghana Constitution, art 14(1) generally.

¹²⁶ It provides: "Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law – upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana."

¹²⁷ Ghana Constitution, art 19(2) (c).

presumption of innocence guarantees the freedom against arbitrary detentions and provides the needed precautionary measure to abate punishment before conviction.¹²⁸ Bail in turn provides a balance between ensuring the liberty of the suspect or accused person and the security and safety of the public.¹²⁹ It plays the role of securing the release of the suspect or accused person, restricted or detained pending his/her trial, upon sufficient security for his/her appearance at trial.¹³⁰

7.4.2 General Principles of Bail Applications

The Constitution of Ghana authorises the courts to deprive suspects and accused persons of their personal liberty in criminal proceedings.¹³¹ The courts may remand a suspect or an accused person pending either police investigation or trial. Conversely, the courts could admit accused persons or suspects to bail. The power to grant bail is an instrument in the hands of the courts to ensure that the personal liberties and innocence of suspects or accused persons are protected during the period of their arrest, arraignment and trial until they are convicted and sentenced.¹³²

Any accused person who is brought before a trial court upon arraignment reserves the right to apply and/or be considered for bail.¹³³ There is no constitutional or statutory right to automatic bail.¹³⁴ The law however guarantees a presumption of bail, which requires the courts to be disposed to granting bail in all cases unless there are good reasons falling within certain defined exceptions that justify refusal of bail.¹³⁵ The watershed decision of the Supreme Court in the case of *Martin Kpebu v. Attorney-General*,¹³⁶ recently struck out the concept of non-bailable offences from the criminal jurisprudence of Ghana as being unconstitutional. As a result, all

¹²⁸ *Martin Kpebu v. Attorney-General* 2016 [02/05/2016] CA J1/13/2015 (unreported). See Benin JSC, adding another feature to the effect that the presumption of innocence acts also as “a preventive measure against the State from successfully employing its vast resources to cause greater damage to a person who has not been convicted that he can inflict on the community.”

¹²⁹ *Ibid*, per Wood JSC.

¹³⁰ *Ibid*, per Dotse JSC.

¹³¹ Ghana Constitution, art 14(3) (b).

¹³² Dotse JSC in *Martin Kpebu v. Attorney-General* (unreported), see note 128.

¹³³ Pursuant to Ghana Constitution, art 14(3) and s 96 of COOPA.

¹³⁴ *Gorman v. The Republic* 2003-2004 SCGLR 784 788.

¹³⁵ *Ibid*. The position in Ghana accords with international law, ICCPR, art 9(3), which provides that “detention in custody of persons awaiting trial shall be exception rather the rule”... “It should not be the general practice to subject defendants to pre-trial detention.” See Human Rights Committee (HRC) *General Comment 35* CCPR/C/GC/35 (2014) para 38.

¹³⁶ See note 128 above.

accused persons may apply to the court for bail pending, irrespective of the nature of the offence charged.

While the power of the courts to grant or refuse bail is discretionary, it is fettered by section 96 of the COOPA, which establishes the substantive and procedural due process in bail matters.¹³⁷ The procedure for bail applications involves a mix of statutory factors, which aim at satisfying the overriding test as to whether the accused person is likely to appear to stand trial, if granted bail.¹³⁸ The law generally prohibits the perverted use of judicial discretion to withdraw or withhold bail merely as a form of punishment.¹³⁹

In some other instances, bail operates as a constitutional remedy against violations of the right to a fair and expeditious trial.¹⁴⁰ The Constitution mandates all trial courts to automatically release accused persons on bail, irrespective of the nature of the offence charged, where criminal proceedings suffer unreasonable delay, or cannot be conducted within reasonable time.¹⁴¹ In such cases, the Constitution excludes the discretion of the judge and compels the grant of bail.¹⁴² The provision underscores the dedication of the justice system to ensuring speedy prosecutions. It also seeks to prevent undue detention and abuse of the liberty of accused persons who theoretically retain their innocence until otherwise convicted by the court. The power to consider bail applications on the ground of unreasonable delay is vested in the court with jurisdiction to hear the substantive offence.¹⁴³

¹³⁷ As amended by NRCD 309. See, e.g., Amissah *Criminal Procedure* 183; *Republic v. Registrar of High Court, ex parte Attorney-General* 1982-83 GLR 407 418.

¹³⁸ Amissah *Criminal Procedure* 183. Korsah J in *Seidu v. Republic* 1978 GLR 65 quoting Taylor J in *Okoe v. The Republic* 1976 1 GLR 80 87: “[T]he sole test as to whether a party ought to be bailed is whether it is probable that, that party would appear to stand trial. Of course, in applying this test, regard must be had to the nature of the accusation, the nature of the evidence in support of the accusation and the severity of the punishment which conviction will entail.”

¹³⁹ COOPA, s 96(4).

¹⁴⁰ See Ghana Constitution, arts 19(1) and 14(4).

¹⁴¹ Ghana Constitution, art 14(4). “Where a person is arrested, restricted or detained [(a) for the purpose of bringing him before a court in execution of an order of a court, or (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana] 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, necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

¹⁴² *Okyere v. The Republic* 1972 1 GLR 99 104; Prof. Modibo Ocran JSC, citing with approval Taylor J in *Okoe v. The Republic* 95-96 in *Gorman v. The Republic* SCGLR 799.

¹⁴³ Benin JSC in *Martin Kpebu v. Attorney-General* (unreported).

7.4.3 Bail Application Procedures in Cases of Self-Representation

The rules of criminal procedure do not expressly detail the procedure by which bail may be considered. In practice, the court usually considers bail for an accused person either *sua sponte*¹⁴⁴ or pursuant to a motion for bail filed by or on behalf of the accused.

7.4.3.1 Courts' *Sua Sponte* Consideration of Bail for Unrepresented Suspects and Accused persons

The power of trial courts to consider bail on their own motion when accused persons first appear before them or at any time in the course of proceedings is not expressly prescribed. It is however implied by section 96 of the COOPA and article 14(4), which vest the courts with the mandate to grant bail in deserving cases. Consequently, the courts do sometimes consider bail for accused persons in the course of proceedings at their own behest. There are however no legal requirements mandating the courts to give reasoned rulings on their decisions to *sua sponte* grant or otherwise refuse bail to self-represented suspects and accused persons, either at their first appearance in court or in the course of proceeding.

Stakeholders in the administration of criminal justice in Ghana are aware of the procedural limitations faced by unrepresented suspects and accused persons while applying for bail in person. To that effect, the Criminal Bench Book, which guides District Courts Magistrates in criminal adjudications, partially addresses the problem.¹⁴⁵ Among other guidelines, it directs District Magistrates to consider, on their own motion, whether the case before them is one regarding which the accused should be admitted to bail.¹⁴⁶ There is no clear directive for the application of this support system to self-represented accused persons before the Circuit Court and High Courts, which also have original jurisdiction in criminal trials. One however notes in practice that in some instances, trial judges in the circuit courts and High Court exercise their power to *suo motu* consider and grant bail in deserving cases, where accused persons are unrepresented and unable to apply for bail pending trial.

One key observation however is that, these trial guidelines in the Criminal Bench Book of the District Courts are not binding. They therefore stop short of imposing a legal obligation on trial

¹⁴⁴ It stands for 'of its own accord'.

¹⁴⁵ Judicial Training Institute of Ghana *The Judiciary of Ghana – Criminal Bench Book* (2011). It was developed by the Judicial Training Institute on behalf of the Judiciary and the Judicial Service of Ghana.

¹⁴⁶ *Id* at 9, para 1(f) "Where the accused pleads not guilty, the accused is admitted to bail upon an application by his lawyer. If the accused person is unrepresented the court on its own motion (*suo motu*) will consider if it is appropriate to admit accused to bail."

magistrates. Furthermore, the guidelines do not vest self-represented accused persons with a right to be automatically considered for bail, breach of which may entail a special legal remedy for the disgruntled accused. There are therefore no legal repercussions for failure of the District Courts, and any other courts for that matter, to consider bail for self-represented accused persons on their own motion. The only relief for accused persons seeking pre-trial release is to take steps to personally apply for bail.

7.4.3.2 Self-Application

Self-application is one of the most common procedures that self-represented accused persons adopt to secure bail, pending trial, in Ghana. An accused person or a suspect seeking to be released on bail either makes an oral application or files a motion supported by an affidavit, deposing to the facts leading to the arrest, the nature of the offence charged, and the preparedness of the accused person to give bail. The formality of the bail application process essentially requires the assistance of defence counsel for persons not learned in the law. In cases where the accused or suspect is unrepresented, his/her only choice is to make the application in person. (self-application).¹⁴⁷

In practice, many accused persons assume the task of securing pre-trial bail in person due to the lack of legal assistance. The Open Society Foundations' report on the Socio-Economic Impact of Pre-trial Detention in Ghana of 2013 suggests that only 27% of persons detained had assistance of counsel. As a result, many self-represented suspects and accused persons had to handle their bail applications before the trial court in person.¹⁴⁸ Oral pleas for bail to the court by self-represented suspects and accused persons are generally taken as bail applications. In practice, these applications for bail are more often than not responded to and contested by the Prosecution. It must be noted that the duty of the court in considering bail applications is to do justice between the Prosecution and the accused, while balancing the right to personal liberty of the accused and the general public interest and safety.¹⁴⁹

In bail applications by self-represented accused persons, the courts adopt a relaxed procedure that is devoid of technicalities and core partisan adversarial argumentation. This judicial practice represents a vital step towards assisting the self-represented accused in their difficult

¹⁴⁷ Amissah *Criminal Procedure in Ghana* 183.

¹⁴⁸ Commonwealth Human Rights Initiative, UNDP & Open Society Justice Initiative *Socio-Economic Impact of Pre-Trial Detention in Ghana* 35.

¹⁴⁹ Ghana Constitution, art 12(2). Wood JSC in *Martin Kpebu v. Attorney-General* (unreported).

endeavour to secure bail. An example of such practice is exhibited in the case of *Abiam v. The Republic*.¹⁵⁰ The accused who was charged with the offence of attempted murder of his wife was detained in custody pending trial. He made an oral application on the day that he was unrepresented in court, to be admitted to bail, on the grounds of ill health pending the determination of the case. The application was contested by the Prosecution, which erroneously argued that the offence of attempted murder was of the same nature as the offence of murder for which bail must be denied. In pursuance of its duty to ensure a fair consideration of the matter, the court eschewed the raw argumentative procedure associated with adversarial contests where both parties are legally represented. The trial judge rather delved into the substantive merits of the application by refuting the legal basis of the Prosecution's submissions in opposition to the application. He paid due regard to the facts before him and the applicable law, the opposing arguments of the Prosecution, the fact that the trial could not be had within a reasonable time, as well as the status of the unrepresented accused. Eventually, upon satisfying himself that the accused person would appear to stand his trial, the court admitted him to bail with two (2) sureties, to be justified and conditioned upon a weekly report to a police station until the final determination of the case. This ruling accords with a principle regarding bail considerations as enunciated by Anim J in the case of *Issah Amadu v. The Republic*.¹⁵¹ The learned judge in this case underscored the fact that all bail applications must be considered by the court "in the light of the facts presented, the relevant law and the circumstances of the accused, as the court is able to ascertain upon interaction with the accused or his counsel".¹⁵²

Of note, unrepresented accused persons in most cases demonstrate abject ignorance of their right to be considered for bail and they exhibit incompetence in initiating bail proceedings on their own. To such self-represented accused, the procedure for applying for bail may be as complex as determining the particular stage of the proceedings in court at which bail applications are made. The magnitude of the procedural challenges is amplified by the lack of institutional support for self-represented accused persons in criminal proceedings. It is commonplace for self-represented accused persons to call upon lawyers at random in court in plea of assistance. A good number of them appeal to lawyers present at the bar during proceedings to pray the court for bail on their behalf.¹⁵³ The spontaneity of the call, and the

¹⁵⁰ 1976 1 GLR 270-272.

¹⁵¹ [29/01/2008] Case No. D16/04/08 (unreported)

¹⁵² *Ibid.*

¹⁵³ See observation by Suurbaareh J in *Mywill Limited v. Issah Abdulai* [25/02/2008] No. E12/38/07(unreported).

fact that the lawyer has very little or no knowledge of the substance of the case, and the accused, make the procedure unattractive to members of the Bar. There are, however, few human rights lawyers and organisations dedicated to the mission of providing in-court assistance to self-represented accused persons in bail applications.¹⁵⁴ Undoubtedly, these laudable efforts of private persons and civil societies do not go far enough to deal with the magnitude of the problem across all courts and jurisdictions where accused persons do not have the benefit of legal assistance.

7.4.4 Other Common Procedural Difficulties for Self-Represented Accused Persons in Bail Matters

Certain difficulties arise from the procedures that govern the process of bail applications in cases of self-representation. These are more apparent in situations where self-represented accused persons, on remand, are required to apply for bail to a court other than the court before which they are arraigned. For accused persons in custody, the bail application process is practically impossible to surmount without legal assistance and in the absence of institutional support. Two procedures are identified with this practice. The first applies to bail applications during committal proceedings, while the second relates to bail review applications of orders made by either the police or District Court in considering bail for suspects or accused persons.

7.4.4.1 Procedures for Bail Application during Committal proceedings

Committal proceedings in trials on indictment take the form of a preliminary hearing before the District Court.¹⁵⁵ They precede the actual trial before the Circuit Court or the High Court.¹⁵⁶ In practice, only persons charged with the offence of murder, among the list of offences triable on indictment, are automatically assigned defence counsel at the trial stage.¹⁵⁷ There is no judicial directive requiring persons tried on indictment for offences not punishable by death to be mandatorily assigned counsel or be represented by counsel at committal proceedings.¹⁵⁸ As a result, some accused persons appear unrepresented by counsel during committal proceedings.

¹⁵⁴ See, e.g., HelpLaw Ghana, an NGO of lawyers headed by Mr. Delanyo Alifo, Esq. in Ghana dedicated to assist indigent self-represented accused persons in criminal proceedings. Other programmes of intervention include the Access to Justice Project run by the African Center for Law and Ethics in Accra and the Justice for All Programme instituted by the Government of Ghana.

¹⁵⁵ COOPA, ss 44(1) & 2(4) (a).

¹⁵⁶ Discussed *supra*, Ch. 2, text at 2.4.4.3.

¹⁵⁷ See Amidu 1992 RGL 167; Amissah *Criminal Procedure in Ghana* 207.

¹⁵⁸ See, e.g. Amidu 1992 RGL 167.

A District Court Magistrate presiding over committal proceedings has no jurisdiction to consider bail applications regarding the offences for which the accused person is indicted.¹⁵⁹ Unrepresented accused persons in committal proceedings, who desire bail, pending trial, must apply to the High Court or Circuit Court with competent jurisdiction to try the substantive offence. Similarly, all bail applications grounded on the reason that the committal proceedings have been unreasonably delayed, must be made before the High Court or Circuit Court. For an accused person remanded in custody pending committal proceedings, the practical utility of this procedure for bail application is affected by serious operational challenges. In such instances, the steps for the preparation of bail applications, the filing of court processes, the choice of appropriate forums, and the identification of the rightful parties to the motion are all shrouded in legal procedures and technicalities. In addition, the process of filing bail applications before courts other than the remanding court adds to the complexity of the procedure. Without institutional assistance, the practicality of the bail application process is hindered by the physical restriction of the self-represented accused.

7.4.4.2 Procedural Constraints to Triggering the Supervisory Power of the High Court and Circuit Court in Bail Matters

Section 96(2) of the COOPA gives the High Court and Circuit Courts of Ghana concurrent jurisdiction to review decisions to refuse bail and excessive bail terms imposed by District Courts or by the police in police bails.¹⁶⁰ Therefore, it is essentially a supervisory jurisdiction pursuant to which the High Court or the Circuit Court directs the District Court or the police to either grant bail or fix a reasonable amount for the bail.¹⁶¹

The power of the police to grant bail to suspects of crimes pending criminal investigations is recognised in Ghana.¹⁶² The Constitution and the COOPA give the police authority to detain suspects of crime for a period not extending forty-eight (48) hours for purposes of crime investigations.¹⁶³ Where a person is arrested without a warrant and investigations are unlikely to be completed within the stated period after arrest, the police have the option to grant him/her

¹⁵⁹ Benin and Dotse JJSC in *Martin Kpebu v. Attorney-General* (unreported).

¹⁶⁰ It provides in material part that “the High Court or a Circuit Court may direct that a person be admitted to bail or that the bail required by a District Court or police officer be reduced.”

¹⁶¹ See *obiter dictum* of Mensa Boison J in *Boateng v. The Republic* 1976 2 GLR 444 446.

¹⁶² In the domestic legal jargon and criminal jurisprudence, this process is referred to as ‘police enquiry bail’.

¹⁶³ See Ghana Constitution, art 14(3) (b) and s 15(1) of COOPA, as amended by s 2 of the Criminal procedure Code (Amendment) Act (Act 633 of 2002). The same power is given to other state investigative agencies including the Bureau of National Investigations (BNI) and the Economic and Organized Crime Office (EOCO)

bail to appear at some specified date, time and place pending investigation.¹⁶⁴ Any suspect in the hands of the police or an accused person brought before the District Court for trial, whether represented by counsel or not, reserves the right to apply to the High Court or Circuit Court to challenge either an order refusing bail or the excessiveness and unreasonableness of the amount of bail granted.¹⁶⁵

The supervisory jurisdiction of the High Court and Circuit Courts is officially triggered through the filing of a formal application seeking a review of the orders of the police or District Court.¹⁶⁶ At this stage, the misfortunes of self-represented suspects in police detention or self-represented accused persons remanded in custody arise. Similar to the procedure in committal proceedings, this mechanism of bail application involves invoking the jurisdiction of a court other than the court or body before which the detained self-represented accused person or suspect originally makes his/her appearance. Consequently, the same procedural challenges arising in bail applications by self-represented accused persons in committal proceedings apply.

Twumasi J in *Marfo v. The Republic*¹⁶⁷ broadly interpreted this supervisory power and reaffirmed the authority of the court to *suo motu* engage this process of bail consideration where necessary. He ruled that the High Court and Circuit Courts, in appropriate cases, could exercise their supervisory powers under section 96(2) of the COOPA, on their own motion, where they are informed that the District Court or the police has improperly withheld or granted bail on unconscionable terms. This principle of judicial interventionism stands to relieve accused persons who are unrepresented by counsel and who are incompetent to surmount the procedural hurdles associated with the process, from the burden of having to initiate the bail review procedure themselves. The lingering snag despite these efforts and goodwill of the courts relates to the lack of institutional support and prescribed procedures to direct how such facts are brought to the notice of the Court, where the self-represented accused is remanded in custody.

The procedural realities of self-representation in the criminal adjudication system of Ghana are noted in everyday courtroom experiences. Sadly, no concerted efforts have been made to holistically address the problem. As a result, the realisation of the right to bail appears more

¹⁶⁴ *Ibid.*

¹⁶⁵ COOPA, s 96(2)

¹⁶⁶ *Ibid*; see also Amissah *Criminal Procedure* 184.

¹⁶⁷ 1981 GLR 722 -728 725.

illusory in the absence of any institutional support system for self-represented accused persons in custody. It is not uncommon to find accused persons remanded in police and prison custody for unreasonably long periods of time and sometimes 'forgotten' and 'abandoned' mainly due to their inability to formally apply for bail in person. Usually, it takes the support of counsel and of some other institutions to assist self-represented accused persons to enforce the right to bail.

*Francis Agyare v. The Republic*¹⁶⁸ remains a sensational case that exposed the phenomenon of unreasonable detentions of accused persons and unreasonable delays in criminal proceedings in Ghana. The accused person unrepresented by counsel was arrested on January 5, 1994, in a police swoop and was remanded by the District Court in prison custody pending investigations. He was not given the opportunity to appear in court again for fourteen (14) years until his release on May 29, 2008, under the Justice for All Programme run by the Government of Ghana, to among others, assist accused persons on remand. Similarly, in *Barnabas Adjei v. The Republic*,¹⁶⁹ the accused/applicant that was unrepresented by counsel was arraigned before the District Court and remanded in custody upon a charge of possessing narcotic drugs in or around 2001. He spent eight (8) years on remand without trial. It took the intervention of a lawyer to file a motion before the High Court to seek the release of the accused person under article 14(4) on the ground of unreasonable delay. These are not cases in isolation, as several more self-represented accused suffer the same fate.

Unfortunately, the various legal aid schemes in Ghana have not been efficient enough to provide the much needed assistance to self-represented suspects and accused persons at this stage of the criminal proceedings.¹⁷⁰ The courts have also not been sufficiently proactive in ensuring the full implementation of their authority to assign counsel to deserving unrepresented suspects and accused persons to assist in their bail applications.

The need to secure a workable procedure through which all self-represented accused persons can effectively benefit from the guarantee of the right to bail is imperative. For unrepresented accused persons not learned in the law and unable to personally apply for bail, reliance on the proactiveness of the court to consider bail on their own motion provides the needed procedural relief. The decision to remand accused persons pending trial is a judicial one and rests at the

¹⁶⁸ 2014 (unreported).

¹⁶⁹ [30/03/2009] Suit No. E12/32/09 (unreported).

¹⁷⁰ Discussed *supra*, Ch. 6, text at 6.5.

doorstep of judges and magistrates.¹⁷¹ Consequently, the ultimate responsibility regarding the usefulness and legitimacy of any restriction of accused persons pending trial must equally rest with them. Furthermore, the need for an effective institutional support system for unrepresented accused persons is indispensable to deal with the internal procedural challenges arising from inter-court referrals for bail applications in committal proceedings and bail review applications.

7.5 THE RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

The Constitution of Ghana guarantees the right of every accused person to adequate time and facilities for the preparation of his/her defence under clause (e) of article 19(2). The provision applies to all accused persons, whether represented by counsel or not, detained in custody or released on bail, and irrespective of the nature of the charge. The provision is an important element of the guarantee of fair trial and an application of the principle of equality of arms.¹⁷² Its essence is embedded in a *dictum* of the Court Appeal in the case of *Ennin v. Republic*,¹⁷³ which emphasises the need to provide accused persons with ample opportunity to contest state power in the Ghana adversarial system.¹⁷⁴ This right is linked to the procedural entitlement of the accused person not to be subjected to an unduly hasty trial and to an entitlement to state assistance in preparing his/her defence.

It has been argued that where a self-represented accused person, illiterate in law and inexperienced in criminal procedure, is made to advance a defence without adequate facilities and time to prepare a defence, the trial loses its efficiency and becomes a sham trial and a mockery of justice.¹⁷⁵ In Ghana, the implementation of this right has been relatively adequate for accused persons on indictment trials only. As a result, it has attracted strictures amidst the general concern of whether the criminal procedure of Ghana has kept abreast with international best practices and standards as far as summary trials are concerned.¹⁷⁶ How the law attends to the speciality of self-representation also raises concerns about the competence of the procedural

¹⁷¹ COOPA, s 21(4) of COOPA.

¹⁷² See Human Rights Committee (HRC) *General Comment 32 CCPR/C/GC/32* (2007) para 32, fn 64 referring to Communications No. 282/1988, *Smith v. Jamaica*, para 10.4; No. 226/1987 and 256/1987, *Sawyer, Mclean and Mclean v. Jamaica*, para 13.6.

¹⁷³ *Ennin v. Republic* 1976 1 GLR 326 334.

¹⁷⁴ *Ibid.*

¹⁷⁵ "Notes: The Jailed *Pro Se* Defendant and the Right to Prepare a Defence" 1976-1977 *Yale L. J* 292 297.

¹⁷⁶ Awuku "Disclosure in Our Criminal Process" 2011 <https://www.modernghana.com/news/352403/1/disclosure-in-our-criminal-trial-process.html>, (Accessed 12-02-2017)

system to ensure that the accused person is fully prepared to make his/her defence at the trial, especially when not represented by counsel.

7.5.1 The Right to adequate time to Prepare a Defence

The right to adequate time to prepare a defence generally seeks to protect the accused against hasty trials. It involves the principle that the courts' obligation to conduct speedy trials ought not to be done to the detriment of the procedural rights of the parties.¹⁷⁷ This is a time-honoured common law principle of fair trial.¹⁷⁸ There has been very little academic or judicial consideration of the right to adequate time to prepare a defence in the Ghana criminal jurisprudence. Even more importantly, there is a dearth of jurisprudence on the exercise of the right by self-represented accused persons. The basic international standards of the accused person's right to adequate time to prepare his/her defence however apply in Ghana by reason of the country's ratification of article 14 of the International Covenant on Civil and Political Rights (ICCPR).¹⁷⁹

In general terms, this right translates into ensuring that the accused person, whether or not represented by counsel, is given enough opportunity to prepare his/her defence before pleading to the charge or facing the trial. It is usually the practice of the courts in Ghana to have the criminal proceedings begin once the Prosecution is ready. Relatively little consideration is attached to the readiness of the accused to stand trial beyond the test of mental competence.¹⁸⁰ The right to adequate time therefore requires applying the principle of reciprocity. The decisive question must extend to also finding out whether the accused person is adequately prepared for the trial to begin.¹⁸¹ Concerning self-represented accused persons, the right to adequate time will only be sufficiently beneficial and meaningful if prior to the trial the court enquires, *inter alia*, whether the accused has had the opportunity to fully prepare for the trial or to consider his/her plea to the charges.¹⁸²

¹⁷⁷ See Council of Europe/European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights (2014) 43, referring to *Kröcher and Möller v. Switzerland* No.8463/78; *Bonzi v. Switzerland* No. 7854/77; and *OAQ Neftyanaya Kompaniya Yukos v. Russia* No. 14902/04.

¹⁷⁸ Steytler *Constitutional Criminal Procedure: A Commentary on the Republic of South Africa* 1996 (1998) 233.

¹⁷⁹ *General Assembly Resolution 2200A (XXI)* (1966).

¹⁸⁰ See COOPA, ss 133-138.

¹⁸¹ See, e.g., Steytler *Constitutional Criminal Procedure* 233.

¹⁸² *Id* at 234. It has been argued that the purpose is to ensure that the accused who is self-represented has had reasonable opportunity to prepare his/her defence and conduct his/her case. See, e.g. the South African case of *S v. Yantolo* 1977 (2) SA 149 H.

The question as to what amounts to 'adequate time' for the accused to prepare his/her defence has also not been addressed in the Ghanaian criminal jurisprudence. The Human Rights Committee has however postulated that what amounts to adequate time in preparing for a trial depends on the circumstances of each case.¹⁸³ Assessment of the sufficiency or otherwise of the time needed to effectively construct a defence to a criminal charge is usually done based on the professional evaluation of counsel, at whose behest the court may grant an adjournment.¹⁸⁴ Where the accused person is not represented by counsel, s/he bears the duty to personally request such an adjournment, where s/he reasonably thinks that the time for the preparation of the defence is insufficient. Generally, in all cases where the accused is charged with a serious offence, the Human Rights Committee (HRC) specifically imposes an obligation on the courts to grant reasonable requests for adjournment and additional time for preparing the defence.¹⁸⁵

The High Court of Ghana has set aside convictions and sentences on appeal as being irregular and amounting to miscarriage of justice, in cases where self-represented accused persons are hurriedly tried, having been deprived of reasonable time to prepare their defence. A good example is reported in the case of *Armah v. The Republic*.¹⁸⁶ On his first appearance before the court, the accused who was unrepresented by counsel during the trial, applied for an adjournment to enable him to secure the presence of his counsel in order to adequately prepare for the trial. His application was disallowed and he was compelled to incompetently defend himself in person. The High Court *per* Taylor J held that the trial resulted in a miscarriage of justice, as the accused was unable to put his defence adequately before the court. The conviction was set aside.¹⁸⁷ Thus, where the accused person is unrepresented by counsel and he/she requests an adjournment for the purpose of enabling him/her to prepare adequately for the trial, the courts consider it appropriate to exercise their discretion to grant the adjournment.¹⁸⁸ Due considerations are however given to the potential of abusing the right to adequate time by accused persons in order to frustrate the progress of the case. It is therefore the position of the law that where the self-represented accused is given a reasonable opportunity

¹⁸³ HRC *General Comment* 32, para 32.

¹⁸⁴ *Ibid*, see *Morais v. Angola* Communication No. 1128/2002 para 5.6.

¹⁸⁵ *Ibid*, referring to *Chan v. Guyana* No. 913/2000 para 6.3; *Phillip v. Trinidad and Tobago* No. 594/1992 para 7.2.

¹⁸⁶ 1971 2 GLR 17, Taylor J.

¹⁸⁷ See also *dictum* of Taylor JSC in *Appiah v. The Republic* 1987-88 2 GLR 377 426.

¹⁸⁸ See COOPA, ss 169 & 186.

to obtain legal representation and fails to do so, s/he may be estopped from attacking the proceedings unless there are convincing reasons to the contrary.¹⁸⁹

7.5.2 The Right to Adequate Facilities to Prepare a Defence

The COOPA reinforces the constitutional guarantee to provide accused persons with ‘adequate facilities’ to prepare their defence in Ghana, especially when s/he is remanded in custody or kept in detention. ‘Adequate facilities’ is interpreted by the HRC to include access to documents, evidence and all materials that the Prosecution intends to rely on at trial, whether incriminating to the accused or exculpatory.¹⁹⁰ According to the Lawyers Committee for Human Rights, the term ‘facilities’ means that “the accused and the defence counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defence”.¹⁹¹ The accused must receive all relevant information from the Prosecution in order to prepare an effective defence. The procedural directive is to make available to counsel for the accused, all relevant documents.¹⁹²

According to section 9 of the COOPA, any person arrested shall while in custody, be given reasonable facilities to arrange for a defence. There is very little or no jurisprudence on the content and implementation of this provision in criminal proceedings in Ghana. Its application to self-represented accused persons has also not been considered.

The duty to provide adequate facilities is owed to the accused in person where s/he is unrepresented by counsel.¹⁹³ This right serves the overall objective of enabling the accused person, well before his/her appearance at the trial, to know the materials, facts and evidence that would be put against him/her and adequately prepare for the trial.¹⁹⁴ The right to adequate facilities in this case may also include the right to be provided with a free interpreter for indigent accused persons to facilitate communication with counsel at both the trial and pre-trial phases of the proceedings.¹⁹⁵ This also includes providing the accused with the means of

¹⁸⁹ See, e.g., *Cossier v. Avadetsi* (Practice Note) 1968 GLR 985-986, per François J.

¹⁹⁰ HRC General Comment 32 para 33.

¹⁹¹ Lawyers Committee for Human Rights *What is a Fair Trial? – A Guide to Legal Standards and Practice* (2000) 16 para 7. https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf. (Accessed 11-02-2017). It guarantees as well that the accused be provided with facilities enabling communication, in confidentiality with counsel, when in custody.

¹⁹² HRC General Comment 32 para 33, referring to *Harward v. Norway* communication No. 451/1991 para 9.5.

¹⁹³ There is no reciprocal duty on the accused to disclose facts and statements and material facts to the prosecution. This is justified as being consistent with his/her presumption of innocence. See, e.g., *Juma v. Attorney-General* 2003 AHRLR 179; KeCH 2003 para 22.

¹⁹⁴ *Id* at para 15.

¹⁹⁵ HRC General Comment 32 para 32.

understanding the documentary evidence against him/her and familiarising him/herself with them in a language that s/he understands.¹⁹⁶

The criminal justice system of Ghana mandates disclosure of information by the Prosecution to the accused in indictment offences only.¹⁹⁷ Section 182 of the COOPA enjoins the Prosecution to furnish the accused person, whether represented by counsel or not, with a bill of indictment, which shall state in writing the charge against the accused person. It also directs that the accused person be equally furnished with the summary of the evidence of each prosecution witness, the list of all prosecution witnesses, as well as the lists of documents and exhibits that the Prosecution intends to tender at the trial.¹⁹⁸ Unfortunately, there is no duty to disclose on the part of the Prosecution, as far as summary trials are concerned. Even serious offences attracting up to twenty-five (25) years of imprisonment, which are triable summarily, do not compel pre-trial disclosure obligations on the part of the Prosecution, in terms of furnishing the accused person with material statements and exhibits.¹⁹⁹ The procedure remains the same whether the accused is represented by counsel or simply unrepresented. In practice, it is commonplace for the Prosecution and the police to refuse to disclose information and documents to the accused prior to the commencement of proceedings in summary trials. Generally, the instruments of examination and cross-examination of witnesses become the principal tools for gathering information and documents from the Prosecution during the trial. This process indubitably denies the accused of the right to adequate and effective pre-trial preparations.²⁰⁰

Thus, despite mainstreaming the doctrine of fair trial, the criminal justice system of Ghana erroneously gives tacit approval to the long outlived notion of 'trial by ambush' in criminal proceedings conducted summarily. It is a general and time-honoured principle of the common law that,

...the fruits of the investigation, which are in the possession of the prosecution counsel, are not the property of the Prosecution for use in securing conviction: it is a property of the public to be used to ensure that justice is done.²⁰¹

This principle is yet to be fully applied to summary trials in Ghana. Consequently, self-represented accused persons in summary trials, irrespective of the gravity of the offence,

¹⁹⁶ *Harward v. Norway*, Communication No. 451/1991, 15 July 1994.

¹⁹⁷ Discussed above at 7.3.2.3.

¹⁹⁸ COOPA, ss 182(1) (a) & (b).

¹⁹⁹ Examples include the offences of defrauding by false pretention and corruption.

²⁰⁰ Awuku "Disclosure in Our Criminal Process" 2011, see note 176 above.

²⁰¹ See, e.g., *Juma v. Attorney-General* para 22; *Republic v. Stinchcombe* 1991 3 S.C.R 326.

continue to be tried without pre-trial access to information and documents on the case. They are subjected to cross-examination without any meaningful opportunity to prepare and without knowing in advance, what each witness would say. This procedure also limits their ability to conduct meaningful investigations into matters pertaining to the prosecution witnesses themselves.²⁰² The failure to disclose Prosecution's statements and evidence in advance of their trials deprives self-represented accused persons the opportunity to fully prepare their defence in answer to the case of the Prosecution.²⁰³

Thus, for self-represented accused persons at trial, the expectation of efficient realisation of the constitutional right to adequate time and facilities for the preparation of the defence, without any form of legal assistance, may be at best illusory. The potential to ensure that such an accused is provided with the necessary tools and materials, and is given adequate time to prepare his/her defence, may be achieved at the back of certain legislative and procedural interventions. The COOPA must enact an obligation on the part of the Prosecution to disclose all material facts, evidence and prosecution witnesses and the summary of their evidence to the accused. At any time in the course of the proceedings, it must fall to the court to justly determine whether the accused is fully prepared and ready to begin the trial.

7.6 CONCLUSION

The regime of pre-trial rights affords a very important cover of protection for suspects and accused persons, whether represented by counsel or not, in criminal proceedings in Ghana. For self-represented accused persons, the realisation and enforcement of the vast scope of protections offered by these rights are subject to several procedural limitations. The formal procedural system is structurally designed for the use and operation of lawyers and it attests to the incompetency and inability of self-represented accused persons to formally apply and seek the enforcement of these pre-trial rights. This situation reinforces the notion that the most important propelling agent for securing the full benefits of the rights of the accused person rests in the invaluable guiding hand and assistance of counsel.²⁰⁴

In practice, the courts have progressively interpreted these rights to provide several degrees of assistance in cases where the suspect or accused person is disadvantaged due to lack of legal

²⁰² See, e.g., observations by the Court in *Juma v. Attorney-General* para 16.

²⁰³ *Ibid*, para 28.

²⁰⁴ See, e.g., Cape, Smith & Spronken *Effective Criminal Defence in Europe – Executive Summary and Recommendations* (2010) 2, stating that without the assistance of lawyers who actively use these rights on behalf of suspects or the accused persons, they will in fact not be available in practice.

assistance. The various judicial interventions tend to consolidate a laudable scheme of protection and enforcement of the pre-trial rights for the benefit of self-represented accused persons. However, many more structured interventions are needed. Several procedural and legal adjustments, as well as key institutional and structural reforms are required to ensure that self-represented suspects and accused persons obtain the full benefits of the pre-trial rights.



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CHAPTER 8

PROFESSIONAL AND ETHICAL RESPONSIBILITIES OF PUBLIC PROSECUTORS IN TRIALS OF SELF-REPRESENTED ACCUSED PERSONS IN GHANA

8.1 INTRODUCTION

The office of the Prosecution is a fundamental institutional body within the criminal justice system of Ghana. All criminal prosecutions are conducted in the name of the Republic by public prosecutors, all of whom act under the authority and on behalf of the Attorney-General.¹ The Criminal and Other Offences (Procedure) Act² (COOPA) previously permitted private individuals to also institute and conduct criminal proceedings regarding offences triable summarily before the District Courts.³ This system of private prosecutions was however abolished in the year 2002. Thus, all criminal trials in Ghana today are public prosecutions by nature. They take the form of a contest between public prosecutors representing the state and individual accused persons, acting either by themselves or through a lawyer.

This chapter is principally an examination of the professional and ethical responsibilities of public prosecutors in criminal proceedings involving self-represented accused persons. Part 2 discusses the various systems of criminal prosecutions. Part 3 analyses the status of the public prosecutor in the adversarial contest with a self-represented accused person. Part 4 is an examination of the key ethical and professional responsibilities of public prosecutors to self-represented accused persons at the pre-trial and trial stages of criminal proceedings. Part 5 is a comparative analysis of the ethical and professional duties of prosecutors in trials of self-represented accused persons in the American legal system. It aims at projecting the American position on the law in a form of a persuasive authority for purposes of legal reforms in Ghana. Finally, Part 6 is a reconsideration of the system of private prosecutions that earlier operated alongside the prevailing model of public prosecutions. It includes a highlight of the benefits of private prosecutions for self-represented accused persons and a call for its possible reinstatement.

¹ Ghana Constitution, art 88(4).

² Act 30 of 1960.

³ Further discussed below, see 8.6. Summary trials are discussed, *supra*, Ch. 2, text at 4.2.2.3

8.2 SYSTEMS OF CRIMINAL PROSECUTIONS IN GHANA

All criminal offences in Ghana are prosecuted as offences against the State. The Attorney-General is the chief public prosecutor who controls the initiation and conduct of all criminal prosecutions in the country, among other constitutional functions.⁴ The Attorney-General also has a right of audience in all courts throughout the country.⁵ In discharging his/her prosecutorial functions, s/he is assisted by public officers duly authorised to act on his/her behalf.⁶ There are two parallel systems of criminal prosecution in Ghana. The first is the system of Prosecuting Attorneys consisting of various ranks of state Attorneys who conduct criminal trials on behalf of the Attorney-General. The second refers to the system of lay prosecutors. The law allows the Attorney-General to appoint professionals other than lawyers, such as police officers not below the rank of Sergeant, to prosecute offences triable summarily, especially in the lower courts. These public officers are professionally trained in matters of criminal law and procedure in order to deliver on their prosecutorial mandate.

8.2.1 The System of Prosecuting Attorneys

The system of Prosecuting Attorneys in Ghana falls squarely within the principal administrative setup of the office of the Attorney-General, commonly referred to as the Attorney-General's Department. The Department, which also doubles as the Ministry of Justice, defines its administrative objectives to include promotion of the rule of law, the principle of equality of access to justice, and equality of treatment of all persons before the law, among others.⁷ The mission of the Attorney-General's Department is to ensure fair, efficient and transparent trials for all accused persons.⁸ In practice, the Prosecution Division of the Attorney-General's Department discharges the constitutional mandate of the Attorney-General to initiate and conduct criminal prosecutions. The Director of Public Prosecutions (DPP), who reports directly to the Attorney-General, heads this Division. Prosecutions under the said Division are usually conducted by and on behalf of the Attorney-General by State Attorneys

⁴ Ghana Constitution, art 88(3).

⁵ Ghana Constitution, *arts* 88(4) and 88 (6); see also Amissah "Titles of Cases: Different Names for the Same Legal Personality" 1970 *RGL* 183.

⁶ Ghana Constitution, art 88(4).

⁷ "Ministry of Justice and Attorney-General – Ghana" <http://ghana.gov.gh/index.php/blog-categories/blog-donec-eu-elit-in-nisi/94-ministries-info/380-ministry-of-justice-attorney-general> (Accessed on 16-08-2017); see also *Ministry of Justice and Attorney-General's Department, Medium Term Expenditure Framework for 2017-2019, 2017 Budget Estimates (MOJAGD MTEF PBB Estimates) (2017) 4*, http://www.mofep.gov.gh/sites/default/files/pbb_2017/2017-PBB-MoJAGD.pdf (Accessed 16-08-2017)

⁸ "Ministry of Justice and Attorney-General - Ghana" <http://ghana.gov.gh/index.php/blog-categories/blog-donec-eu-elit-in-nisi/94-ministries-info/380-ministry-of-justice-attorney-general> (Accessed on 16-08-2017).

statutorily appointed and mandated under the Law Officers Act.⁹ They all act under the supervision of the DPP.¹⁰ Prosecuting Attorneys in the Attorney-General's Department are professionally trained lawyers and qualified solicitor advocates of the courts of Ghana.¹¹ In the performance of their duties, they exercise all prosecutorial powers constitutionally vested in the Attorney-General.¹² In other words, they have the power to initiate and conduct any criminal prosecutions in Ghana. They are authorised to prosecute all criminal cases, including misdemeanours, felonies and capital offences.¹³ As members of the Legal Service branch of Public Services in Ghana, all Prosecuting Attorneys are appointed by the President of the Republic or by the Board of Legal Service acting upon delegated authority from the President.¹⁴ Their mode of appointment stands opposed to the systems in countries where public prosecutors are publicly elected.¹⁵

The group of Prosecuting Attorneys in Ghana extends beyond the list of Attorneys directly employed at the Attorney-General's Department as officers of the Legal Service. The COOPA vests the Attorney-General with power to appoint any legal practitioners whatsoever, to prosecute criminal offences relating to activities of government departments and agencies.¹⁶ Consequently, lawyers working in several public offices have been listed on the role of Prosecuting Attorneys in Ghana.¹⁷ Every lawyer claiming to have been appointed as a public

⁹ NRCD 279 of 1974, s 3(1). The specific ranks at the Prosecution Division are in order of seniority: Director of Public Prosecutions, Chief State Attorney, Principal State Attorney, Senior State Attorney, State Attorney and Assistant State Attorney. See, *id*, s 3(3). The DPP must have a minimum of 12 years standing as a lawyer, the Chief State Attorney 10 years, the Principal State Attorney, five years, the Senior State-Attorney and state Attorney 3 years, and no requirement for Assistance State Attorneys. See Legal Service Act (PNDCL 320 of 1993), Second Schedule.

¹⁰ The DPP is also responsible to the Attorney-General for all criminal prosecutions including prosecution by the police and other public prosecutors appointed under the COOPA, s 56. The division of the DPP advises the police on criminal law and on their dockets, and exercise general supervisory jurisdiction and control of criminal prosecutions in Ghana. See "Ministry of Justice and Attorney-General's Department" <http://www.mojagd.gov.gh/attorney-general%E2%80%99s-department> (Accessed on 21-11-2016).

¹¹ See, e.g., Legal Service Act, (PNDCL 320 of 1993) Second Schedule.

¹² Amissah *Criminal Procedure in Ghana* (1982)19.

¹³ They inherit this authority from the power of the Attorney-General to institute and conduct all criminal offences. See Ghana Constitution, art 88(3).

¹⁴ Legal Service Act, ss 1(4) and 1(9).

¹⁵ See, e.g., the United States where prosecutors are elected and answerable to the public through public elections. Kempinen "Ethics of Prosecutor Contact with the Unrepresented Defendant" 2006 *Geo. J. Legal Ethics* 1147 1165. Also Wright "Community Prosecution vs Comparative Prosecution" 2012 *Wake Forest L. Rev.* 361 363, arguing that generally, almost all American states elect their chief prosecutors at the local level. The few exceptions include appointment of chief prosecutors at the local level by an elected official, typically the State-Attorney General. In addition, the United States Attorney for each district is a presidential appointee. See 28 U.S.C § 541 (1).

¹⁶ COOPA, ss 56(1) & 56(2).

¹⁷ See, e.g., appointment of lawyers working in the following government departments as public prosecutors: (a) Appointment of Public Prosecutors Instruments, E.I 6 of 2013 to prosecute offences under the National Lotto Act, 2006, Act 272; (b) Appointment of Public Prosecutors Instruments, E.I 15 of 2004 for the prosecution of offences under the Internal Revenue Service, CEPS and VAT services; (c) Appointment of Public Prosecutors

prosecutor in this manner justifies his/her authority based on a specific executive instrument issued by the Attorney-General to that effect.¹⁸ The COOPA also vests the Attorney-General with power to appoint any legal practitioners to prosecute any particular cases, as s/he so wishes.¹⁹ Unlike the general power of appointment by executive instrument, such appointments may simply be made in writing.²⁰ In practice, Prosecuting Attorneys are exclusively concerned with the conduct of certain categories of offences. Usually, they target the prosecution of serious crimes, which are triable on indictment.²¹ In some instances, they also attend to cases that, though triable summarily, involve serious legal issues and complexities.²² Prosecuting Attorneys seldom try cases in the lower courts and especially in the District Courts.²³ Where they initiate and conduct prosecutions, Prosecuting Attorneys square off with accused persons, whether legally represented or acting without legal assistance.

8.2.2 The System of Lay Prosecutors

The system of lay prosecutors refers to public officers, other than trained and qualified lawyers, who prosecute crimes on behalf of the State. In simple terms, it is the non-lawyer division of public prosecutors in Ghana.²⁴ Indeed, the large and ever-increasing number of criminal cases in the country makes it practically impossible for the Prosecution Division of the Attorney-General's office to conduct all criminal prosecutions in the country. The Constitution of Ghana empowers the Attorney-General to delegate his/her prosecutorial powers and duties to any persons s/he may authorise.²⁵ In furtherance of this constitutional authority, the COOPA confers power on the Attorney-General to appoint by executive instrument, public officers other than lawyers, as public prosecutors to initiate and conduct prosecutions regarding any, or

Instruments, E.I 9 of 1999, for the prosecution of offences under the Environmental Protection Agency Act, No. 490 of 1994; (d) Appointment of Public Prosecutors Instruments, E.I 7 of 1997 for the prosecution of offences under bye-laws and regulations of the Accra Metropolitan Assembly; (e) Appointment of Public Prosecutors Instruments, E.I 27 of 1988 for the prosecution of offences under the Standards Act (NRCD 173 of 1973); (f) Appointment of Public Prosecutors Instruments, E.I 38 of 2010 for the prosecution of offences relating to supply of electricity.

¹⁸ See, Brobbey *Practice and Procedure in the Trial Courts and Tribunals of Ghana* (2011) 593.

¹⁹ COOPA, s 56(1).

²⁰ *Ibid.*

²¹ COOPA, s 58, according to which "[p]roceedings shall not be instituted for the trial of an accused on indictment except by or on behalf of the Attorney-General."

²² Amissah *Criminal Procedure* 18-19. Also Amissah "The Machinery of Criminal Justice in Ghana" 1964 *UGLJ* 80.

²³ See Brobbey *Practice and Procedure* 592.

²⁴ This is contrary to the criminal practices in the United States and England where every public prosecutor is a lawyer. See Standard 3-2.1 Criminal Justice Section Standards, American Bar Association and the Prosecution of Offences Act of 1985 of England, s 3.

²⁵ Ghana Constitution, art 88 (4).

a specific class, of offences.²⁶ In *Clerk of Axim Local Council v. Tandoh*,²⁷ Edusei J of the High Court emphasised the position that a public officer who undertook the prosecution of a criminal offence did not necessarily become a public prosecutor.²⁸ The required procedure is by direct appointment under an Executive Instrument issued in accordance with the COOPA.²⁹ Every public officer who is appointed as a public prosecutor derives his/her authority from the specific Executive Instrument under which his/her appointment is made.³⁰

The non-lawyer system of criminal prosecutions fills the resource gap of the Attorney-General's office and provides another prosecutorial arm of the criminal justice system. Delegating prosecutorial powers to such group of prosecutors does not abate the constitutional mandate of the Attorney-General. S/he is ultimately responsible for all criminal prosecutions undertaken by both Prosecuting Attorneys and non-lawyer prosecutors.³¹ Since the 1970s, several categories of public officers have been duly appointed by the Attorney-General as public prosecutors.³²

In practice, the largest group of public officers appointed to conduct criminal prosecutions is chosen from the Ghana Police Service (GPS). Under the Appointment of Public Prosecutors Instrument, (E.I.4),³³ police officers, not below the rank of Sergeant, may be appointed public prosecutors and assigned the task of prosecuting criminal offences falling within the criminal jurisdiction of District Courts. Pursuant to this Instrument, a good number of police officers have been duly appointed as public prosecutors to support the office of the Attorney-General in criminal prosecutions. They practically undertake all criminal prosecutions in the District Courts all over the country. They also assume the prosecution of offences triable summarily

²⁶ COOPA, s 56(1).

²⁷ 1968 GLR 774 774.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ See, e.g., Brobbey *Practice and Procedure* 593.

³¹ Ghana Constitution, art 88(3).

³² See, e.g., Appointment of Public Prosecutors Instruments of 1976 (E.I. 4) where the Attorney-General appointed the following non-lawyer professionals as public prosecutors: police officers not below the rank of Sergeant for the prosecution of criminal causes or matters heard by a District Court or heard summarily by a Circuit Court. It also appoints other public officers for the prosecution of specific offences under their enacting statutes. These include Inspectors of Produce, Labour Officers, Factory Inspectors, Inspecting Pharmacists, Inspectors of Mines and Machinery, Technical Officers of the Ministry of Forestry, Officers of the Department of Game and Wildlife above rank of Game Ranger, Officers of the Social Security and National Trust. Also, Appointment of Public Prosecutors Instrument of 1999 (E.I. 9) for the appointment of officers of the Environmental Protection Agency of the rank of Senior Programme Officer and above, and Environment Protection Inspector as public prosecutors for offences committed under the Environmental Protection Agency (Act 490 of 1994); Appointment of Public Prosecutors (Amendment) Instruments of 1980 (E.I. 7) for the appointment of Immigration Officers.

³³ E.I 4 of 1976, made on December 31, 1975.

before the Circuit courts.³⁴ In the discharge of their prosecutorial duties, they remain a proxy of the Attorney-General and report to his/her office.

In terms of legal developments in Ghana, the idea of police prosecution in Ghana is traced to the historical antecedents of the Supreme Court Ordinance of 1876.³⁵ The Ordinance introduced the substance of the common law, doctrines of equity, and the statutes of general application in force in England no later than July 24, 1874 to Ghana.³⁶ It also introduced the procedure and practice observed in the English courts of justice as of that date.³⁷ These included the system of police prosecutions, which was rather implemented in Ghana as a system of public prosecutions, contrary to its private nature in England.³⁸ In effect, police prosecutions in England were private in nature, even though they reinforced the public interest in crime prosecutions and control.³⁹ English police officers who prosecuted criminal offences acted not by virtue of their office, but as private citizens interested in maintaining law and order.⁴⁰ In Ghana however, all criminal prosecutions conducted by police prosecutors are public prosecutions by virtue of the formal appointment of police prosecuting officers by the Attorney-General.

The system of police prosecutions in Ghana has not been extensively studied and their contribution to the overall scheme of criminal prosecutions has not been currently investigated. In a report of a study conducted over two decades ago,⁴¹ Appiahene-Gyamfi observed that lay police officers prosecuted over ninety percent (90%) of criminal cases.⁴² The reality is not much different today. The bulk of criminal cases, which are tried summarily before the District and Circuit Courts in Ghana, are initiated and prosecuted by the police. Police prosecutors do consult with the office of the Attorney-General in the discharge of their prosecutorial functions.

³⁴ See Column 1, para 2 of E.I 4.

³⁵ Cap 4. Discussed *Supra*, Ch. 2, text at 2.3.2.

³⁶ Cap 4, s 14.

³⁷ *Ibid.*

³⁸ In English legal history, the system of police prosecutions formally emerged in the nineteenth century with the establishment of the London Metropolitan Police in 1829. It was originally instituted to complement the system of Crown prosecutions. Crown prosecutions consisted of trials that involved the interest of the Crown, which were conducted by law officers and King's Attorneys on behalf of the Crown. See Langbein 1973 *Am. J. Legal Hist.* 316. It is also noted that Crown prosecutions in England operated alongside a scheme of private prosecutions regarding all other offences falling outside the Crown's interest. Police prosecutions were introduced to assist in conducting such private prosecutions

³⁹ Ma "Exploring the Origins of Public Prosecution" 2008 *Int'l Crim. Just. Rev.* 190 194-195.

⁴⁰ *Ibid.* The English system of police prosecution however fell in disuse with the passing of the Prosecution of Offences Act (C23) in 1985.

⁴¹ Appiahene-Gyamfi *Alternatives to Imprisonment in Ghana: A Focus on Ghana Criminal Justice System* (LL.M – Dissertation, SFU, 1995)

⁴² *Id* at 132.

They generally request for advice on matters of adequacy and admissibility of evidence, and for directives on appropriate offences and charges.⁴³ In relatively serious and complex cases, the office of the Attorney-General provides extra-curial advisory services to police prosecutors. Police prosecutors are also mandated to act on the directives and advice given by the Attorney-General.⁴⁴ In the year 2016, for example, police prosecutors referred seven hundred and fifty-five (755) cases to the office of the Attorney-General.⁴⁵ A large number of prosecutions are however conducted by police prosecutors without prior reference to the Attorney-General. This is particularly so in cases of minor offences.⁴⁶ The Attorney-General bears full responsibility for the conduct of proceedings by police prosecutors. At any time in the course of the trial, s/he reserves the right to take over the prosecution where s/he thinks it right to do so.⁴⁷

The establishment of the body of police prosecutors joins two institutional roles of the appointed officers in the criminal justice delivery system. Police prosecutors retain their primary functions of crime control and apprehension of criminal suspects, but crown them with conducting criminal prosecutions. In the discharge of these roles that attract potentially conflicting interests, certain concerns have been raised. The ability of a police officer to juggle in the most efficient terms, the dual role of policing and law enforcement on the one hand, and of engaging in a prosecutorial duty on the other, both with not too clearly compatible objectives, is doubted.⁴⁸ As Mwalili clearly puts it in his analysis of the legal structure in Kenya, which is similar to the system in Ghana, “[t]he police prosecutor finds that he is, so to speak, wearing two hats. Sometimes it is hard to reconcile the two”.⁴⁹ Generally, their duty as law enforcers influences the discharge of their prosecutorial functions. They tend to display more loyalty to their duty of crime control. As a result, they exhibit a common tendency to more forcefully seek convictions of accused persons, with minimum concern for the overriding duty to do justice through a fair trial.

In addition, the system of police prosecutions has largely been criticised as being fraught with some practical difficulties. In a strong academic opinion, Appiahene-Gyamfi underscores the

⁴³ Amissah *Criminal Procedures* 19.

⁴⁴ COOPA, s 56 (3), providing that “[t]he Attorney-General may give express directions in writing to the police prosecutor.”

⁴⁵ *MOJAGD MTEF PBB Estimates* 7.

⁴⁶ See Amissah *Criminal Procedure* 18.

⁴⁷ *Id* at 19.

⁴⁸ Appiahene-Gyamfi *Alternatives* 132, stating that “it does not seem appropriate that an individual or institution can serve properly, the dual role of policing or law enforcement and prosecution at the same time, in any society.”

⁴⁹ Mwalili “The Role and Function of Prosecution in Criminal Justice” 1997 *Resource Material Series No. 53* 218 223. http://www.unafei.or.jp/english/pdf/RS_No53/No53_23PA_Mwalili.pdf (Accessed 04-10-2016)

impropriety of appointing police officers in Ghana as prosecutors. He points out that within the unique Ghanaian local circumstances, handing prosecutorial powers into the hands of police officers endows them with excessive authority, especially in their dealings with the grass-root masses of the society that are for the most part illiterate.⁵⁰ Similarly, reports of widespread and porous performances in criminal prosecutions by a good number of police prosecutors around the country are commonplace.⁵¹ Findings have been made, which suggest that a good number of police prosecutors proceed to charge and arraign accused persons before the courts with such quality of evidence and preparations that essentially lead to miscarriages of justice.⁵²

Furthermore, concerns have been raised about the fairness of, and state of compliance with due process rights of accused persons in criminal proceedings conducted by police prosecutors.⁵³ For self-represented accused persons, the lack of counsel's assistance to check the excesses of police prosecutors in the course of proceedings is crucial. In such cases, general issues of non-compliance with the fundamental due process guarantees appear almost inevitable during the trial. One major cause of these alarming phenomena is the poor and inadequate training of police officers for the delicate task of crime prosecutions. The institutional requirements for admission to the Police Service in Ghana are not stringent enough. Prospecting candidates must have a secondary school certificate by way of academic qualification. Selected candidates then undertake a total of six months training, among other things, in basic principles of criminal law at the Ghana Police College.⁵⁴ With the limited academic and intellectual engagement, the professional abilities of police prosecutors to appreciate the workings of the highly stylised adversarial procedures of criminal prosecutions are largely compromised.⁵⁵

Reinforcing the system of police prosecutions in Ghana and its ability to secure just outcomes demands serious institutional and policy interventions. In order to justify the continued retention of police officers as public prosecutors, it is important to ensure that selected police officers are adequately trained and instilled with the core principles of effective criminal justice delivery, and access to justice for all.⁵⁶ Particularly, the office of the Attorney-General must provide the required training, aimed at enhancing the skills and qualities of police prosecutors

⁵⁰ Appiahene-Gyamfi *Alternatives* 132, 170.

⁵¹ Editorial "Reviewing the law on Criminal Prosecutions" <http://www.ghanaiantimes.com.gh/reviewing-the-law-on-criminal-prosecution/> (Accessed 21-11-2016)

⁵² *Ibid.*

⁵³ Appiahene-Gyamfi *Alternatives* 132, 170.

⁵⁴ *Id* at 170.

⁵⁵ *Ibid.*

⁵⁶ Abbey "Training of Police Prosecutors in Ghana" <http://www.graphic.com.gh/news/general-news/fifty-police-prosecutors-complete-training-in-accra.html> (Accessed 10-9-2016).

in ensuring fair criminal trials.⁵⁷ Even more importantly, critical consideration must be given to the need to attune the competencies and skills of police prosecutors to the peculiar status and needs of self-represented accused persons at trial. These recommendations are even more important as police prosecutors are technically not subject to any ethical rules of professional conduct in prosecuting accused persons, whether legally represented or not.⁵⁸

8.3 THE PUBLIC PROSECUTOR *VERSUS* THE SELF-REPRESENTED ACCUSED IN CRIMINAL PROCEEDINGS IN GHANA

The adversarial criminal trial, as previously discussed, denotes the engagement of opposing contestants in legal proceedings.⁵⁹ Each of the parties, the prosecutor and the accused person, has an interest to protect. Within the parameters of the adversarial theory of criminal adjudication, these interests remain inherently adverse.⁶⁰ More importantly, each party's case is fundamentally biased towards safeguarding his/her or its interest at the trial. When both the Prosecution and the accused are legally represented, the process treats the procedural objectives of 'winning', seeking the 'truth' and achieving 'fairness' and 'justice' as applying based on equality.⁶¹ The situation however becomes more complex and volatile where the accused person is not legally represented at the trial.⁶² Generally, the viability and efficiency of the adversarial process remain a cause for concern where the trial involves self-represented accused persons. The absence of defence counsel in the adversarial criminal trial creates a number of practical difficulties for all the actors within the judicial system, including the Prosecution.⁶³ These difficulties go as far as their responsibility to guarantee the procedural protection, and to safeguard the right to a fair trial, of unrepresented accused persons is concerned.

An undertaking by public prosecutors to assist self-represented accused persons creates a dilemma in the discharge of their professional duties. They stand to increase the risk of unfairness and inefficiency of the trial if they remain insensible to the disadvantaged position of the accused person acting without legal representation. Ironically, they cannot also be

⁵⁷ See, e.g., Editorial "Reviewing the law on Criminal Prosecutions" <http://www.ghanaiantimes.com.gh/reviewing-the-law-on-criminal-prosecution/> (Accessed 21-11-2016).

⁵⁸ Discussed below, text at 8.5.

⁵⁹ Discussed *supra*, ch.2, text at 2.6.

⁶⁰ Kempinen "Ethics of Prosecutor Contact with the Unrepresented Defendant" 2006 *Geo. J. Legal Ethics* 1147 1151-1152.

⁶¹ *Id* at 1162.

⁶² *Ibid*.

⁶³ Kempinen 2006 *Geo. J. Legal Ethics* 1150-1151.

expected to rightly compensate for the lack of assistance of counsel without the risk of compromising their obligations to the state in an adversarial proceeding.⁶⁴ An underlying fact of the adversarial model of proof is that the disadvantaged position of the self-represented accused person does not affect the prosecutor's ultimate duty to zealously act for and represent the state in any way.⁶⁵ From a simplistic view, it is practical to assume that public prosecutors, largely, have a field day in proceedings where accused persons are unrepresented. The presumption lies in the well-nigh inexistence or low level of contest that generally characterises a trial where a legally unskilled and unrepresented accused person takes charge of the conduct of his/her own defence. The consequential effect is that the Prosecution wins an opportunity for swift proceedings resulting for the most part in fast convictions.

For Prosecuting Attorneys in Ghana, the tendency to adopt a hard-line adversarial posture against an unrepresented accused person falls in line with their professional and ethical obligations as described by law. Lawyers acting on behalf of their clients in legal proceedings, including criminal trials, are enjoined to engage in uncompromising advocacy in defence of their clients' interests. The rules of ethics of the legal profession unambiguously emphasise "the duty of a lawyer, while acting with all due courtesy [to] fearlessly (...) uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person".⁶⁶ This implies an obligation on the part of the Prosecuting Attorney to zealously act in furtherance of the interest of the State, without any regard whatsoever for the disadvantaged position of the accused, caused by the lack of legal assistance.

The reason for the enactment of this professional commitment to being rigidly adversarial and to practising partisan advocacy is not far-fetched. It rests on the underlying presumption of the adversarial procedure that both the Prosecution and the accused person will be represented by counsel at the trial. Of note, the discharge of the parties' respective procedural duties in adversarial criminal proceedings is uninfluenced by the status of their representation in court. For the accused person, being self-represented does not detract from his/her legal obligations to deliver on his/her procedural and substantive duties to establish an effective defence to the Prosecution's case.⁶⁷

⁶⁴ *Id* at 1151.

⁶⁵ *Id* at 1163.

⁶⁶ Legal Profession (Professional Conduct and Etiquette) Rules (L.I 613 of 1969), rule 7(1).

⁶⁷ Kempinen 2006 *Geo. J. Legal Ethics* 1154.

Insofar as self-representation remains an unavoidable feature of the criminal adjudicatory process in Ghana, the need to ensure the protection of self-represented accused in public prosecutions in the spirit of fair trial is indispensable. The concern of the legal system lies in achieving a substantial level of procedural equality between the public prosecutor and the self-represented accused towards a fair adversarial contest. In cases of self-representation, the overarching obligation of the prosecutor resides not only in the zeal to prosecute and secure a conviction. Primarily, such obligation rests with the need to ensure that, as much practically possible, the self-represented accused person's right to a fair trial is duly realised. Indeed, in Ghana, there is an implicit recognition of the principle that accused persons should not unfairly suffer or be unfairly treated because they are not represented by counsel. The criminal justice system imposes a number of procedural obligations and ethical duties on public prosecutors for the benefit of accused persons in general, and sometimes with direct benefits to self-represented accused persons in particular.

8.4 ETHICAL AND PROFESSIONAL DUTIES OF PUBLIC PROSECUTORS TOWARDS SELF-REPRESENTED ACCUSED PERSONS

The criminal justice system of Ghana has developed a number of core principles and obligations that direct the actions and activities of public prosecutors, when initiating and conducting prosecutions against self-represented accused persons. For the most part, these are meant to benefit accused persons at the pre-trial and trial stages of the proceedings. The Ghana Code for Prosecutors (GCP)⁶⁸ issued by the Attorney-General prescribes a number of prosecutorial obligations towards accused persons in general. It does not distinguish between the statuses of representation of the accused person, whether represented by counsel or not. The Code of Ethics of the Ghana Bar Association⁶⁹ (GBA Code of Ethics) is another important source of prosecutorial duties to accused persons in criminal proceedings in Ghana. It prescribes certain specific prosecutorial obligations to self-represented accused persons, alongside other obligations owed to accused persons in general. All the laid down prosecutorial obligations are, in the present context, assessed from the perspective of their application to self-represented accused persons.

⁶⁸ Passed under the hand of, Mrs Marietta Brew Appiah-Opong, Minister of Justice and Attorney-General of the Republic of Ghana between from 2012 to 2016 (Not dated.)

⁶⁹ Adopted in 1994.

8.4.1 Nature and Sources of Prosecutors' Obligations to Self-Represented Accused

Persons

The GCP together with the GBA Code of Ethics assume a significant role in moderating prosecutors' dealings with accused persons and, by extension self-represented accused persons. They together provide the framework of professional and ethical obligations of prosecutors to accused persons. It must be stated at the onset that there is no defined set of prosecutorial obligations specifically prescribed to apply in proceedings involving self-represented accused persons. The sole exception is the GBA Code of Ethics, which dedicates rule 20 to two standard obligations of the Prosecuting Attorney to the self-represented accused.⁷⁰ Therefore, most prosecutors' obligations in trials of self-represented accused persons are read and adapted from their conventional duties to accused persons in general.

However, this situation is not peculiar to Ghana. The various international instruments on the roles and duties of public prosecutors do not expressly distinguish between the statuses of the prosecutor's adversaries in criminal proceedings, and especially as they apply to adversarial proceedings. The United Nations Guidelines on the Role of Prosecutors (UN Guidelines on the Role of Prosecutors) makes no special case for self-represented accused persons.⁷¹ Neither does the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, which provides an international benchmark for the conduct of individual prosecutors and for the discharge of prosecutorial services.⁷² As a result, the drafting of professional rules of conduct and ethical rules across jurisdictions generally has taken very little account of the responsibilities of public prosecutors, when dealing with an adversary who has no legal assistance.⁷³

It is also worth noting that the GBA Code of Ethics applies only to Prosecuting Attorneys, by virtue of their qualification as lawyers. It essentially lays down acceptable ethical standards and values of representation owed by lawyers to their clients as well as to the courts, the legal profession and the public in general. These rules embody mandatory principles for lawyers and Prosecuting Attorneys and attract disciplinary sanctions for their violations. Like in other adversarial jurisdictions, they do not however involve any serious consequences affecting the

⁷⁰ It prescribes for the prosecutor, a duty to disclose and not to supply false information or mislead and the duty not to take advantage of the self-represented accused. These are further discussed below, text at 8.4.

⁷¹ Adopted in 1990 by the United Nations Congress on the Prevention of Crime and Treatment of Offenders. It is formulated to assist Member States in their duties to secure and promote effective, impartial and fair prosecutors.

⁷² Adopted in 1999 by the International Association of Prosecutors.

⁷³ See, e.g., Kempinen *Geo. J. Legal Ethics* 1166.

validity of the trial beyond disciplinary measures.⁷⁴ They however assume great importance in guiding the practice of lawyers by underlining the basic principles that regulate the discharge of their professional duties, and by shaping their conduct.

The question of how the ethical rules of the legal profession balance the rigours of the adversarial process with the special status of self-represented accused persons attracts a mixed answer. Generally, the ethical rules of the legal profession stimulate a practice of aggressive adversarial advocacy in defence of clients' interests.⁷⁵ They focus on promoting an ideology of competition between the parties to the proceedings, which is an important feature and a goal of the adversarial system of adjudication. The Prosecuting Attorney is ethically placed in the same position of an ordinary lawyer. As an agent of the State, s/he is entrusted with the responsibility to uncompromisingly pursue its interest and to exploit every possible procedural advantage in its favour. In making these rules, the focus of the legislature lies with the most congenial adversarial setting where both the Prosecution and the accused person would be represented by counsel.⁷⁶ However, the Code of Ethics also recognises the practical realities of self-representation in criminal proceedings in Ghana, especially through its adoption of the provision of rule 20, which deals with the specific obligations of Prosecuting Attorneys to self-represented accused persons.⁷⁷

On its part, the GCP prescribes standard guidelines for prosecutors on principles to apply on conducting criminal prosecutions. It details the general obligations of all public prosecutors in the country, whether Prosecuting Attorneys or lay prosecutors, and requires all public prosecutors to mandatorily comply with the prescribed guidelines.⁷⁸ Like the ethical rules, violations of these guidelines do not necessarily impact the validity or otherwise of the proceedings. The GCP itself does not prescribe any sanctions for non-compliance. It also makes no special provisions regarding the obligations of prosecutors in their dealings with self-represented accused persons. The lack of special consideration for self-represented accused persons in this context is also based on the assumption that s/he will be represented by counsel. However, in a country where a great number of accused persons appear unrepresented by

⁷⁴ See, *e.g.*, *id* at 1160, referring to the American system.

⁷⁵ See, Legal Profession (Professional Conduct and Etiquette) Rules, rule 7(1); also GBA Code of Ethics, rule 39.

⁷⁶ See Zacharias "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice? 1991 *Van. L. Rev.* 45 68, arguing that the prosecutor's ethical role in preserving the adversarial process rides on the principle of equal representation. Of course, as he argues, the notion does not relate to perfect equality and "tolerates a range of inequality."

⁷⁷ Discussed below, text at 8.4.

⁷⁸ GCP (revised and updated) 2.

counsel in criminal proceedings, the need to lay forth direct, prosecutorial obligations for the protection of self-represented accused persons and their right to a fair trial is indispensable.

For the purpose of the present study, certain ethical and professional obligations of prosecutors have been earmarked as providing vital assistance in safeguarding the fairness of proceedings involving self-represented accused persons. In some cases, the discussion relates to such obligations that apply to all public prosecutors. In other specific situations, they are rather limited in their application to Prosecuting Attorneys only. These obligations are discussed following a flexible categorisation into pre-trial and trial obligations, preceded by a brief presentation of the overarching prosecutorial duty to do justice, which runs through the entire proceedings.

8.4.2 The Overarching Duty to do Justice

The prosecutor's inclination in initiating and conducting criminal proceedings, as a party to an adversarial trial, is coloured by his/her character as an adversary to the accused. In more objective terms, the peak of the prosecutorial duty is the trial. The prosecutor who proceeds to trial mainly intends to secure a verdict of guilt and a conviction of the accused person.⁷⁹ When so considered, the prosecutor's role falls below the standard of an objective inquisitor interested in a fair evaluation of the merits of the case.⁸⁰ This notwithstanding and beyond the positional and interest-led strategy of the prosecutor, the law imposes an overarching obligation on him/her to do and seek justice.⁸¹ Thus, in initiating and conducting criminal proceedings, the prosecutor's principal obligation is to ensure that justice is done through a genuine and candid approach to developing the facts before the court, coupled with an accurate application of the relevant laws. This obligation of the prosecutor is fused into his/her overriding mandate to ensure, as far as possible, that the innocent accused is acquitted and that only the guilty accused person is convicted.⁸² As a result, the role of the prosecutor in an adversarial criminal trial

⁷⁹ Frey "The state v. The self-represented: A Florida Prosecutor's Concerns when litigating against a pro se Defendant in a criminal trial" 1999 *Stetson L. Rev.* 181 181.

⁸⁰ "Second class justice – Prosecution" http://www.secondclassjustice.com/?page_id=380 (Accessed 29-09-2016), arguing the position in the United States and revealing that many prosecutors are elected on their ability to convict a large number of people. In such cases, the "responsibility to see that justice is done is often overshadowed by their desire to be re-elected."

⁸¹ See, e.g., Frey 1999 *Stetson L. Rev.* 181.

⁸² Mwalili 1997 *Resource Material Series* 223. In Ghana, see *Emmanuel Kwashie & Sawa v. The Republic* 1998 [14/0/1998] CA No 2/98 (unreported). See also *Kwakye v. Attorney-General* 1981 GLR 944 965, stating as follows: "The purpose of judicial proceedings is to try the accused and if found innocent to acquit or if found guilty to convict."

remains far from securing the conviction of the accused at all costs, and by all means necessary in all cases.

Both the GBA Code of Ethics and the GCP underline the prosecutor's overriding duty to do justice in criminal prosecutions. The two instruments endorse the primary obligation of every public prosecutor present and acting in a criminal trial to ensure that justice is done, and not to seek the conviction of the accused person regardless.⁸³ This obligation operates as the standard by which the rightfulness of the prosecutor's actions during criminal proceedings is assessed. Sir Awory, in the English case of *Republic v. Banks*, gave a classic statement of this obligation of the prosecutor, which influenced the position of the law in Ghana.⁸⁴ The learned judge held that counsel for the Prosecution ought not to struggle throughout a case to secure a verdict of guilt against a prisoner. Prosecutors "ought to bear themselves in the character of ministers of justice assisting in the administration of justice".⁸⁵ According to Humphreys, this philosophy of the adversarial criminal justice directs the prosecutor to seek "justice first, justice second and conviction a very bad third".⁸⁶ The lead theory of the prosecutor's functions in the adversarial trial is that, s/he is an agent of justice whose function is to primarily secure a fair prosecution and do justice between the state and the accused person. Overall, the obligation of the prosecutor to seek justice reinforces the institutional aim of the criminal justice system. It ranks the pursuit of justice above the partisan aim of the prosecutor to secure convictions of accused persons.

For purposes of safeguarding the procedural protection of self-represented accused persons and the fairness of their proceedings, this obligation remains of fundamental importance. Vesting the prosecutor with the mandate and authority to do and seek justice in all criminal proceedings dampens the rigours of confrontation and partisanship that underlie the adversarial system of trial. Removing the clog of competition between the prosecutor and the accused person ultimately ensures that the self-represented accused is not abandoned in a lone enterprise of

⁸³ GBA Code of Ethics, rule 25. Same is replicated in the GCP, rule 1(2) (j), stating that "[t]he prosecutor has the duty to 'always act in the interests of justice and not solely for the purpose of obtaining conviction'"; also rule 8(7) stating that "[a] prosecutor must be firm and fair in the presentation of the case and in the countering of the defence. It is not the role of a prosecutor to obtain a conviction at all costs."; GCP, rule 11(7), providing that the prosecutor "must always act in the interest of justice and not for the purpose of obtaining a conviction."

⁸⁴ 1916 2 KB 623.

⁸⁵ *Ibid*, quoted by *Fraser Ethical Aspects of the Prosecution of Criminal Cases* (2000) 1. http://www.jambar.org/index.php?option=com_phocadownload&view=category&download=202:Ethical%20Aspects%20of%20the%20Prosecution%20of%20Criminal%20Cases.%20David%20Fraser.%20November%2011%202000&id=11:other-years&start=80&Itemid=105 (Accessed 08-09-2016).

⁸⁶ Brobbey *Practice and Procedure* 592, referring to Humphreys "The duties and responsibilities of prosecuting counsel" 1955 *Crim LR* 739 746.

pursuing his/her own interests against the State. Prosecutors find themselves confronted with the obligation to carefully balance their quest for zealous prosecutions with the delicate position of self-represented accused persons. In general, the Prosecution assumes the obligation to desist from exploiting the disadvantaged position of a self-represented accused person to its advantage at trial.⁸⁷ Every prosecutor must delve into the merits of the case to ensure that the self-represented accused is deservedly acquitted or otherwise convicted, irrespective of the status of his/her representation.

In the discharge of their obligation to do and seek justice, prosecutors are generally tasked to comply with certain procedural necessities. Among others, they are mandated to conduct prosecutions with scrupulous fairness.⁸⁸ They are also required to lay down the facts of the case surrounding the offence charged in the sequence of their natural occurrence, in the simplest manner, and in a comprehensive form. This requirement is to ensure that the Prosecution's case is made perfectly intelligible to the court, which is charged with pronouncing the guilt or innocence of the accused.⁸⁹ This directive also benefits the accused person, especially when s/he is unrepresented. The simplicity of the Prosecution's case provides the self-represented accused with the opportunity to grasp the case s/he has to defend, and to fully understand the proceedings before the court. The prosecutorial obligation to seek justice in criminal proceedings in Ghana, as far as it applies to Prosecuting Attorneys in particular, also includes a duty to be fair, frank and candid not only to the court, but also to the parties and their advocates in the proceedings.⁹⁰ Obviously, this duty is directly owed to the accused person where s/he is unrepresented by an advocate at the trial. Unfortunately, this last duty has no corresponding application to lay prosecutors. It is therefore recommended, for purposes of uniformity, that a similar duty be postulated under the GCP to bind public prosecutors other than Prosecuting Attorneys.

With the recognition of the prosecutorial duty to do justice, the criminal justice policy of Ghana adheres to the best practices and international standards of criminal justice. Indeed, the UN Guidelines on the Role of Prosecutors recognises this important obligation of prosecutors. It

⁸⁷ Discussed below, text at 8.4.4.2.

⁸⁸ Brobbey *Practice and Procedure* 593.

⁸⁹ *Ibid.*

⁹⁰ GBA Code of Ethics, rule 47; see, e.g., Council of Europe – Committee of Ministers *The Role of Public Prosecution in the Criminal Justice System* (2000) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804be55a> (Accessed 07-10-2016). Recommending that governments of member-states base their legislation and practices concerning the role of public prosecution in the criminal justice system. At para 20, It states that prosecutors are mandated in the delivery of their prosecutorial duties to be objectives and fair.

describes the character of public prosecutors as “essential agents of the administration of justice”.⁹¹ The position of the public prosecutor as an ‘agent of justice’, in turn, entrusts him/her with a number of obligations towards the accused person. For the self-represented accused, these obligations are critical to ensure that s/he is not, unduly disadvantaged at the trial. They provide a legal framework that guides the exercise of the prosecutorial duty to ensure that the self-represented accused is duly protected during the proceedings, and given a full opportunity to make his/her defence against the criminal charge.

8.4.3 Pre-Trial Obligations of Public Prosecutors

Public prosecutors engage in a significant amount of interactions and dealings with accused persons, which generally have a great impact on the conduct of the proceedings. The majority of decisions affecting the outcome of criminal proceedings are made outside the courtroom and far in advance of court appearances. The pre-trial phase is the most important stage of the proceedings that involves considerable exercise of extra-curial prosecutorial authority on the accused person.⁹² The prosecutor’s influence at this stage is attached to his/her authority to conduct investigations into the alleged crimes, which places him/her in direct contact with the self-represented accused. The pre-trial activities of the prosecutor in the context of criminal prosecutions in Ghana includes investigation, pre-charge advice, decision to prosecute or to discontinue a prosecution, and all such proceedings ancillary to prosecution, such as seizures, confiscation and pecuniary penalty orders.⁹³

As far as investigations are concerned, public prosecutors, aided by law enforcement and investigatory agencies, maintain direct contact with accused persons, whether represented by counsel or self-represented, at some points in the course of the proceedings. All decisions regarding the mode of investigation, nature and sufficiency of evidence, nature of the charges, and the decision to prosecute, fall within the scope of operations of the prosecutor. Generally, the power to investigate criminal offences is vested primarily in the law enforcement agencies and not the prosecuting body.⁹⁴ There is a composite body of state investigative agencies assigned with the responsibility to investigate crimes and assist prosecutors with criminal

⁹¹ Rule 3.

⁹² See, e.g., Kempinen 2006 *Geo. J. Legal Ethics* 1159, stating that “[t]he bulk of the prosecutor’s contact with the self-represented accused occur at the pre-trial stage of the proceedings and out of the sight of the court.”

⁹³ See GCP (revised and updated) 4.

⁹⁴ Zaimaru “The Relationship of the Prosecution with the Police and investigative Responsibility” http://www.unafei.or.jp/english/pdf/RS_No53/No53_29RC_Group1.pdf (Accessed 02-01-2016). This is unlike countries like Cameroon, China, Indonesia, Japan and the Republic of Korea where both the police and Prosecution undertake criminal investigations.

prosecutions in Ghana.⁹⁵ Key among this body is the Criminal Investigation Department (CID) of the Ghana Police Service. The Police Service is the main body vested with general investigatory powers in all criminal matters. Its duty to mainly detect crime and apprehend offenders, bridges the executive functions of the Service with its responsibilities as an agency of the prosecutorial arm of Government.⁹⁶ Other investigatory agencies supplement the work of the police in certain specialised areas. For example, the Bureau of National Investigations (BNI), established under the Securities and Intelligence Agencies Act⁹⁷, investigates state and national security matters.⁹⁸ In addition, there is the Economic and Organised Crimes Office (EOCO) established by the Economic and Organised Crime Office Act.⁹⁹ It is created as a public service to supplement the efforts of Government in the fight against economic and organised crimes.¹⁰⁰

Prosecutors are not however excluded from the process of crime investigations in Ghana. The GCP creates a number of interventional duties for prosecutors in crime investigations. Prosecutors provide the necessary guidance and advice to investigators throughout the process of crime investigations.¹⁰¹ This duty includes providing crime investigators with lines of enquiry, evidential assessment and requirements, hints on potential accused persons, and potential charges.¹⁰² Prosecutors are also mandated to act proactively in identifying, and if possible, rectifying all evidential weaknesses and deficiencies during investigations and prosecutions.¹⁰³ Decisions made by law enforcement officers and information gathered through informal discussions between prosecutors and self-represented accused persons, are largely

⁹⁵ *Ibid.*

⁹⁶ Police Service Act (No. 350 of 1970) s 1. It details a four-fold duty structure of the Ghana Police Service, and defines it to include: (i) the prevention and detection of crime, (ii) apprehension of criminal offenders, (iii) maintenance of public order and (iv) maintenance of the safety of persons and property.

⁹⁷ No. 526 of 1996. It is essentially a national security intelligence operating under the National Security Council. See *Id.* ss 10 & 11.

⁹⁸ *Id.* s 12. These, as specified by the enabling Act, are defined to include the investigation of: (i) all activities constituting threats to the security of the state and Government of Ghana; (ii) acts and omissions of persons, including organizations either within or outside Ghana, constituting a threat to the economic wellbeing of the state; (iii) all acts against the state amounting to threats of espionage, sabotage, terrorism, hijacking, piracy, drug trafficking and similar offences, and (iv) acts of treason by both nationals and foreign nationals, involving acts intended to overthrow the Government of Ghana or undermine its constitutional order through illegal and unlawful means.

⁹⁹ No. 804 of 2010.

¹⁰⁰ *Id.* s 3. The exercise of the criminal investigative function of the Office is clearly outlined in respect of the following crimes: (i) causing financial or economic loss to the Republic of any state entity or any institution in which the state has a financial interest; (ii) offences of money laundering; (iii) human trafficking; (iv) cyber-crimes; (v) tax fraud and such other related serious offences.

¹⁰¹ GCP, s 01- para 2 (k)

¹⁰² *Id.* s 03 - para 2.

¹⁰³ *Id.* s 01 - para 2 (l)

excluded from judicial assessment. They do, however provide the foundation of the entire prosecution.

In ensuring the realisation of the self-represented accused person's right to a fair trial however, the criminal adjudicatory process identifies two key pre-trial obligations of the public prosecutor. These relate to the duty of the prosecutor not to initiate criminal prosecutions except upon a probable cause, and the duty to disclose material facts and information to the self-represented accused.

8.4.3.1 Prosecutor's Obligation to Initiate Prosecutions Only upon Probable Cause

The principal duty of the public prosecutor in conducting criminal prosecutions is to ensure that the accused person does not escape guilt when culpable, and s/he does not wrongfully suffer when innocent.¹⁰⁴ Primarily therefore, settling on a decision to initiate criminal proceedings against an accused person is the most crucial part of the prosecutor's duty. The authority to charge a suspect with a criminal offence and initiate criminal prosecutions is by nature discretionary. This characteristic of the prosecutor's charging power enables the state to initiate prosecutions in all cases, even where victims would otherwise be unwilling to have the accused prosecuted. Further, it allows the state to decide against pursuing vain or unwarranted prosecutions.¹⁰⁵ Where a prosecutor has reasonable cause to believe that the accused committed an offence, s/he decides what charge(s) to file and in some cases what mode of trial to adopt.¹⁰⁶

Prosecutorial discretion is generally subject to the overriding constitutional principle governing the exercise of discretion in all public matters in Ghana.¹⁰⁷ They are required to be fair and candid, and equally expected to eschew all forms of arbitrariness, capriciousness and bias by either resentment, prejudice or personal dislike.¹⁰⁸ More importantly, they are instructed to ensure that the process of initiating the proceedings is in accordance with due process of law.¹⁰⁹

The GCP details certain key requirements that the prosecutor must comply with in meeting the standards of a rational exercise of prosecutorial discretion in Ghana. The principal obligation of the prosecutor to that end is to satisfy him/herself that the decision to prosecute passes an

¹⁰⁴ See, discussed above, text at 8.4.2.

¹⁰⁵ See, e.g., Frey 1999 *Stetson L. Rev.* 181.

¹⁰⁶ COOPA, s 2(3), stating that where the law does not specify the mode of trial of any particular offence, the Attorney-General has discretion to decide whether to try the offence summarily or on indictment.

¹⁰⁷ Ghana Constitution, art 296.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

‘evidence test’ and a ‘public interest test’.¹¹⁰ By the ‘evidence’ test, the GCP directs the prosecutor to commence prosecution only when s/he is satisfied that there is sufficient evidence to sustain a *prima facie* case against the accused person on each charge.¹¹¹ In making this assessment, the prosecutor is required to consider the accused person’s explanations to the charge and the general case that s/he has in defence to the charge. The prosecutor is also mandated to consider all available evidence that may potentially undermine the case of the Prosecution.¹¹² More importantly, s/he must ensure that the accused is the right person to be prosecuted, regarding the alleged crime, and that any defence advanced by the accused may not be strong enough to displace the case of the Prosecution.¹¹³

The ‘public interest’ test, as the name suggests, directs the prosecutor to consider the public interest in deciding whether to prosecute or not. It vests the prosecutor with discretion to consider whether it is indeed necessary that the accused should be prosecuted. By this test, the prosecutor is called upon to balance all factors that favour the institution of criminal proceedings¹¹⁴ against factors that militate against such a decision.¹¹⁵ Any decision not to prosecute the accused on the ground of public interest must be balanced against two other factors, namely, (a) the seriousness of the offence and the need to safeguard the security and safety of the public,¹¹⁶ and (b) the consequences of a decision not to prosecute on the victim or family of the victim.¹¹⁷ These guidelines underscore the resolve of the criminal justice system of Ghana, ensuring that prosecutions are legitimate and grounded in substance. They also provide the necessary safeguards against unnecessary prosecutions that may be intended for purposes of persecution.

¹¹⁰ GCP, s 04 – para 4(3).

¹¹¹ *Id*, s 05.

¹¹² *Ibid*.

¹¹³ *Id*, s 05 - paras (a) & (f).

¹¹⁴ *Id*, s 05. It lists the factors in favour of prosecution to include: (a) gravity of offence; (b) significant sentence upon conviction; (c) use of weapon or violence to commit the offence; (d) offence was committed against a public servant on duty; (e) accused was in position of trust or authority; (f) victim was vulnerable; (g) offence was motivated by a form of discrimination on grounds of ethnicity, nationality, religious beliefs...; (h) accused has previous convictions relevant to present offence; (i) likelihood that offence is likely to continue; (j) offence is widespread in the community; (k) prosecution will serve a deterrence.

¹¹⁵ *Ibid*. It lists the factors against prosecution to include: (a) accused is already sentenced and further sentence may be inconsequential; (b) long delay between date of offence and date of charge or trial unless the offence is serious or the delay is substantially caused by the accused or the complexity of the case required the long investigation; (c) genuine mental or physical illness; (d) publicity of the case may harm sources of information, national security or international relations; (e) offence is minor and parties have reconciled or recompense has been given; (g) maintenance of family cohesion and offence is minor; (g) accused has suffered directly or indirectly as a result of offence.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

The aforementioned standards are also very important guidelines in determining the reasonableness of prosecutorial decisions against self-represented accused persons. But even more importantly, prosecutors must act scrupulously to ensure that prosecutions against such a category of accused persons are legally well grounded and are in the interest of justice, because there is limited access to remedies for wrongful and legally unfounded charges and resultant verdicts. In effect, the COOPA guarantees the right of an accused person to file a motion to quash an indictment, which either does not state or cannot by any authorised amendment, be made to state an offence for which the accused can be convicted, at any time before s/he pleads to the charges.¹¹⁸ This statutory remedy against unsupported and baseless charges is however available to accused persons in trials on indictment only.¹¹⁹ The law does not extend the benefit of the right to accused persons in summary proceedings. Moreover, despite it being available to all accused persons in trials on indictment, the procedure for exercising the right involves puzzling processes for legally unskilled persons acting without the advice of counsel. The drafting and filing of a motion to quash an indictment with the registrar of the court indeed require a good understanding of the law and its procedures. To that end, more professionalism is expected of prosecutors in reaching decisions to initiate prosecutions against self-represented accused persons, who are technically excluded from the benefit of this procedural relief.

In all cases, it behoves the prosecutor to do a proper assessment of probable guilt of the accused, especially when s/he is not represented by counsel, before proceeding to charge him/her.¹²⁰ Therefore, ensuring strict compliance with the principles under the GCP provides the most effective means of shielding self-represented accused persons from being dragged unreasonably or prematurely into criminal prosecutions. Due consideration must be given to the need to seek alternatives to prosecution, such as settlement and reconciliation in very minor cases,¹²¹ especially where they involve self-represented accused persons.

8.4.3.2 *Disclosure Obligations of Prosecutors towards Self-Represented Accused Persons*

The international benchmark for the conduct of prosecutors in the discharge of prosecutorial services enjoins full disclosure of material facts and evidence regarding a criminal charge to

¹¹⁸ COOPA, s 234(1).

¹¹⁹ Discussed *supra*, Ch. 2, text at 2.4.4.3.

¹²⁰ Kempinen 2006 *Geo. J. Legal Ethics* 1152-1153.

¹²¹ GCP, s 05 - paras (e) & (f). They include minor offences arising from family disputes where the need to maintain family cohesion.

accused persons.¹²² It recommends the protection of the right to fair trial and most importantly insists on the disclosure of all information, both incriminating and exculpatory, to accused persons within the most reasonable time and throughout the course of trial.¹²³ In substantive terms, this obligation is anchored in the right of the accused to adequate time and facilities for the preparation of his/her defence.¹²⁴

For self-represented accused persons, this obligation provides the sole opportunity to have full knowledge of the existing facts and evidence and to be informed about the case that they are expected to answer during the trial. The GCP obliges all public prosecutors to ensure that copies of all relevant documents are made available to all deserving parties, including the accused.¹²⁵ In addition, an accused person may reasonably request any documents or materials in possession of the prosecutor. Following such a demand, the prosecutor is required to timely supply all such requested materials to the accused.¹²⁶ The prosecutor is duty bound to promptly disclose any evidence or information that s/he becomes aware of, to the accused that might reasonably assist him/her.¹²⁷ The duty of the prosecutor in this sense is to ensure that all relevant and material evidence and information are fully disclosed to the court¹²⁸ and all the parties involved in the trial.



The GBA Code of Ethics specially assigns certain disclosure duties to Prosecuting Attorneys for the benefit of self-represented accused persons. Prosecuting Attorneys of cases against self-represented accused persons have an obligation to fully disclose all materials and information to such accused persons.¹²⁹ This is one of the two key obligations specifically enacted under the Code, for the benefit of self-represented accused persons.¹³⁰ In discharging this disclosure obligation, such Attorneys are emphatically mandated to supply the right information to the accused.¹³¹ The duty extends to providing the court and the accused with any facts, documents, or relevant and admissible evidence, which tend to prove either the guilt or innocence of the accused. The Code of Ethics sets out a form of punishment for failure by prosecutors to comply

¹²² Standards of professional responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) rules 1 & 4.3.

¹²³ *Ibid.*

¹²⁴ Discussed *supra*, Ch.7, text at 7.5.

¹²⁵ GCP, s 08 - para 6 (g).

¹²⁶ *Id.*, s 08 - para 6 (d).

¹²⁷ *Id.*, s 08 - para 8.

¹²⁸ GCP, s 02 - para (r).

¹²⁹ GBA Code of Ethics, rule 20(a).

¹³⁰ The second is the duty not to take improper advantage of the inexperience or lack of education of the self-represented accused, GBA Code of Ethics, rule 20(c).

¹³¹ GBA Code of Ethics, rule 20(a).

with this directive. It punishes any act of unreasonably withholding the required information, documents or materials as a form of professional misconduct on the part of the Prosecuting Attorney.¹³² In addition, the Code of Ethics punishes as a form of professional misconduct, any deliberate act of the Prosecuting Attorney, which involves supplying any false or misleading information to the self-represented accused in the course of discharging his/her disclosure obligations.¹³³ The rules prescribe the penalties for such professional misconduct to include striking the offending Prosecuting Attorney's name off the Register of Lawyers, suspension from practice as a lawyer, fine or censorship or admonition.¹³⁴

For lay prosecutors such as police prosecutors, there is minimal control to ensure compliance with the obligation to make full disclosure of material information to the self-represented accused persons. This situation is crucial because this branch of public prosecutors handle the bulk majority of criminal trials involving self-represented accused persons in the lower courts. To ensure parity in the level of obligation and treatment of public prosecutors, and in order to guarantee due compliance with the disclosure obligations of prosecutors in the lower courts, lay public prosecutors must be subjected to a similar standard of responsibility.

8.4.4 Prosecutorial Obligations to Self-Represented Accused Persons during Trial

The procedural obligations of public prosecutors to self-represented accused persons extend to the trial stage of the proceedings. Ideologically, the prosecutor and the accused person are considered equal parties in the development and argumentation of their respective cases before the judicial officer. The core reality is however that the self-represented accused does not usually match up to the professional qualities of the prosecutor in an adversarial battle. The criminal adjudicatory system acknowledges certain key procedural obligations of the prosecutor, which essentially assist in mitigating the procedural disadvantages associated with the lack of legal representation for the accused person during the trial process.

8.4.4.1 The Prosecutors Obligation to Assist Self-Represented Accused Persons in the Interest of Justice

The GCP prescribes certain restrictions on the Prosecution's dealings with accused persons. The prosecutor's function at the trial puts him/her in an adversarial position against the accused.

¹³² *Ibid.*

¹³³ GBA Code of Ethics, rule 20 (b).

¹³⁴ GBA Code of Ethics, rule 9.

His/her primary interest in initiating a criminal prosecution is adverse to the accused's interest in the proceedings. The prosecutor's involvement in the trial is partial and biased against the accused person's interests. Because of the conflicting natures of their respective interests, the public prosecutor is ethically unfit to propose or suggest a lawyer for the accused. S/he is also ill positioned to assist the accused in the making of his/her case.¹³⁵ Conversely, the accused person, whether represented by counsel or unrepresented, cannot call on the Prosecution to seek assistance towards an acquittal or a discharge. The GCP however allows the prosecutor to provide any form of assistance to the accused in the making of his/her defence, only if the interests of justice so require.¹³⁶ The circumstances of the 'interest of justice' criterion have however not been determined by either judicial pronouncement or academic literature.

The GCP also falls short of providing the necessary guidelines to govern the discharge of the aforementioned duty. The duty to assist the accused, and by extension the self-represented accused, is objectively defined. In broad terms, it operates along the principle of ensuring that every accused person is given the opportunity to fully make his/her defence in court during the trial. In this context, the public prosecutor bears the duty to ensure that the accused's case, in the circumstances where s/he is unrepresented, is put to the Prosecution's witnesses to answer.¹³⁷ The public prosecutor must ensure that the Prosecution's case is put to the witnesses of the accused and is fully examined.¹³⁸ There is still the need, however, to develop the basic features of this procedural duty of the Prosecution. Devising detailed guidelines and substantive rules to specifically cater for self-represented accused persons will be most apposite in achieving the intended impact of the law.

8.4.4.2 Prosecutors Obligation Not to Exploit Ignorance or Incompetence of the Self-Represented Accused

Where both parties to the proceedings are legally represented, each lawyer uses the procedure to the best interest of his/her client.¹³⁹ Concerns however arise where a party is unrepresented. The self-represented accused person may be ignorant about the real consequences of exercising his/her substantive and procedural rights guaranteed under the Constitution.¹⁴⁰ Ignorance of the procedural and evidentiary rules, and of the nuances of the local practice of the adversarial

¹³⁵ GCP, s 08 - para 4.

¹³⁶ *Ibid.*

¹³⁷ GCP, s 08 - para 11.

¹³⁸ *Ibid.*

¹³⁹ Kempinen 2006 *Geo. J. Legal Ethics* 1156.

¹⁴⁰ *Id* at 1158.

proceedings on the part of the accused, exposes the prosecutor to the risk of taking advantage of the weaknesses of a self-represented accused person. It is however considered most unfair for a prosecutor to exploit this circumstance to achieve a harsher punishment, especially where the accused is self-represented.¹⁴¹ In his/her dealings with self-represented accused persons, the GBA Code of Ethics enjoins every Prosecuting Attorney to be fair and candid in the discharge of his/her prosecutorial duties. This is the second of the two key obligations of the Prosecuting Attorney to the self-represented accused, specifically adopted under the GBA Code of Ethics.¹⁴² In express terms, the Code of Ethics enjoins the prosecutor to refrain from taking improper advantage of the inexperience or lack of education of the accused.¹⁴³ In a broad sense, this obligation rests on the need to give due consideration to the lack of skills and professional incompetence of a self-represented accused when compared to the qualifications and legal acumen of the Prosecuting Attorney. It also implies that justice in the adversarial criminal trial of a self-represented accused must be won on the balance of fair proceedings.

The duty not to exploit the ignorance or incompetence of the accused is also well recognised by the UN Guidelines on the Role of Prosecutors. The instrument enjoins prosecutors “to take proper account of the position of the suspect (...) and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect”.¹⁴⁴ The duty also extends to the prosecutor’s obligation to exclude all evidence, which s/he knows or believes to have been obtained through unlawful means and in violation of the human rights of the suspect or accused person, whether represented by counsel at trial or not.¹⁴⁵

In Ghana, the duty not to exploit the weaknesses of the self-represented accused person, as adopted under the GBA Code of Ethics, however applies exclusively to Prosecuting Attorneys and not to lay prosecutors. Further, a call is made for its extension to all other public prosecutors, including police prosecutors who handle the majority of criminal prosecutions in the lower courts. Whereas lay public prosecutors may not have acquired the full and rigorous legal training, their professional training as public prosecutors and daily courtroom experiences put them in a far better position than self-represented accused persons at trial. They have the benefit of knowing the theory of the law and its practice. The English system of police prosecution however fell in disuse with the passing of the Prosecution of Offences Act in 1985.

¹⁴¹ *Id* at 1157.

¹⁴² See note 130 above.

¹⁴³ GBA Code of Ethics, rule 20 (c).

¹⁴⁴ UN Guidelines on the Role of Prosecutors, rule 13(b).

¹⁴⁵ *Id*, rule 16.

This advantage they have over ordinary accused persons unskilled in the law, justifies the need to extend this obligation to them.

8.4.4.3 Prosecutors' Obligation not to Advise Self-Represented Accused Persons

Accused persons in an adversarial trial rely on their counsel to understand the workings of the law and legal consequences of their choices in the rather complex procedural and evidentiary system. It is therefore common in practice for self-represented accused persons to approach prosecutors to discuss their options. The conflicting interest of the prosecutor may incite him/her to use any methods available to obtain as much information needed from the accused person in order to secure a conviction.

Regulating abuse of communication between the prosecutor and the self-represented accused person may take a number of forms. Firstly, it may involve an express ban on all contacts between the self-represented accused and the prosecutor. Secondly, it may take the form of a controlled and limited contact for merely sharing information with the self-represented accused person, and not to advise him/her regarding the conduct of the trial.¹⁴⁶ One problem, however, which is highlighted regarding the first option, is that it may hinder any possibility of seeking settlements in deserving cases and rather compel prosecution in all cases.¹⁴⁷

In Ghana, the courts are vested with power to promote, encourage and facilitate settlement in all criminal matters not amounting to felonies and not aggravated in degree.¹⁴⁸ Both the Prosecution and the accused may engage in out-of-court negotiations for an amicable settlement of the matter.¹⁴⁹ This option stands in line with the UN guidelines on the Role of Prosecutors, which emphasises the need for prosecutors to “give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system”.¹⁵⁰ It is relatively acceptable to allow limited contact for the purposes of seeking information from the prosecutor, while limiting the risk of the prosecutor taking unfair advantage of the self-represented accused.¹⁵¹

In summary, the legal framework on the professional and ethical responsibilities of public prosecutors in Ghana is a great source of regulations from which to infer the covert duties of

¹⁴⁶ See Kempinen 2006 *Geo. J. Legal Ethics* 1155.

¹⁴⁷ *Ibid.*

¹⁴⁸ See Courts Act (Act 459 of 1993), s 73.

¹⁴⁹ *Ibid.*

¹⁵⁰ See UN Guidelines on the Role of Prosecutors, rule 18.

¹⁵¹ Kempinen 2006 *Geo. J. Legal Ethics* 1156.

prosecutors to self-represented accused persons in Ghana. The various obligations, as discussed in this part, provide an important perspective from which to assess the general duties of public prosecutors particularly to self-represented accused persons. The duties, as analysed from the diverse sources, reveal the lack of uniformity in terms of their applicability. The main concern lies with non-lawyer public prosecutors to whom the various obligations under the Code of Ethics do not apply. The extent of their involvement in the initiation and conduct of criminal prosecutions in the country however, makes it imperative to ensure that they assume the same obligations as applicable to Prosecuting Attorneys. In addition, an objective evaluation of the scope of these prosecutorial obligations clearly exposes their inadequacy in terms of securing the needed protection for self-represented accused persons and the fairness of their trials in general. Generally, the duties of public prosecutors to self-represented accused persons have not been given the needed attention in both academic literature and the criminal jurisprudence in Ghana.

8.5 A COMPARATIVE ANALYSIS WITH THE AMERICAN LEGAL SYSTEM

8.5.1 Justification and Scope

The limited consideration of the subject on the roles and responsibilities of public prosecutors in trials of self-represented accused persons in Ghana provides an opportunity to engage in some comparative research.¹⁵² The purpose is to draw insights from the American legal system in particular, as an advanced adversarial system of law and as a jurisdiction that has been a great source of persuasive authority in matters of criminal law and justice in Ghana. This particularly is more relevant, as the study considers ways to enhance the domestic legal doctrine in Ghana.¹⁵³ In this context, the comparative analysis looks beyond the idea of harmonisation of laws. It also goes beyond a mere descriptive analysis of the American legal framework on the obligations of prosecutors in their dealings with self-represented accused persons. This Part primarily examines the legal instrument on the key obligations of the prosecutor to the self-represented accused. The focus, however, is restricted to only such areas of the American law

¹⁵² Patrick Glenn provides four aims of comparative analysis in the following terms: (a) comparative law as an instrument of learning and knowledge (information on the law elsewhere and a better understanding thereof), (b) comparative law as an instrument of evolutionary and taxonomic science (common evolutions, diachronic changes, legal families), (c) contributing to one's own legal system and (d) harmonisation of law. See Glenn, *The Aims of Comparative Law*, in: J. M. Smits (ed.) *Elgar Encyclopedia of Comparative Law* (2006) 57-65.

¹⁵³ Westerman *Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law in Methodologies of Legal Research* (2011) 92, stating that comparative research may be "undertaken with the aim of getting fresh ideas concerning a good and workable order."

that affect the need for reform in the Ghanaian law. This study also takes into consideration the contextual differences between the two legal regimes to ensure a viable adoption and incorporation of the relevant American norms into the governing legal framework on the duties of prosecutors in Ghana.

8.5.2 Key Duties of Prosecutors to Self-Represented Accused Persons under the American Bar Association Model Rules of Professional Conduct

The American Bar Association Model Rules of Professional Conduct¹⁵⁴ (ABA Model Rules) provides very specific obligations of Prosecuting Attorneys in their dealings with accused persons in general.¹⁵⁵ The ABA Model Rules also provide a great source of ideas and guidance for purposes of domestic reforms in Ghana. The commonality between the two jurisdictions resides mainly in the adversarial nature of their legal systems.

Comment 1 on Rule 3.8 of the ABA Model Rules designates the prosecutor as a ‘minister of justice’ and not simply an ordinary advocate. This character of the prosecutor as a minister of justice implies his/her obligation to ensure that every accused person “is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence”.¹⁵⁶ There is a legitimate expectation to ensure that this obligation of the prosecutor is realised in all criminal cases and even more particularly, in trials where the accused person is not represented by counsel at any stage of the proceedings. More importantly, Rule 3.8 imposes a number of obligations on prosecutors in the discharge of their prosecutorial duties for the benefit of accused persons. The first duty of the prosecutor relates to the obligation to “make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining counsel, and has been given reasonable opportunity to obtain counsel”.¹⁵⁷ The second, on the other hand, directly restricts and enjoins prosecutors to desist from seeking “to obtain from an unrepresented accused, a waiver of pre-trial rights, such as the right to a preliminary hearing”.¹⁵⁸ The third, on its part, relates to the duty of the prosecutor to disclose his/her adverse interest to the self-represented accused. The first duty is of a general application to all accused persons, while the remaining two duties detail specific obligations to self-represented accused

¹⁵⁴ They were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most States.

¹⁵⁵ See ABA Model rule 3.8 entitled “special Responsibilities of a Prosecutor”. The Rules are merely recommendations and are not by themselves binding. They however acquire the force of law and become binding in particular American States that adopt them.

¹⁵⁶ *Id*, Comment 1.

¹⁵⁷ *Id*, rule 3.8 (b).

¹⁵⁸ *Id*, rule 3.8 (c).

persons. These key duties of the prosecutor are not explicitly recognised in the existing legal framework in Ghana, though they are of great importance in securing adequate protection for self-represented accused persons.

8.5.2.1 Duty to inform Self-Represented Accused Persons of the Right to Counsel

Rule 38(b) of the ABA Model Rules enjoins the prosecutor to ensure that the accused is informed of the right to counsel and advised of the procedure to obtain one, and is actually given a reasonable opportunity to do so. According to Kempinen, this obligation of the American prosecutor ensures that every accused person, and the self-represented accused for that matter, is aware of the right to be represented by counsel.¹⁵⁹ One may agree with Kempinen that the laudable intention reflected in the right to inform the accused of the right to counsel may be lost, if despite being informed, the accused is unable to secure legal representation and thus compelled to represent him/herself at the trial.¹⁶⁰ Thus, in addition to informing the accused person of the existence of the right for his/her benefit, the prosecutor must also take the necessary steps to advise the accused of the procedures for acquiring legal assistance. Generally, the right to be informed of the right to counsel is activated first upon arrest of the suspect and before interrogation. The Constitution of Ghana in this context directs the arresting officer, generally a police officer, to inform a suspect of a crime, who is arrested, restricted or detained, in the language that s/he understands, of his/her right to a lawyer of his/her choice.¹⁶¹ This constitutional injunction is not necessarily addressed to public prosecutors, except in the limited circumstances that they personally effect the arrest of the accused person.¹⁶²

In a country like Ghana where English is the official language and the literacy rate has a national average ratio of 58%, a large section of the population lives in ignorance of their due process rights.¹⁶³ Prosecutorial practices sometimes stand in violation of this constitutional obligation and in breach of the accused person's due process right. Scores of arresting officers fail to inform suspects and accused persons of their right to the assistance of counsel. The criminal justice system of Ghana however, imposes no duty on the prosecutor in charge of the trial to enquire into the status of representation of an accused person s/he is dealing with at the

¹⁵⁹ Kempinen *Geo. J. Legal Ethics* 1174.

¹⁶⁰ *Ibid.*

¹⁶¹ Ghana Constitution, art 14(2). Discussed *supra*, Ch. 7, text at 7.2.1.

¹⁶² Law Officers Act, s 4, which gives all Prosecuting Attorneys the power of arrest.

¹⁶³ See "Literacy in Ghana" World Reader, <http://www.worldreader.org/wp-content/uploads/2015/07/Ghana-Literacy.pdf> 2015 1. (Accessed 25-09-2016). Other sources fix a higher literacy rate. E.g., the "The World Factbook" <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> (Accessed 25-09-2016) fixes it at 76.6%.

trial, especially when s/he is unrepresented. Aside from the police, the procedural rules for criminal prosecutions are generally silent on the duty of the actors in the administration of criminal justice, to ensure that the right of accused persons to be informed of the right to counsel, at the time of arrest, was indeed complied with. It is the height of all procedural injustice, if accused persons should have to self-represent in criminal proceedings simply because they are unaware of the right to counsel.¹⁶⁴

Therefore, the American criminal justice system directs judges and prosecutors to ensure that self-represented accused persons are indeed informed of their right to counsel.¹⁶⁵ This obligation derives on the part of the prosecutor, from his/her principal duty to ensure the fairness of the procedure governing the trial and its outcomes.¹⁶⁶ It is therefore not beyond the limits of the prosecutor's duty in Ghana to ensure that any accused person s/he is dealing with, has in actual fact been fully made aware of his/her right to the assistance of counsel. The prosecutor must also assume the burden of informing the self-represented accused of the local procedures for obtaining legal assistance, either privately or from state institutions such as the Ghana Legal Aid office.¹⁶⁷

8.5.2.2 Prosecutors' Duty to inform the Self-Represented Accused of his/her Interest in the Trial

According to Rule 4.3 of the ABA Model Rules, a Prosecuting Attorney dealing with an unrepresented accused person shall not give the appearance that s/he is disinterested in the proceedings. Neither shall s/he give legal advice to the self-represented accused other than advice to secure counsel.¹⁶⁸ Every prosecutor is enjoined to disclose his/her adverse interest as agent of the state to the self-represented accused.¹⁶⁹ This principle is grounded in the notion that the prosecutor's decision to prefer charges against the accused for purposes of prosecution puts the two parties in an adversarial relationship. Indeed, many self-represented accused in the United States erroneously conceive the prosecutor as the appropriate party from whom to seek legal advice on the strategy of their case, in order to secure an acquittal or a dismissal of the

¹⁶⁴ See, e.g., Kempinen 2006 *Geo. J. Legal Ethics* 1156.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ See, e.g., United Nations *Principles and Guidelines on Legal Aid in Criminal Justices*, UNGA/RES/67/187 (2012), principle 3 (23), "stating that it is the responsibility of the police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided accused to legal aid."

¹⁶⁸ ABA Model rule 4.3.

¹⁶⁹ Ladd "In the Matter of the Prosecutor's Ethics" 2004-2005 *St. & Loc. L. News* 9 10.

charge.¹⁷⁰ However, in practice, the lead interest of the prosecutor is to seek ‘justice’, which evidently, s/he believes must translate in the conviction of the person s/he has decided to charge and prosecute.¹⁷¹ The underlying principle is that the polarised interests of the prosecutor and the accused in an adversarial trial simply prevent the former from “assuming the role of surrogate counsel” for the unrepresented accused.¹⁷² This notion is easily appreciated by the prosecutor, by virtue of his/her professional qualification and training. It is however very important to engage self-represented accused persons to understand the position of the prosecutor at the trial and reject the ideologically inept idea of securing legal assistance from the prosecutor.

Generally, where parties to an adversarial dispute are represented by counsel, the antagonising sides clearly understand not only the conflicting nature of their interests but also the risk associated with contacting the adversary.¹⁷³ In cases where the accused is unrepresented, any information that s/he lawfully parts with to the prosecutor may be used at trial to secure his/her conviction. Even matters that a self-represented accused person may deem harmless might be adversely used by the prosecutor to secure conviction.¹⁷⁴ S/he may otherwise, unknowingly or without good counsel, waive certain important procedural or substantive rights that the Prosecution could use to its advantage.¹⁷⁵ In fact, any dissemination of information to the Prosecution is a potential tool that may be used to secure the accused person’s conviction.¹⁷⁶ Therefore, the accused pays where s/he naively considers the prosecutor as ‘a neutral and benevolent expert’.¹⁷⁷ The prosecutor therefore has a positive duty to take steps to correct the self-represented accused’s misconceived idea on the prosecutor’s role.¹⁷⁸ It falls to him/her to avoid any conflict of interest issues by desisting from advising an accused who is acting without the assistance of counsel.¹⁷⁹ The prosecutor must inform the self-represented accused that s/he does not and cannot act as his/her counsel. The rationale is to get the self-represented accused person to understand that s/he cannot expect any valuable assistance from the prosecutor to establish his/her defence. Ensuring that the prosecutor clarifies his/her position or interest to the self-represented accused stands to “reduce the risk of exploitation of the layperson’s

¹⁷⁰ Frey 1999 *Stetson L. Rev.* 183.

¹⁷¹ Kempinen 2006 *Geo. J. Legal Ethics* 1153.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ Kempinen 2006 *Geo. J. Legal Ethics* 1154.

¹⁷⁶ *Id* at 1153.

¹⁷⁷ *Id* at 1154.

¹⁷⁸ Frey 1999 *Stetson L. Rev.* 183-184

¹⁷⁹ *Id* at 183.

ignorance and also balance the level of each party's protection of interest".¹⁸⁰ Comment 2 on Rule 4.3 provides further directives to be complied with by a prosecutor dealing with a self-represented accused in an adversarial capacity. It allows the prosecutor to participate in settlement or negotiation of disputes, provided s/he thoroughly explains to the accused that s/he represents an adverse party.¹⁸¹ This duty remains a vital procedural protection for self-represented accused persons, which is worth being adopted into the Ghanaian criminal jurisprudence.

8.5.2.3 Prosecutor's Duty not to Seek a Waiver of Procedural Rights of Self-Represented Accused Persons

According to Rule 3.8 (c) of the ABA Model Rules, every prosecutor has the duty not to seek waivers of important pre-trial rights of an unrepresented accused person. The rule restrains the prosecutor from adopting procedural strategies and from using the rules of procedure to his/her advantage in conducting prosecutions. It implies imposing restrictions on the prosecutor's use of strategic planning in order to take advantage of the disadvantaged position of the self-represented accused during pre-trial interactions.¹⁸² In this context, the Rule makes perfect sense in preventing the prosecutor from exploiting a lay accused's ignorance, especially by getting him/her to waive his/her procedural rights.

Within the Ghanaian context, this principle becomes even more relevant. Its adoption will seek to protect the key pre-trial rights of the accused person from abuses and violations by investigatory agencies and public prosecutors, which generally escape judicial scrutiny. In more pragmatic terms, such rights as the pre-trial right to counsel would be effectively enforced, and admissions of guilt efficiently controlled, if prosecutors in Ghana are subjected to the ethical standard not to seek a waiver of pre-trial rights.

Eventually, the main objective of the trial of self-represented accused persons is to achieve substantive justice. Trials with self-represented accused persons must therefore be treated with the same level of objectivity usually accorded to proceedings involving defence counsel. In other words, great emphasis must be placed on the need to ensure that, the self-represented accused is not subjected to a harsh or abusive treatment because of lack of representation.¹⁸³

¹⁸⁰ Kempinen 2006 *Geo. J. Legal Ethics* 1154.

¹⁸¹ Ladd 2004-2005 *St. & Loc. L. News* 9.

¹⁸² *Ibid.*

¹⁸³ Kempinen 2006 *Geo. J. Legal Ethics* 1157.

In order to achieve a reliable system of fair criminal prosecutions in Ghana, the present scope of prosecutorial duties to self-represented accused persons must be enhanced. The existing legal framework must consider a number of ideas and workable strategies to boost the efficiency of the criminal adjudicatory system, as far as unrepresented accused persons are concerned. Any endeavour to devise a strong regime of prosecutorial duties to the self-represented accused persons ought to consider the adoption of rules that mould the interests of the prosecutor into the procedural concerns arising from the self-represented status of the accused. Firstly, the ideal situation must target the creation of a distinct body of ethical rules for all public prosecutors. Secondly, the body of ethical rules for public prosecutors must thoroughly address those aspects of the Prosecution's functions that are distinct from the issues facing lawyers representing private persons as clients. Finally, the body of rules must accommodate all the necessary exceptions to the existing ethical rules of the legal profession that are inconsistent with the obligation to secure justice for self-represented accused persons. It is important that all public prosecutors and most especially, lay prosecutors, be subjected to ethical controls that acknowledge the unique challenges in their area of practice.

8.6 A CASE FOR PRIVATE PROSECUTIONS IN GHANA

Private prosecutions, as earlier mentioned, refer to the procedure by which individual citizens were empowered to institute criminal proceedings in their private capacity against an accused person. This procedure of criminal prosecutions was initially recognised as a viable mode of criminal prosecution in Ghana. It is important, at this stage of development of the criminal justice system in Ghana, to give serious consideration to its benefits to self-represented accused persons. Eventually, it may be important to consider the probability of its reinstitution to address some of the key concerns of the criminal justice system associated with the trial of self-represented accused persons.

In effect, section 57 of the COOPA initially enacted the complainant's right to conduct his/her own criminal case. This section vested the individual with the power to make a complaint before the District Court and to conduct criminal prosecutions either in person or through counsel. Such proceedings however applied only to offences triable summarily and did not include proceedings on indictment. The law however gave the public prosecutor the right to intervene and assume the conduct of the trial at any time, in which case the trial assumed a

public character.¹⁸⁴ The Ghana law on private prosecution was however repealed in the year 2002.¹⁸⁵

It is however, important to note that the system of private prosecutions recorded very little patronage during its existence in Ghana. In effect, years after the promulgation of the law, private prosecutions still remained very uncommon events and underused in the courts. Even though there is no statistical data to show the rate of its prevalence in criminal trials in Ghana, Amissah surmised that its percentage rate of participation in the total number of criminal trials stood at less than one percent in the first decade of its implementation.¹⁸⁶ Details of its expunction from the statute book are unreported but practical considerations refer to the high cost of conducting private prosecutions and of privately pursuing such proceedings.¹⁸⁷ With the promulgation of article 88(3) of the Constitution of 1992, the full authority to initiate and conduct criminal prosecutions is now vested in the Attorney-General only. Consequently, the concept of private criminal prosecutions became unconstitutional and lost its application in Ghana's judicial system paving the way for the recognition of a sole system of public prosecutions in Ghana. No private person may institute criminal proceedings against another in Ghana.¹⁸⁸

The reasons for the institution of private prosecutions in Ghana have not been discussed in literature. Evidently, it was one of the colonial legal inheritances from England. Historically, early criminal prosecution in England was a purely private affair between the complainant and the accused person. Crime was a private wrong and it was the responsibility of the aggrieved party to initiate proceedings before the court and seek private redress.¹⁸⁹ Today in the United Kingdom, private prosecution remains integral to the modes of initiation of criminal proceedings. Individuals may lawfully initiate and conduct criminal proceedings by themselves against accused persons. The right to private prosecution is guaranteed under section 6 of the English Prosecution of Offences Act (POA).¹⁹⁰ Lord Diplock in *Gouriet v. Union of Post Office*

¹⁸⁴ COOPA, s 57 of COOPA, which is repealed stated in part that "... but the public prosecutor, at any time of any criminal cause or matter before a District Court may intervene and assume the conduct of the cause or matter if it is one for which he is appointed by a public prosecutor."

¹⁸⁵ See Criminal Procedure Code (Amendment) Act (No. 633 of 2002), ss 3 & 9.

¹⁸⁶ Amissah "Practical Problem No.3: Private Prosecutions" 1970 *RGL* 115-120.

¹⁸⁷ Similar reasons are raised as affecting the present English system. see Peachy "Two-Tier Justice: Private Prosecution Revolution" <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html> (Accessed 17-12-2016).

¹⁸⁸ Brobbey *Practice and Procedure* 60-61.

¹⁸⁹ Ma 2008 *Int'l Crim. Just. Rev.* 191.

¹⁹⁰ 1985, C 23, s 6(2).

*Workers*¹⁹¹ gave the logic for the preservation of this system of prosecution. He opined that the right to privately institute and conduct criminal offences operates as “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal” of the formal prosecutorial bodies to initiate criminal proceedings against offenders. More objectively however, this system of private prosecution is also fuelled by high financial pressure on the State’s budget and insufficient financial resources of the state to tackle the prosecution of every crime.¹⁹² The right to private prosecution in England extends to cases involving proceedings in the service of the public interest.¹⁹³ Generally, this procedure applies to cases involving less complex and serious offences, which call for no detailed disclosure issues and which do not involve disclosure of highly sensitive materials.¹⁹⁴

In practice, this mode of initiation of criminal proceedings raises very little or no concern for counsel’s assistance in cases where the accused person is unrepresented and the trial is personally conducted by the complainant. Such a trial is relatively balanced as between the positions and statuses of the complainant/private prosecutor and the accused person. The trial also envisages no substantial disparities in terms of skill and competence between the accuser and the accused as far as they act in their private and lay capacities. Procedurally, proceedings pitching a private accuser against an unrepresented accused are relatively simple and devoid of the complexities associated with the formal system of criminal prosecutions. They also minimise the risk of unfair procedures associated with public criminal trials of self-represented accused persons. Before it was abandoned, this private procedure presented the sole and relatively fair prosecutorial scheme with the potential to curtail the concerns of procedural fairness involved in proceedings where accused persons stood unrepresented in summary trials before the District Courts.

A call for reconsideration and thorough analysis of the system of private prosecutions may be relevant to determine its potential of not only alleviating the burden on public prosecutions, but also of offering assistance to self-represented accused, especially in cases of misdemeanours.

¹⁹¹ 1978 A.C 435 498

¹⁹² See, e.g., Peachy “Two-Tier Justice: Private Prosecution Revolution” See note 187 above.

¹⁹³ E.g., confiscation and compensation cases; *R (Virgin Media Ltd) v. Zinga* 2014 EWCA Crim 52.

¹⁹⁴ “Private Prosecutions” http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/ (Accessed 16-11-2016)

8.7 CONCLUSION

The adversarial trial's philosophy of reliance on the autonomy of the parties projects the importance of maintaining procedural equality between the prosecution and the unrepresented accused person at trial. The institutionalised office of the public Prosecution remains an important state agency in the enforcement of criminal law in Ghana. Beyond the overarching duty to seek justice as agents of justice in the trial, the framework of ethical and professional rules for prosecutors recognises a number of prosecutorial obligations towards the self-represented accused throughout the course of proceedings. These duties are, for the most part, not expressly prescribed, but deduced from the general obligations of the prosecutor, as far as the initiation and conduct of criminal prosecution are concerned.

The criminal trial, as Goldstein puts it, is “the most distinctive embodiment of societal interest in the process of administering law”.¹⁹⁵ It necessitates a proper adjustment of the conventional roles of the prosecutor in proceedings involving self-represented accused for achieving fair prosecutorial ends. Advocating for a system of ‘loose prosecutions’ in cases of self-representation will not redress the defects in the adversarial trial but rather weakens its prowess at establishing the truth.¹⁹⁶ The way forward requires the establishment of a set of mandatory ethical rules for prosecutors to govern the peculiarity of the trial of self-represented accused persons. It is also important to reconsider the system of private prosecution as a measure to meet the practical procedural exigencies of trials of self-represented accused persons.

¹⁹⁵ Goldstein “The State and the Accused: Balance of Advantage in Criminal Procedure” 1959 -1960 *Yale L. J* 1150. Also in Goldstein & Goldstein *Crime, Law and Society* (1971) 174.

¹⁹⁶ Zacharias 1991 *Van. L. Rev.* 70.

CHAPTER 9

JUDICIAL ASSISTANCE TO SELF-REPRESENTED ACCUSED PERSONS IN CRIMINAL PROCEEDINGS IN GHANA

9.1 INTRODUCTION

The policy of the criminal adjudicatory system of Ghana, as far as proceedings involving self-represented accused persons are concerned, leans towards adjusting the key features of the adversarial framework to make up for the void created by the absence of defence counsel. Where the accused is unrepresented, the system primarily devolves the ultimate responsibility of ensuring the fairness of the trial to the judge. To that end, the criminal procedural regime of Ghana adopts a number of interventional measures that water down the rigours of the philosophical precepts of judicial neutrality and passivity within the general concept of judicial enabling. The concept in practice targets an expansion of, and the infusion of activism, into the classical role of judicial officers, in order to meet the procedural challenges associated with trials where accused persons are unrepresented. It therefore departs from the conventional structures of the adversarial system under the Anglo-American common law tradition, which strictly insists on the neutrality and passivity of the judicial officer.¹⁹⁷

This chapter examines the forms of judicial assistance to self-represented accused persons enacted under the procedural and evidentiary legislations of Ghana. Part 2 contains an analysis of the nature, sources and scope of the judicial duty to assist self-represented accused persons. Part 3 is a discussion of the judicial interventional duties under the Evidence Act.¹⁹⁸ Part 4 is an examination of the various judicial interventions enacted under the Criminal and Other Offences (Procedure) Act¹⁹⁹ (COOPA). Finally, Part 5 is an analysis of the key limitations to the statutory interventions.

¹⁹⁷ See, e.g., Zuckerman, “No Justice Without Lawyers – The Myth of an Inquisitorial Solution 2014 *C.J.Q.* 355 372, arguing that “...judicial involvement is incompatible with doing justice between two parties, each entitled to equal protection. The paradoxical truth is that in order to maintain an unbiased decision-making process, the parties must not rely on the decision-maker to develop their respective positions but must each have their own champion unburdened by responsibility to the opponent beyond ethical obligations of propriety and fair-play.”

¹⁹⁸ NRCD 323 of 1975. It details the general evidentiary rules of court proceedings.

¹⁹⁹ Act 30 of 1960. According to its preamble, it generally legislates the procedural regime governing the conduct of criminal trials in Ghana.

9.2 SOURCES, NATURE AND SCOPE OF JUDICIAL ENABLING

The specific statutory interventions by way of judicial assistance to unrepresented accused persons operate within the meaning and parameters of the concept of judicial enabling. By definition, judicial enabling espouses the idea of active judicial participation in trials of self-represented accused persons.²⁰⁰ As an interventional mechanism, it responds to the need to make the adversarial model of adjudication more accommodating of the plight of self-represented accused persons through active judicial assistance.²⁰¹ Cole defines judicial enabling as a “process wherein a judicial officer engages in a ‘hand-holding’ process, guiding the unrepresented accused through the trial process, by informing [him or] her of the procedures”.²⁰² The concept essentially denotes an obligation on the part of the trial judge to give due consideration to the professional deficiencies and want of competencies of self-represented accused persons in the adversarial proceedings. More fundamentally, it requires judicial officers to assist unrepresented accused persons through the procedural maze and legal complexities governing the proceedings.²⁰³ Thus, in addition to ensuring compliance with the procedural and statutory rules of trials, it falls to the court to consider and to take into account the peculiar circumstances of each unrepresented accused person appearing before it.²⁰⁴

The procedural and evidentiary legal regimes in Ghana, as advanced by the COOPA and the Evidence Act, frame and determine the duty of judicial officers to assist self-represented accused persons during the trial. These two instruments lay down the processes of criminal proceedings, the rights, obligations and burdens of the parties and the judicial officer, as well as the methods and standards of proof. In substance, the aforementioned statutes undeniably contemplate legal representation for the contending parties for their implementation and

²⁰⁰ See, e.g., Cole “Between Judicial Enabling and Adversarialism: The Role of the Judicial Officer in Protecting the Unrepresented Accused in Botswana in a Comparative Perspective” 2010 *U. Botswana L. J.* 81 93.

²⁰¹ See, e.g., Scieszinski 2012-2013 *Drake L. Rev.* 819, arguing that “[j]udges shoulder responsibility to ensure a fair process, so that those seeking justice can actually get it”. Also at 826-827: “A judge presides by conducting a proceedings: therefore in guaranteeing a person’s right to be heard, the judge must make sure notice of the proceedings was provided, reasonable opportunity to appear and communicate a position was afforded, and that participation was meaningful.” See also Lawrence & Aarons *Unrepresented Accused and the Language of the Magistrate’s Court* (1997) 12.

²⁰² Cole 2010 *U. Botswana L. J.* 93.

²⁰³ *Id* at 85, 89. Also Kempinen “The Ethics of the Prosecutor’s Contact with the Unrepresented Defendant” 2006 *Geo. J. Legal Ethics* 1147 1151, stating that “[t]he trial judge bears a greater responsibility to ensure that the trial is fair when the accused person is unrepresented by counsel at the trial.” Also in civil cases, see, e.g., Correll “Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of *Pro se* Appellant Briefs” 2011 *Vermont L. Rev.* 863 864, 894.

²⁰⁴ Lawrence & Aarons *Unrepresented Accused* 12.

enforcement. This presumption obviously accords with the core foundation of the adversarial model of trial, which is theoretically designed for the use of legally trained professionals.²⁰⁵

It is thus not surprising that the default status of self-representation figures with little prominence, in the procedural and evidentiary frameworks of criminal proceedings in Ghana. Despite the minimal procedural focus on self-representation, the recognition of the plight of self-represented accused persons during proceedings is well settled in the criminal legislative framework and its jurisprudence. The COOPA and the Evidence Act converge to consolidate the substantive truth about self-representation in criminal proceedings in Ghana; they recognise that lay accused persons generally lack the competencies to navigate the procedural and evidentiary labyrinths governing the criminal trial process. It is worth emphasising that an accused person who is unrepresented by counsel does not have a constitutional right to the assistance of, and instructions from the judge regarding courtroom procedures and techniques to conduct his/her defence.

The scope of statutory interventions in the nature of judicial assistance is limited to such critical stages of the criminal proceedings where the law considers that the constitutional right of the self-represented accused person to a fair trial stands the risk of being jeopardized. These interventions call for heightened judicial vigilance and where appropriate, active judicial participation in the proceedings as curtailed by the requirements of judicial neutrality and impartiality.

9.3 JUDICIAL ASSISTANCE TO SELF-REPRESENTED ACCUSED PERSONS UNDER THE EVIDENCE ACT

The Evidence Act of Ghana defines the general rules of evidence applicable to legal proceedings in the formal courts of competent jurisdiction in the country.²⁰⁶ Most importantly, it provides general procedural relief for all unrepresented parties including self-represented accused persons, in court proceedings. From a broad perspective, the Evidence Act directs judicial officers to ease the standard of compliance with the laid down rules of evidence for purposes of procedural fairness, as far as unrepresented parties to legal proceedings are concerned. In that context, it specifically mandates trial judges and magistrates to have “special regard to the fair application of the Act”²⁰⁷ when dealing with parties who are not represented

²⁰⁵ Discussed *supra*, Ch. 3, text at 3.5.

²⁰⁶ Evidence Act, preamble.

²⁰⁷ *Id*, s 178(2).

by counsel at the trial. The value of this provision underlies the presumption that unrepresented parties to legal proceedings in court cannot be reasonably expected to fully cope with the intricacies of the rules of evidence.

Even more particularly, the Evidence Act imposes an obligation on judicial officers to be more proactive regarding raising and determining matters of admissibility of evidence in such proceedings where a party is unrepresented. In effect, the general principle in adversarial criminal proceedings is that parties to the controversy have the substantive obligation to develop the facts and evidence of the case for trial.²⁰⁸ The contending parties assume the task of probing the stories of their adversaries. In discharging this procedural obligation from a partisan perspective, they equally assume the duty to raise all legal objections to the admissibility of any form of evidence being adduced by the adversary. It is also their duty to timely object to the tendering of any piece of evidence they deem inadmissible,²⁰⁹ and to invite the court to rule on the matter.²¹⁰ These processes in essence involve a great deal of legal technicalities, usually deriving from the complex legal framework of the rules of evidence. The parties' knowledge of the law on the nature of evidence, rules on relevancy and admissibility, competency of witnesses, legal assessment of material and probative values of evidence, matters of privileges and hearsay, among others, are to that end indispensable. For the accused person who is unskilled in the law, the discharge of this procedural obligation is well-nigh impossible without the assistance of counsel.

For self-represented accused persons therefore, the remedial scheme to this procedural challenge under the Evidence Act takes the form of judicial assistance to such accused persons. Section 8 of the Evidence Act vests judges and magistrates with power to exclude on their own motion, any piece of evidence that would be inadmissible, if objected to by a party. This judicial duty is particularly reinforced and heightened in cases where such a party is unrepresented by counsel. This is contained in section 178(2) of the Evidence Act, which provides as follows:

[I]n applying this Act, and in particular in determining whether and to what extent to exercise its power under section 8, the Court shall have special regard to the fair application of this Act in respect of a party not represented by a lawyer.

Consequently, in the absence of defence counsel, the law expects a lot more activism on the part of the judicial officer in evaluating the admissibility or otherwise of the Prosecution's

²⁰⁸ Discussed *supra*, Ch. 2, text at 2.6.1.1.

²⁰⁹ See Evidence Act, s 6(1): "In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered."

²¹⁰ Evidence Act, s 1(1) according to which "[a] question of law including but not limited to the admissibility of evidence shall be decided by the court."

evidence. It is the judge who fully assumes the duty to raise and determine on his/her own motion, all matters of admissibility of evidence in the proceedings.

The combined effect of sections 187(2) and 8 of the Evidence Act therefore provides the needed relief for self-represented accused persons in matters of admissibility of evidence in criminal proceedings. It shifts the full procedural burden unto the judicial officer to critically and fairly examine statements, documents and materials that the Prosecution may seek to tender in evidence in proceedings against the accused person.

The essence of this judicial obligation under the Evidence Act was fairly broached by Acquah JA in his dissenting opinion in the case of *Agogrobisah v. The Republic*.²¹¹ The learned judge took the opportunity to examine the import of section 178(2) of the Evidence Act as it applies to proceedings involving self-represented accused persons. The appellant that was unrepresented at the trial failed to duly raise an objection to the tendering and admissibility of a confession statement during the trial. The objection stood on the ground that the alleged confession statement of the accused did not comply with the statutory requirements of a valid confession statement. On appeal against his conviction and death sentence, Acquah JA while dissenting underlined the common purpose and effect of sections 178(2) and 8 of the Evidence Act as a protective shield for unrepresented accused persons. In his reasoning, the combined effect of the reading of the two provisions is that failure to comply with the evidentiary rules of the trial ought not to operate against an unrepresented accused person who is unable to appreciate the technicalities of the law of evidence. The judicial officer in such cases assumes a higher procedural duty to pay due regard to the status of the self-represented accused person. It is his/her obligation to provide them with the required assistance and guidance in matters of admissibility relating to the Prosecution's evidence.

Of note however, the legislative protection under section 178(2) is subject to serious procedural uncertainty. What amounts to 'fair application' of the Act remains at best a matter of discretion for the judicial officer. The provision is yet to be judicially defined and its parameters determined. As such, no substantial jurisprudence exists on the normative interpretation of the detailed nature and full scope of the provision of section 178(2) within the framework of the

²¹¹ 1995-1996 1 GLR 557 578.

Act.²¹² Eventually, the need for specific guidelines on the full extent of the relief remains crucial.

9.4 THE FRAMEWORK OF JUDICIAL ENABLING OF SELF-REPRESENTATION OF ACCUSED PERSONS UNDER THE COOPA

The COOPA enacts a number of procedural interventions in the nature of judicial obligations to guide judicial officers in their treatment of self-represented accused persons during the trial. These duties are scattered throughout the course of the proceedings. In practice, the nature of the assistance tends to vary depending on the nature of the offence charged, the defences arising from the case, the accused person's level of awareness and understanding of the substantive and procedural laws, as well as the particular stage of the proceedings. Much of the assistance is left to the discretion of the judge to determine, subject to the overriding fair trial imperative.²¹³

The COOPA also presents varying degrees and forms of judicial intervention and assistance depending on whether the self-represented accused is being tried on indictment or summarily.²¹⁴ It prescribes relatively more detailed obligations for the benefit of accused persons in trials on indictment than it does regarding summary trials due to the vaunted dynamics and complexities of such proceedings. Further, the various judicial obligations under the COOPA, target particular stages of the proceedings. The focus has generally been on the stages of the trial that are governed by highly technical legal processes and which stand above the mastery of lay accused persons. The form of assistance required under the various judicial obligations varies from mere exercise of critical judicial vigilance to active judicial participation in the proceedings. Overall, the principal procedural goal points to the need to secure the integrity and fairness of the prosecution. The key judicial obligations under the COOPA apply in the stages of plea taking, opening the defence, developing the facts and evidence of the case, raising defences, and sentencing.

²¹² The Memorandum to the Evidence Act offers very little insight into the enactment of the provision. It simply states at para 21 in respect of s.178 (2) as follows: "Subsection (2) directs the Court to have special regard to the fair application of the Act in respect of a party not represented by lawyer."

²¹³ See, e.g., similar consideration in South Africa, by Lawrence & Aarons *Unrepresented Accused* 12, emphasising the notion that "it is the responsibility of the magistrate to decide the extent of participation that is necessary to ensure a fair trial." They however predicate the statement with Steytler's caution that "the court is not required to participate actively in the process since the adversary system is predicated on the assumption that each party to the dispute will protect its own interests." Steytler *The Undefended Accused at Trial* (1988) 6.

²¹⁴ Discussed *supra*, Ch. 2, text at 2.4.4.3.

9.4.1 Judicial Duty in Taking ‘Guilty’ Pleas from Self-Represented Accused Persons

The dire implications of a ‘guilty’ plea make it the first critical stage for judicial intervention in proceedings where the accused is not represented by counsel. Criminal trials under the COOPA begin with the reading and explanation of the offences charged to the accused person.²¹⁵ The first and most important task of the court at this stage is to take the plea of the accused to the charges read. The plea is expressed in the form of an answer to the question whether the accused is ‘guilty’ or ‘not guilty’ of the offence charged.²¹⁶ The nature of the plea in substance determines the fate of the accused in the trial process. A plea of ‘not guilty’ generally triggers the procedure for the actual and full trial of the case. The court proceeds to hear the evidence in the case and makes a determination on its merits.²¹⁷ A ‘guilty’ plea on the contrary, carries serious legal implications for the accused person. As Amissah rightly states, “a plea of guilty is a judicial confession which disposes of the obligation to prove the case”.²¹⁸ By implication, it dispenses of the need for trial and takes away the opportunities to assess both the evidence and the status of compliance with the procedural obligations applicable to the pre-trial stage of the proceedings. This position of the law is statutorily grounded in section 239(1) of the COOPA, according to which “a plea of guilty when recorded shall constitute a conviction”.²¹⁹

In all cases where the accused person in the proceedings is unrepresented, the practice of the court is to be wary of accepting ‘guilty’ pleas, as well as of swiftly convicting accused persons upon such pleas. The law therefore directs judicial officers to exercise due care in order to forestall wrongful admittance of ‘guilty’ pleas in particular cases. These include (i) situations where the self-represented accused does not understand or appreciate the nature of the charge(s); (ii) does not intend to admit that s/he was guilty; (iii) where upon the admitted facts,

²¹⁵ COOPA, ss 171(1) & 198 (2).

²¹⁶ *Ibid.*

²¹⁷ COOPA, s 172; see also s 198(6) in respect of indictment proceedings. The same applies in situations where the accused simply refuses to plead to the charge. See COOPA, s 171(5): “Where the accused or counsel for the accused, refuses to plead, or if the accused does not appear and the Court decides to hear the case in the absence of the accused in accordance with section 170, a plea of not guilty shall be entered and the plea so entered shall have effect as if it had been actually pleaded.”

²¹⁸ See Amissah *Criminal Procedure in Ghana* (1982) 109; see also Brobbey *Practice & Procedure in the Trial Courts and Tribunals of Ghana* (2011) 76, stating that “a genuine plea of guilty to a charge is said to amount to a judicial confession to having committed the offence. Such a plea obviates the necessity for a trial or proof of the charge by the prosecution.”

²¹⁹ The courts in Ghana have also cited with approval, the American Supreme Court case of *Machibrode v. U.S.* 368 U.S. 487 493, quoting *Kercheval v. U.S.* 274 U.S. 220 223 that “a plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession, it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.” See *Darkurugu v. The Republic* 1989-1990 1 GLR 308 311.

the accused person could not in law have been convicted of the offence charged; or (iv) where the self-represented accused pleads guilty in ignorance of an obviously bad charge.²²⁰

In both summary trials and trials on indictment, certain common standards affect the scope and nature of the judicial obligation in taking guilty pleas from self-represented accused persons. Firstly, the trial judge is mandated to fully record the 'guilty' plea. Secondly and even more importantly, the judge can only admit a 'guilty' plea against the accused if there are no words, facts or explanations, which in effect negate an admission of guilt.²²¹ Where the accused person gives any explanation following a 'guilty' plea, it falls to the judge to ensure that the explanation is consistent with guilt and raises no defence in order to sustain the plea.²²² Thirdly, the judge is obligated to establish that there are facts that justify the commission of the offence charged, before admitting the 'guilty' plea and convicting the accused.²²³

Beyond these common obligations, the COOPA postulates additional but different sets of judicial duties in considering 'guilty' pleas made by unrepresented accused persons, depending on the nature of the proceedings. As far as trials on indictment are concerned, the COOPA provides detailed judicial obligations in accepting a 'guilty' plea and convicting a self-represented accused person. According to section 199(1) of the COOPA, where a self-represented accused pleads guilty to a charge in proceedings on indictment, "the court, before accepting the plea, shall (...) explain to the accused, the nature of the charge and the procedure which follows the acceptance of a plea of guilty". In *Akrong v. The Republic*, the court held that "[t]he whole intention of the legislature in enacting section 199 (...) [is] to safeguard the interest of prisoners who might conduct their own cases in ignorance because they are not represented by counsel".²²⁴ The objective, as expressed in section 199(2), is to expose the self-represented accused to the effects and implications of a 'guilty' plea. Becoming aware of these legal consequences, the accused person will be well positioned to make an informed decision.

²²⁰ See *Lassey J in Kofi alias Fiozo v. The State* 1965 GLR 28 30; also, *Alpha Zabrama v. The Republic* 1976 1 GLR 291 303; *Kwaku v. The Republic* 1978 GLR 279.

²²¹ COOPA, s 171(3) in respect of summary trials, stating that the plea shall be recorded and the court shall convict the accused and pass sentence or make an order against the accused *unless there appears to it sufficient cause to the contrary*." (Emphasis added). In trial on indictment, see COOPA, s 199(4), stating that "[w]here the accused pleads guilty but adds words indicating that the accused may have a defence or so indicates in answer to the court, the court shall enter a plea of not guilty and record it as having been entered by order of the court."

²²² *Brobbey Practice & Procedure* 77-78; see also *Dorvlo v. The Republic* 2001-2002 1 GLR 679 682-683; *Republic v. Bright* 197 2 GLR 12; *Alpha Zabrama v. The Republic* 1976 1 GLR 291; *Isaac Cofie v. The Republic* [31/07/2008] Suit No. E2/87/08 (unreported); *Clifford Broni Bediako v. The Republic* [16/12/2010] Suit No. H2/1/2010 (unreported); *Amissah Criminal Procedure* 109-110.

²²³ *Brobbey Practice & Procedure* 83; *Dom v. The Republic (Practice Direction)* 1968 GLR 767; *Chidia v. The Republic (Practice Note)* 1978 1 GLR 81; *Atinga Frafra v. the Republic* 1968 GR 85.

²²⁴ 1968 GLR 748 749, *per* Quarshie-Sam AG J.

It will be open to him/her, where necessary, to consequently withdraw the 'guilty' plea and plead 'not guilty'.

Concerns have however been raised about the content and details of the explanation of the nature of the charge to unrepresented accused persons. More particularly, the question is asked as to whether the explanation should involve giving a mere notification of the charge to the accused or whether the elements of the crime must be explained to him/her.²²⁵ In this instance, the courts have adopted the 'totality of circumstances' test, which permits each case to be considered differently and on its own merits. This includes taking into consideration such matters as the educational background, the level of intelligence, the language of the accused, and more importantly, the lack of legal representation, in explaining the nature of the offence to self-represented accused persons.²²⁶

The COOPA prescribes a single procedure for taking guilty pleas of all accused persons in summary trials. It does not specially consider the status of the self-represented accused. The provisions of section 171 of the COOPA describe the obligation of trial judges in taking 'guilty' pleas from accused persons including those unrepresented by counsel. According to the section in reference, where an accused person in a summary trial pleads guilty, the presiding judge shall simply record the plea as accurately as possible in the words used by the accused. The judge shall then proceed to convict the accused person and pass a sentence or make any order against him/her, unless there appears to the judge, sufficient cause to the contrary.²²⁷ Unlike in trials on indictment, the judge has no duty to explain to the accused, the nature and consequences of a guilty plea. Comparatively therefore, the self-represented accused in a summary trial does not have the benefit of the judge's advice before making his/her plea.

The courts have held however that the duty of the court in convicting an unrepresented accused person upon a 'guilty' plea "casts more than an ordinary and passive supervisory role on the trial court".²²⁸ The judicial officer is expected to play an active role to ensure that an accused person who pleads guilty actually intends to make such a plea to the offence charged.²²⁹ Section 171(3) of the COOPA provides that a 'guilty' plea, followed by the attendant conviction of the self-represented accused in summary trials, may be justified only if there are no substantial

²²⁵ Benin J in *Darkurugu v. The Republic* 312.

²²⁶ *Id* at 312-313, citing with approval the test adopted in the American court in *Henderson v. Morgan* 1976 426 U.S. 637.

²²⁷ See COOPA, s 171(3).

²²⁸ *Darkurugu v. The Republic* 311.

²²⁹ *Id* at 312.

reasons to acquit. This duty does not however make up for the need to devise specific guidelines to ensure that guilty pleas of unrepresented accused persons in summary trials are indeed legally and factually founded. Self-represented accused persons must know unambiguously and intelligently what they are pleading guilty to, as well as the direct effect of such a plea.

Unfortunately, the extant literature does not provide any theory that justifies the limited protection for self-represented accused persons in summary trials. From a policy point of view, there appears to be no philosophical foundations for imposing different judicial standards to deal with 'guilty' pleas of self-represented accused persons. As conviction flows directly from a guilty plea, whether in trials on indictment or in summary trials, there is the need to ensure a measure of equality in the statutory scope of protection, for all self-represented accused persons irrespective of the nature of the proceedings.

A practice evolved in the jurisprudence of the courts of Ghana ostensibly to maintain some procedural parity in the two procedures of trial. The courts usually applied the statutory protections in trials on indictment, to self-represented accused persons in summary trials.²³⁰ The Supreme Court of Ghana however recently ruled against this practice of the courts in the case of *Gabrielle Joanne v. The Republic*.²³¹ The Court adopted a purely literal approach to the application of the provisions of the COOPA as far as the procedures under summary trials and trials on indictment are concerned. It held that "[t]he procedure in summary trials so far as taking of plea and its consequences are concerned is not the same as trials on indictment".²³²

The Supreme Court also affirmed the legal position that the duty of the court in taking a plea of an accused, whether or not represented by counsel in a summary trial, is to simply record the plea as accurately as possible in the words used. Then, if there were any explanations or words given by the accused that rendered the plea of 'guilty' inconsistent with the words added, the trial court is legally bound to enter a plea of 'not guilty' and proceed to try the case.²³³ Nothing more is required of the judge. The Court further held that the judicial safeguards in

²³⁰ Adinyira JSC in *Gabrielle Joanne v. The Republic* 2012 47 GMJ 1 13. See also Gbadegbe JSC, *Id* at 57-58 concurring, stating that "although section 199 ...deals with trials on indictment, it is observed that the practice has crept into summary trials such as to be deemed to be part of the existing practice in criminal trials where there is a change by an unrepresented accused from not guilty plea." *Darkurugu v. The Republic* 312. Examples of such cases applying the procedure for trial on indictment to summary trials include *Isaac Cofie v. The Republic* [31/07/2008] Suit No. E2/87/08 (unreported); *Sealar Tarza v. The Republic* [29/07/2008] Suit No. 22/15/08 (unreported); *Republic v. Bright* 1974 2 GLR 12.

²³¹ 2012 47 GMJ 1.

²³² *Id* at 24.

²³³ *Id* at 26, per Rose Owusu JSC.

taking pleas of unrepresented accused persons in a trial on indictment are not available to unrepresented accused persons in a summary trial. In the words of Anin Yeboah JSC:

[A]ll criminal proceedings in common law jurisdictions are regulated by statutes. In Ghana, criminal proceedings in both summary trials and indictment trials are regulated by the Criminal and Other Offences (Procedure) Act, 1960 (Act 30)... Care must be taken not to import certain rights on accused persons, which (...) are not conferred by any existing law into our criminal procedure...²³⁴

It is however worth putting in perspective, the view of the minority in the dissenting opinion, which in essence prospects and advocates for the establishment of a more equitable procedure. This is even more desirable as it aims at assuring adequate protection for unrepresented accused persons while pleading 'guilty' to criminal charges in summary trials. The minority argued that the right to a fair trial, as exemplified in the procedure for the protection of self-represented accused in trials on indictment, must be made available to all accused persons. According to Gbadegbe JSC, it is ideologically inappropriate that the courts should have different judicial standards in dealing with pleas depending on whether the proceeding is by way of a trial on indictment or a summary trial.²³⁵ As Dotse JSC in turn eloquently puts it:

[t]he need to uphold respect and uphold the liberty of an accused person, all in a bid to ensure that the [accused] is dealt with justly is without distinction a necessity, as it applies in summary trials or trial by indictment.²³⁶

The minority also recommended that the criminal procedure system must follow the best practice in the administration of criminal justice in order to protect the liberties of the individual.²³⁷ This recommendation provides an important foundation for rectifying the imbalance in the law. An important starting point in ensuring that self-represented accused persons acquire the necessary procedural assistance while pleading guilty to offences charged against them, is the adoption of Benin J's four-test rule laid down in *Darkurugu v. The Republic*.²³⁸ In this case, an illiterate self-represented accused person was arraigned before the District Court on charges of defrauding by false pretences and deceit of a public officer. He pleaded guilty to the charge of defrauding by false pretences. He however advanced a reason for failing to fulfil his contractual obligations to the complainant. He was subsequently convicted and sentenced to twelve (12) months imprisonment for that offence. There was no indication that the trial magistrate explained the consequences of the guilty plea to the accused person before convicting and sentencing him on his plea. The accused person pleaded 'not guilty' to the charge of deceit of public officer. Following his dissatisfaction with this second

²³⁴ *Id* at 51-52.

²³⁵ *Id* at 58.

²³⁶ *Id* at 43.

²³⁷ *Id* at 13 per Adinyira (Mrs) JSC.

²³⁸ 1989-90 1 GLR 308.

plea, the trial magistrate surprisingly called and examined witnesses, and among others, discredited the accused person, branding him a liar and deceitful person. The accused consequently changed his plea to the second charge to one of 'guilty'. He was eventually convicted on both pleas, and sentenced to twenty-four (24) months imprisonment. Setting aside the conviction on appeal, the High Court determined that the plea of 'guilty' to the charge of deceit of a public officer was not voluntary. In what could be considered as the essentials of the judicial duty in taking guilty pleas in criminal proceedings, the Court laid down the following judicial guidelines in taking 'guilty' pleas.²³⁹ A judicial officer taking a 'guilty' plea shall ensure in every case that:

- (i) The accused person makes the plea voluntarily. The judge shall inquire from the accused whether s/he was prompted by any other person to plead guilty to the charge, or whether the accused was led to plead guilty by threat or upon a promise or any form of inducement however unintended.
- (ii) The plea is intelligent or that the accused is aware of his/her rights, including the right to have a full trial of the case, the nature of the charge to which s/he is pleading and the consequences of his/her plea.
- (iii) There is a factual basis for the plea. In other words, the facts presented by the Prosecution must support the charge and the accused person's explanation should not seek to negate the essential elements of the offence charged.
- (iv) Finally, the judicial officer must personally address the accused person in the language s/he understands and record all the above listed processes.

The combined effect of these specific duties can positively assist the court in evaluating the genuineness and validity of a 'guilty' plea entered by unrepresented accused persons. More importantly, these duties encapsulate the essence of the judicial obligation to exercise heightened judicial scrutiny to ensure that self-represented accused persons are not unreasonably convicted following erroneous guilty pleas.

9.4.2 Judicial Duty at the Opening of a Defence

²³⁹ *Id* at 313-314. Benin J also held that "the cardinal principle is that justice must not be sacrificed in the altar of expediency. It is more desirable to spend a little more time on an accused who pleads guilty to ascertain his real intent than in haste to accept the guilty plea and do injustice to him. For it is part of the accused's fundamental human rights to be safeguarded under the due process of law which involves properly supervising the guilty plea process."

Upon entering a plea of 'not guilty' for the accused person, the court normally proceeds to hear the case in a full trial.²⁴⁰ By convention, it is for the Prosecution to prove its case beyond all reasonable doubt in order to secure a conviction.²⁴¹ Where a case is sufficiently made for the accused to answer at the close of the Prosecution's case, s/he is called upon by the court to open his/her defence.²⁴² Generally, where an accused person is unrepresented at the trial, the COOPA invites the judge to fulfil a number of obligations to him/her before s/he opens the defence.

In both summary trials and trials on indictment, the judicial officer is mandated to inform the self-represented accused person of his/her right either to testify on oath as a witness in the witness box, or to make an unsworn statement from the dock.²⁴³ Other separate obligations remain peculiar to the nature of the proceedings and depend on whether the accused person is being tried summarily or on indictment. In summary trials, the COOPA additionally instructs the judicial officer to remind the accused of the offences for which s/he is standing trial.²⁴⁴ In trials on indictment on the other hand, the COOPA prescribes a substantially different obligation for the judge. S/he is mandated to inform the self-represented accused of his/her right to address the court and of the right to call witnesses in defence.²⁴⁵ There are no theories underlying the enactment of distinct judicial obligations to self-represented accused under the two procedures. The general approach adopted by the courts in practice however, leans towards uniformity of the rules. In all criminal proceedings whether summary or on indictment, the courts do inform the accused person of the right to either testify on his/her own behalf or to make unsworn statements from the dock, and also of the right to call witnesses and to address the court.

The utility of this procedure however only addresses an aspect of a bigger problem associated with appreciation by self-represented accused persons of courtroom explanations of procedural

²⁴⁰ COOPA, s 171(4); also, COOPA, s 236 providing that "[a]n accused, on being arraigned on an indictment, by pleading 'not guilty' generally to the indictment places the onus on the prosecution to establish the guilt of the accused."

²⁴¹ Evidence Act, s 11(2).

²⁴² See COOPA, s 174(1); Evidence Act, s 22; also Brobbey *Practice & Procedure* 126, referring to Ofori-Boateng, *The Ghana Law of Evidence* (2000) 287-290. On the other hand, the accused will be acquitted if the court is of the opinion that no case has been made against the accused. See, COOPA, ss. 173 & 271. Also note the Supreme Court decision in *Tstatsu Tsikata v. The Republic* 2003-2004 SCGLR 1068, holding that the decision whether or not the prosecution has proved its case beyond reasonable doubt should be made at the end of the entire trial, after consideration of both the case of the prosecution and the defence.

²⁴³ COOPA, ss 174(1) & 271(1).

²⁴⁴ *Id.*, s 174(1).

²⁴⁵ *Id.*, s 272(1).

rights. Following an empirical study on Magistrates' explanations of legal and procedural requirements to self-represented accused persons in South Africa, Lawrence and Aarons highlighted a fundamental problem associated with the process of informing unrepresented accused persons of their rights after a 'not guilty' plea.²⁴⁶ The study found that the explanation of rights alone is not decisive in determining the extent to which a self-represented accused person is able to articulate his/her case.²⁴⁷ In fact, the explanations and instructions of the judicial officer to the self-represented accused may be adequate in terms of the requirement of the law. However, these explanations do not necessarily lead to the accused's understanding of what is expected of him/her. This is in part due to the disorientation and sense of unfamiliarity with the law, as well as the courtroom procedures and antics experienced by the average unrepresented accused person.²⁴⁸

The findings of the study are relevant to the Ghanaian context because of the similarities in the procedure in the two systems. It is a truism that unrepresented accused persons who enter the court for the first time are confronted with an unfamiliar and intimidating environment. Thus, the explanation of rights by judicial officers can "exacerbate rather than ease the sense of disorientation experienced by an already nervous and anxious unrepresented accused".²⁴⁹ It is therefore particularly necessary for judicial officers to critically identify and be sensitive to the various factors inhibiting the unrepresented accused person's understanding and appreciation of the various processes at the trial and provide the necessary assistance.²⁵⁰

The COOPA omits to further instruct the judge to provide a detailed explanation of the contents of the rights and procedural options, as well as their legal effects. As a result, the obligation to simply 'inform' the self-represented accused of his/her procedural rights and options hardly alleviates the disorientating effect of the courtroom and procedural dynamics on him/her. In giving effect to the right to a fair trial, the obligation of the judge must, of necessity, extend to ensuring that the self-represented accused is duly educated on the substance of each procedural right and option at the opening of his/her defence. More importantly, the judge must assume the ultimate responsibility for ensuring that the self-represented accused makes his/her procedural choices intelligibly.

²⁴⁶ Lawrence & Aarons *Unrepresented Accused* 2, 48-49.

²⁴⁷ *Id* at 31.

²⁴⁸ *Id* at 2, 48-49.

²⁴⁹ *Id* at 31.

²⁵⁰ *Id* at 48, stating that the magistrates should consider these problems and make allowance for them when arriving at a judgment.

The first procedural decision that the accused person makes at the opening of his/her defence is to determine whether to open a defence and give evidence at the trial, after the Prosecution has closed its case. A preliminary step involves evaluating and assessing the Prosecution's case in order to determine whether the prosecutorial burden to establish his/her guilt, is duly met, to warrant a defence. Where the charge against him/her is not proved beyond reasonable doubt, the accused may tactfully exercise his/her right to remain silent. An intelligent decision at this stage requires an insight into the complex procedural rules of trial, which are evidently unknown to persons untutored in the law.

Even where a case is sufficiently made against the accused, the decision to open a defence and give evidence at the trial must always be validated against the accused's constitutional right not to be compelled to give evidence at the trial.²⁵¹ This right is also expressed in the form of a statutory privilege of the accused person not to testify at his/her trial under section 96(1) of the Evidence Act. This section provides that an "accused in a criminal action shall not be called as a witness and shall not be compelled to testify, except on [his/her own] application (...)"²⁵² In view of the legality of the right and privilege to remain silent, it may be erroneous for a court to simply infer guilt of the accused person from his/her failure to give evidence at trial.²⁵³

There is however, also a more critical part of the analysis to consider. Where after close of the Prosecution's case, there is *prima facie* evidence from which to infer the accused person's guilt, the judge's call unto the accused to offer an explanation in defence must be taken seriously. This is because where the accused person erroneously fails or refuses to open his/her defence, s/he may be properly convicted on the strength of the evidence available.²⁵⁴ Regrettably, the COOPA guarantees no statutory or judicial obligation to explain these intricacies of the procedure to self-represented accused persons. This category of accused persons remain therefore at the risk of making uninformed procedural decisions to remain silent and failing to open a defence when reasonably needed, thus jeopardising their right to a fair trial.

The options available to accused persons regarding the procedure for presenting evidence in court require detailed consideration. Generally, the COOPA guarantees accused persons the procedural right either to give evidence from the witness box or to make an unsworn statement

²⁵¹ Ghana Constitution, art 19 (10).

²⁵² See, COOPA, s 174(2), stating that "[t]he Court shall then hear the accused if the accused desires to be heard and the evidence the evidence may adduce in defence"

²⁵³ Brobbey *Practice & Procedure* 150.

²⁵⁴ *Id* at 145-146. See also *State v. Afenuvor* 1961 2 GLR 655; *Moro v. The Republic* 1979 GLR 256.

from the dock.²⁵⁵ It is particularly important for self-represented accused persons to understand these procedural options and their respective effects on the strength of their case. Section 170 of the COOPA and section 63(1) of the Evidence Act, do allow an accused person to make an unsworn statement from the dock. With this option, the accused is not liable to be cross-examined. Neither the judge and the jury or the Prosecution can question him/her.²⁵⁶ In the case of *Dochie v. The State*,²⁵⁷ the court held that the making of an unsworn statement from the dock is a statutory right conferred on an accused person. More importantly, electing to make an unsworn statement does not in any way amount to proof of guilt. It is a statement, which must be considered by the court in evaluating the evidence.²⁵⁸

The Evidence Act however empowers the court to comment on the failure of the accused to testify on oath, where s/he does not intend to be subjected to cross-examination.²⁵⁹ The Court in the *Dochie* case held to that effect that the probative value of a statement made from the dock “is of course weakened by the right to give sworn evidence accorded to the accused under statute”.²⁶⁰ In addition, any unsworn statement may have to be corroborated in order to have a good probative value. Thus, as Brobbey clearly states, “[i]f the unsworn evidence remains uncorroborated till the trial ends, such evidence will be weakened by the failure to give sworn evidence, which could be subject to cross-examination”.²⁶¹ The credit given to the evidence from the witness box is enhanced not only by the penalty for perjury that the witness may suffer for giving false testimony, but also by testing the evidence in cross-examination.²⁶² An unsworn statement loses the benefits of these safeguards. Eventually, it does not carry the same weight attached to evidence given by a witness from the witness box and tested in the crucible of cross-examination.²⁶³

In practice, the courts generally adopt a laudable approach, which gives meaning to these procedures. They take it upon themselves to explain the range of options and their implications to self-represented accused persons.²⁶⁴ Where they opt to offer such explanations, the content and extent of the instructions given differ due to the absence of governing procedural

²⁵⁵ COPA, ss 174(1) & 271(1).

²⁵⁶ Amissah *Criminal Procedure* 132.

²⁵⁷ 1965 GLR 208.

²⁵⁸ *Id* at 210.

²⁵⁹ Evidence Act, ss 63(3) & 96(1).

²⁶⁰ *Dochie v. The State* 210-211.

²⁶¹ Brobbey *Practice & Procedure* 162.

²⁶² Amissah *Criminal Procedure* 133.

²⁶³ *Ibid*.

²⁶⁴ Amissah *Criminal Procedure* 132.

guidelines. This procedural gap in the proceedings will most certainly and effectively be remedied through a direct imposition of a judicial obligation in that regard, either by legislation or by practice direction.

9.4.2 Judicial Assistance in Developing the Facts and Evidence of the Case

In the adversarial common law system, the court itself does not undertake to search for relevant evidence. It reaches its decision exclusively based on the evidence presented by the parties.²⁶⁵ The parties assume full responsibility for developing the facts and evidence before the court. These processes are central to the adversarial system of proof.²⁶⁶ The procedure involves several procedural techniques devised under the rules of evidence, which are tritely known to be the specialty of professionally trained lawyers and judges.²⁶⁷ In the absence of defence counsel, accused persons personally assume the onerous obligation to personally conduct the examination and re-examination of their own witnesses, as well as the cross-examination of their opponent's witnesses. For many self-represented accused persons in any conventional adversarial system, meeting the procedural standards in presenting and testing the facts and evidence in the case may be herculean.

In Ghana, the law allows both the Prosecution and the Defence to call witnesses to give evidence in support of their respective cases. The duty of the court is to find the 'legal truth' after a clash of the facts and arguments by the parties through examination and cross-examination of each other's stories.²⁶⁸ Based on the findings of facts, the court then proceeds to do justice according to law.²⁶⁹ The criminal trial, as argued by Taylor J in *Dabla v. The Republic*²⁷⁰ involves three types of factual truths, which evolve at various stages of the proceedings. These include the Prosecution's facts aimed at establishing guilt, the Defence's facts aimed to rebutting guilt, and finally, the facts, which in the opinion of the court constitute

²⁶⁵ Keane *The Modern Law of Evidence* (2008) 1.

²⁶⁶ MacBarnet "Magistrates' Courts and the Ideology of Justice" *Magistrates' Courts and the Ideology of Justice* 1981 *BJLS* 181 185, referring to Lord Chancellor's Office: *Lecture for Magistrates* (1953) 38 that "cross-examination and re-examination are difficult matters for unrepresented parties and the help of the court is often necessary in most cases to conduct the examination-in-chief."

²⁶⁷ See, e.g., Landsman "A Brief Survey of the Development of the Adversary System" 1983 *Ohio State L. J.* 713 714-715.

²⁶⁸ Discussed *supra*, Ch. 2, text 2.6.3.

²⁶⁹ Lord Denning in *Jones v. National Coal Board* 1957 2 QB 55 63.

²⁷⁰ 1980 GLR 501 (Holding 1).

a closer or near total reconstruction of the events leading to the offence charged. Based on the latter, the court is entitled to adjudicate and make pronouncements.²⁷¹

Judges in Ghana, like in any legal system adherent to the adversarial system of trial, are insulated from investigating charges and evidence. They rely on the parties and their witnesses to establish the factual truth within the confines of the operating rules of procedure and evidence.²⁷² They also do not partake in defining the triable issues. They do not direct the parties regarding which evidence to adduce or which witnesses to call. They again do not participate in the testing of evidence through cross-examination. This adversarial policy of exclusion of judges from the fact-finding process is generally justified by the theory that:

...a person who conducts an investigation will necessarily form a hypothesis at some stage in the investigation, commonly early on. Once a hypothesis is formed, the investigator would tend to focus attention on that hypothesis and be less able to give adequate attention to other possibilities.²⁷³

Thus, according to Professor Landsman, “if the judge is assigned the task of making a factual inquiry, both theoretical analysis and empirical data suggest that his biases are likely to be intensified and his decision opened to judicial influence”.²⁷⁴ Quite apart from these cognitive factors, other policy considerations further rationalise the insulation of the judge from the fact-finding process and its concomitant errors. These include the risk that the judge who actively engages in the fact-finding process may have to assume responsibility for the factual errors and evidentiary inaccuracies, a matter that would obviously undermine the integrity and legitimacy of the court.²⁷⁵ Judges indeed assume a more fundamental duty; they rule on the legal issues raised during the trial, but only after the parties and their advocates have closed their respective cases.²⁷⁶

In Ghana, the COOPA however, tasks the courts to assist unrepresented accused persons in developing the facts and evidence in support of their case. The sanctioned judicial assistance is targeted in one breath at assuaging the technical difficulties associated with the process of

²⁷¹ *Ibid.* The factual truth that the court relies on to decide the controversy between the parties is nothing but the ideal end of the structured procedural enquiry into the controversy engaging the contending parties. See Hodgson *Conceptions of the Trial in Inquisitorial and Adversarial Procedure in The Trial on Trial – Judgment and Calling to Account* (2006) 223 225.

²⁷² Truth is defined as “the maximum correspondence between a guilt judgment and the culpable conduct which the defendant allegedly performed.” See Roodt “Fact finding, Fairness and Judicial Participation in Criminal Proceedings” 2003 *Codicillus* 68 69.

²⁷³ Zuckerman 2014 *C. J. Q.* 355 360.

²⁷⁴ Landsman *The Adversary System: A Description and a Defence* (1984) 31.

²⁷⁵ Zuckerman 2014 *C. J. Q.* 360-361.

²⁷⁶ *Id* at 360. This contrary to the inquisitorial system where the judge partakes in fact-finding.

cross-examination of prosecution witnesses. In another breath, the COOPA details specific judicial assistance in calling defence witnesses and examining them at trial.

9.4.2.1 Judicial Assistance in Calling and Examining Defence witnesses

Self-represented accused persons, like any accused persons or any parties to a case, reserve the right to call and question witnesses in order to elicit evidence that supports their version of the facts. The Constitution of Ghana in that vein guarantees the right of every accused person to “be afforded facilities 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”.²⁷⁷ This right is deeply ingrained in the principle of the adversarial process, according to which, any facts that need to be proved by evidence of a witness must be proved by oral testimony given in public in the court of law.²⁷⁸ This right is an application of the principle of equality of arms. It guarantees, as between the Prosecution and the accused person, the same legal powers for compelling the attendance of witnesses at trial.²⁷⁹

The realisation of the right to call witnesses and present evidence requires the accused person to make a number of important decisions at this stage of the proceedings. Eventually, his/her choices can have a direct impact on the eventual outcome of the trial.²⁸⁰ Self-represented accused persons may not be properly equipped to deal with decisions relating to choice of defence witnesses.²⁸¹ They generally do not have the legal acumen to determine what goes into calling a particular person as a defence witness.²⁸² An option not to call a particular witness, which the court finds material to their defence, may be an object of comment by the judge. Conversely, they may be prone to presenting such witnesses whose testimonies may be more damaging than helpful to their case.²⁸³ Entrusting the self-represented who is legally unskilled in the art of proving a case, with a wide discretion to decide which witnesses to call in support of his/her case, may leave him/her even more confused.²⁸⁴

The COOPA provides several forms of procedural assistance to unrepresented accused persons at this stage of the proceedings. However, within the context of ensuring fair trial through

²⁷⁷ Ghana Constitution, art 19(2) (g).

²⁷⁸ See, e.g., Keane *Modern Law of Evidence* 161.

²⁷⁹ See Human Rights Committee (HRC) *General Comment 32*, U.N. Doc. CCPR/C/GC/32 (2007) para 39.

²⁸⁰ Lawrence & Aarons *Unrepresented Accused* 7.

²⁸¹ Naor “Procedure and Evidence in Criminal Trials” 1990 *Isr. L. Rev.* 622 624.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

effective and meaningful participation of the accused in the proceedings, several procedural technicalities associated with the process call for even more judicial vigilance and activity.

a) Judicial Assistance in Securing Attendance of Defence Witnesses at Trial

It is the responsibility of every accused person to call his/her witnesses and to secure their attendance at court to give evidence. Where an accused person is unrepresented, and where s/he is remanded in custody pending and during trial, the courts insist on giving effect to section 174(3) of the COOPA. This provision, which specifically applies to summary trial, aims at providing judicial assistance to self-represented accused persons to secure the attendance of defence witnesses in court. It provides that where an accused person indicates to the court that s/he intends to call witnesses who are not present at the trial to testify on his/her behalf, the court may adjourn the trial and issue a process or take steps to compel the presence of such witnesses in court. This right does not however connote an unlimited entitlement to obtaining the attendance of all witnesses requested by the accused. According to the Human Rights Committee's interpretation of the right, it is limited to securing the attendance of such witnesses that are relevant and material for the defence.²⁸⁵

In general, the realisation of the right is specifically contingent upon satisfying the court that the absence of the targeted witnesses is not due to a fault or neglect of the accused and that there is a likelihood that the witnesses may give material evidence on behalf of the accused.²⁸⁶ The COOPA however does not enact any equivalent protection for accused persons in indictment proceedings. In practice however, the courts usually extend the same amount of assistance to them. In such cases, the intervention by the courts rather takes its legal grounding from the constitutional right to be furnished with the facilities to secure the attendance of the witness at trial.²⁸⁷ The judiciary has had the opportunity to comment on the nature of the judicial obligation to assist self-represented accused persons in securing the attendance of defence witnesses.

²⁸⁵ HRC *General Comment* 32 para 39.

²⁸⁶ See also *African Commission on Human and People's Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) para N (6)(f) (ii), stating that "The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth."

²⁸⁷ See Ghana Constitution, art 19(2) (g).

In the case of *Amoo v. the State*,²⁸⁸ the accused person was unrepresented. He was charged with the offence of extortion, contrary to section 239(1) of the Criminal Offences Act²⁸⁹ (COA) and obstructing a public officer, contrary to section 205 of the same Act. He was also remanded into custody during most part of the trial. At the close of the Prosecution's case, the accused was called upon to open his defence. After giving evidence, he proceeded to call three (3) witnesses who were all absent from the court. The trial magistrate closed the accused's case without giving an opportunity to produce his witnesses in court and without issuing any processes to compel the attendance of the witnesses to appear in court to give evidence. He was eventually convicted and sentenced. On appeal against his conviction and sentence, the High Court held that after the accused informed the court of his three (3) potential witnesses, the trial judge ought to have complied with the procedure under section 174 of the COOPA. According to the Court:

...the trial magistrate should have adjourned the case because in the circumstances, he was, under section 174 (3) of Act 30, *to issue process or take steps to compel the attendance of such witnesses*. The trial judge should not have inferentially and could not legally have assumed that those witnesses, owing to the evidence adduced by the prosecution might not give any material evidence on behalf of the accused and therefore should have closed the case for the defence at that juncture. (Emphasis added)

b) Judicial Assistance in Examining Defence Witnesses

With the exception of cross-examination, the COOPA is silent on the role of the judge as far as the conduct of the accused person's evidence-in-chief and the procedure for the examining defence witnesses are concerned. The mode and extent of judicial assistance in examining the accused and his/her witnesses are generally a matter of pure discretion. The position of the law has always been to guard against judicial loquacity. Therefore, to any extent possible, the judge will always be prevented from assuming the role of counsel in leading the accused person or his/her witnesses in evidence. Lord Greene MR expressed this principle, which is inherited from English jurisprudence, as follows:

A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position, a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course, he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.²⁹⁰

In practice, the means and the procedure by which self-represented accused persons and defence witnesses present their testimony in court generally differ in the absence of settled procedural guidelines. While some trial judges actively direct the hearing and ask the necessary

²⁸⁸ 1967 GLR 67, Anterkyi J.

²⁸⁹ Act 29 of 1960.

²⁹⁰ *Yuill v. Yuill* 1945 P 15 20, cited by Brobbey *Practice & Procedure* 619.

questions on the main triable issues before the court, the practice for most judges is to allow the witnesses to give their testimony in an open-ended fashion. According to Brobbey, where the accused person is unrepresented, s/he is not particularly led in evidence-in-chief. The accused is only directed to state his/her case in a language understandable to him/her.²⁹¹ The same procedure applies to witnesses called by the accused. Steytler outlines the potential problems confronting an unrepresented accused who is invited to present his/her evidence-in-chief in such a manner. As he argues:

[T]he undefended accused, perhaps, uneducated and/or inarticulate, confronted by the familiar and formal atmosphere of the court, may find it difficult to relate his version of the event in a coherent and logical manner. He may not confine himself to the incident in question, but may include antecedent events, which appear to the court to be irrelevant. The court is obliged, however, to allow the accused his day in court and to give him the necessary leeway to tell his story in his own way.²⁹²

In all cases, the need to explain the process of examination-in-chief and its import to the self-represented accused person and to every defence witness before mounting the witness box is indispensable. It will be needful for the judge to point out to the accused and each witness, what the issues before the court are, and then invite them to tell their story, as personally known to them, on the triable issues.

9.4.2.2 Judicial Assistance in Cross-Examining Prosecution Witnesses

The adversarial process of proving one's case does not only involve a blanket statement of a party's own version of the facts. It also involves the task of undermining the opponent's case through the mechanism of cross-examination.²⁹³ The right of the accused person to confront the evidence adduced against him/her is guaranteed under article 19(2) of the Constitution of Ghana.²⁹⁴ The provision vests every person charged with a criminal offence with the right "to be afforded facilities to examine in person (...) the witnesses called by the prosecution before the court".²⁹⁵ Just like the right to call witnesses, the right to cross-examine is also considered as an application of the principle of equality of arms.²⁹⁶ In theory, the law grants the accused person the same legal powers for conducting cross-examination, as are available to the Prosecution when dealing with defence witnesses.²⁹⁷

²⁹¹ Brobbey *Practice & Procedure* 582.

²⁹² Steytler *The Undefended Accused* 169.

²⁹³ See, e.g., MacBarnet 1981 *BJLS* 184.

²⁹⁴ Para (g).

²⁹⁵ COOPA, s 172(2) guarantee the same right of the accused to "put question to each witness produced against the accused".

²⁹⁶ HRC General Comment 32 para 39.

²⁹⁷ *Ibid.*

Cross-examination underlines the element of confrontation, which is a fundamental pillar of the adversarial theory of adjudication.²⁹⁸ As a procedural instrument, it is commonly described as one of the essential weapons of the adversarial trial.²⁹⁹ It is, as Liniger puts it, the purest expression of the adversary process.³⁰⁰ It provides the accused the opportunity to confront his/her accusers and adversaries,³⁰¹ and to build an effective defence to the offence charged.³⁰² Cross-examination is also touted as the most effective and the principal mechanism for unearthing the truth in the adversarial trial.³⁰³ According to Wigmore, it remains the greatest invention in the adversarial system for seeking the truth.³⁰⁴

The importance of cross-examination in an adversarial trial has been captured by Justice Scalia of the American Supreme Court.³⁰⁵ He describes the process as the most powerful tool for testing the veracity of witnesses' testimonies.³⁰⁶ According to him:

[T]he [confrontation] clause's ultimate goal is to ensure reliability of evidence but it is a procedural rather a substantive guarantee. It commands, not that evidence be reliable, but reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can be determined.³⁰⁷

The key assumption of the adversarial system is that where the parties confront each other's facts and evidence, the truth will surface on its own accord.³⁰⁸ This idea essentially lies at the core of the 'fight theory' of truth underlying the adversarial procedure, according to which truth emerges from a clash of opposing arguments.³⁰⁹ The parties themselves are expected to thoroughly probe and discredit all opposing facts and versions of the truth through cross-examination. To some extent, this tends to justify the exclusion of the judicial officer from the fact-finding process.³¹⁰ In the adversarial proceedings where parties are represented by counsel,

²⁹⁸ Cole 2010 *U. Botswana L. J* 97, referring to Nato "Fair Trial" Safeguards: Precursor to an International Bill of Procedural Rights, The Hague, M. Nijhoff (1963) 30.

²⁹⁹ See MacBarnet 1981 *BJLS* 184.

³⁰⁰ Lininger "Article: Bearing the Cross" 2005-2006 *Fordham L. Rev.* 1353 1353.

³⁰¹ See, e.g., Cassim "The Rights of Child Witnesses Versus the Accused's Right to Confrontation: A comparative Perspective" 2003 *CILSA* 65 66, defining cross-examination as an example of confronting one's adversary. He adds that "the right to challenge evidence may well include the right to confrontation."

³⁰² HRC *General comment* 32 para 39.

³⁰³ Cole 2010 *U. Botswana L.J* 84, referring to L. Ellison *The Adversarial Process and the Vulnerable Witness* (2001); K. Quinn "Justice for Vulnerable and Intimidated Witnesses in Adversarial Proceedings?" 2003 *MLR* 139; see also E. Slater "The Judicial Process and the Ascertainment of Fact" 1961 *MLR* 721 722.

³⁰⁴ Wigmore *A Treatise on the System of Evidence in Trials at Common Law* § 1367 (1904) 1697, cited by Lininger 2005-2006 *Fordham L. Rev.* 1353.

³⁰⁵ *Crawford v. Washington* 2004 54 U.S 36.

³⁰⁶ *Id* at 46.

³⁰⁷ *Id* at 61.

³⁰⁸ Roodt 2003 *Codicillus* 69, referring to Jörg. Field & Brant *Are Inquisitorial and Adversarial Systems Converging? In Harding et al, Criminal Justice in Europe: A comparative Study* (1995) 41 53.

³⁰⁹ Discussed *supra*, Ch. 2, text at 2.6.3.1.

³¹⁰ See, e.g., Cole 2010 *U. Botswana L. Rev.* 84.

it is believed that the “lawyer’s highest ethical duty is to cross-examine zealously”.³¹¹ Scholars like MacBarnet have soundly argued that with no cross-examination, there is in a sense no trial, and with no professional lawyer, there tends to be no cross-examination.³¹²

The process of cross-examination is a complex procedure ingrained in legal technicalities and procedural intricacies, making it intractable for unrepresented accused persons. Lawrence and Aarons have eloquently underlined the floppy nature of cross-examination when conducted by an accused person that is untrained and unskilled in the law. According to the authors:

Cross-examination represents an invaluable opportunity, which, if exploited to the fullest, can result in the discrediting of a dishonest witness by a skilled questioner. However, a typical cross-examination conducted by an unrepresented accused person appears to bear only a passing resemblance to the confrontation between a lawyer skilled in the art and a witness. In the case of an unrepresented accused, the cross-examiner seldom has any advantage over the witness, no pre-conceived strategy to challenge her testimony and more often than not, has no idea what he is meant to do or prove during the examination. To an unrepresented accused with little or no previous exposure to what is prescribed by the law of evidence, the cross-examination process can be a harrowing ordeal.³¹³

Judge Dicott J. gives a classic description of the experience of self-represented accused persons in conducting cross-examination of prosecution witnesses, as he observes:

Few have the wit to appreciate every point they should challenge or make, and to sort the wheat from the chaff in this respect. Few have the memories to store every detail of the evidence they hear and not many more, the literacy to note such as the trial progresses or the means of doing so when it comes to that... And scarcely any know how to set about the task when the moment arrives. So many records one sees on appeal and review show a layman doing his best, only to find himself pulled up time and again for assertions instead of questions, or for questions that are irrelevant, repetitive or argumentative, until eventually he tires of the effort.³¹⁴

Interestingly, the description perfectly fits the experience of most self-represented accused persons in other adversarial jurisdictions including Ghana. The procedural regime in Ghana acknowledges the lack of mastery of the art of cross-examination among self-represented accused persons. The COOPA clearly sets three key judicial interventions in aid of the self-represented accused.

a) *The Duty to Inquire of the Accused Person’s Desirability to Cross-Examine*

Where the accused person is unrepresented at trial, the COOPA mandates the trial judge to inquire from him/her at the close of examination of each prosecution witness, whether s/he

³¹¹ Lininger 2005-2006 *Fordham L. Rev.* 1353, fn 5

³¹² See MacBarnet 1981 *BJLS* 184.

³¹³ Lawrence & Aarons *Unrepresented Accused* 3-4.

³¹⁴ *S v. Mngomezulu* 1983 91) SA 1152 (N) 1153 C-E., cited by Lawrence & Aarons *Unrepresented Accused* 4 in respect of South Africa.

intends to cross-examine the prosecution witness.³¹⁵ Notably, this statutory instruction to the judge falls short of stating what purposefully would be the very most important object of the duty. One would rather expect a legal provision directing the judge to inform the self-represented accused of the right to and import of cross-examination. Under the law, the judicial officer has no duty to explain the purpose of cross-examination to the self-represented accused, neither is s/he obligated to explain what is required of the accused person by way of effective cross-examination. The courts have also not interpreted their responsibilities at trial to include an obligation to educate self-represented accused persons on the nature and purpose of cross-examination. Thus, within the framework of the law in Ghana, the self-represented accused can hardly rely on the judge to understand the essence of cross-examination in legal proceedings.

The duty to inquire of the accused's desirability to cross-examine the prosecution witnesses, is however, broadly interpreted by the court. It includes the duty to afford the unrepresented accused the right and every reasonable opportunity to personally cross-examine any prosecution witness. In *Banda v. The Republic*,³¹⁶ the appellant who was charged with possession of Indian hemp without lawful excuse was in the course of the trial represented by counsel. After a number of adjournments because of the frequent absence of defence counsel from court, the trial judge decided to proceed with the trial. The court officially closed the process of cross-examination of prosecution witnesses began by the accused's counsel. It also held that the accused's counsel was deemed to have abandoned the further cross-examination of the first prosecution witness, which he had begun. The accused person was not asked whether he would like to cross-examine the first prosecution witness himself. On appeal against his conviction and sentence of twelve (12) years imprisonment, the court held that the trial judge ought to have afforded the appellant the opportunity to cross-examine the witness himself. It added that the trial court failed in its duty to assist the accused in the trial, especially since he was not represented by counsel. According to the court, the trial judge erred in denying the appellant the right to cross-examine the first prosecution witness himself when his counsel failed to appear in court. The trial judge indeed appreciated that the cross-examination of the first prosecution witness had not concluded. As a result, he ought to have called the unrepresented accused if he were so mindful of continuing with the cross-examination of the witness. For even if the counsel of the accused had abandoned the cross-examination of the

³¹⁵ COOPA, s 172(3) stating that "where counsel did not employ counsel, the court shall at the close of the examination of each witness for the prosecution, ask the accused whether the accused wishes to put questions to that witness and shall record the answer of the accused."

³¹⁶ 1975 1 GLR 52.

prosecution witness, it did not in itself disentitle the accused from relying on his own resources to cross-examine.³¹⁷ Failure to grant the self-represented accused the opportunity to continue with the process of cross-examination in person was an irregularity.³¹⁸

b) Judicial Assistance in Cross-Examining Prosecution Witnesses

The second statutory intervention essentially targets the provision of judicial assistance to self-represented accused persons through participation in the cross-examination of prosecution witnesses. According to section 174(2) of the COOPA:

Where the accused instead of questioning the witness makes a statement regarding the evidence of that witness, the magistrate shall, if desirable in the interest of the accused, put the substance of the statement to the witness in the form of questions.³¹⁹

The provision, though ingrained in a legislative enthusiasm to assist the self-represented accused, stops short of reaching its intended purpose in practice. A similar provision in the English jurisdiction was the object of critical academic analysis. According to McBarnet, such a provision is grossly inadequate to provide the self-represented accused with the needed and required assistance. On face value, this procedural intervention is believed to compensate for the lack of representation, reinforce the disadvantaged position of the accused person, and safeguard the interest of the accused person in the hands of the judge. From a rather casual observation, it is presumed that the judge relieves the self-represented accused by assuming the burden of turning the accused's statements into powerful questions on behalf of the accused.³²⁰ This process, as McBarnet rightly argues, does not however serve the substantive purpose of cross-examination. She argues as follows:

The problem is that this is not cross-examination. For a start, it is too late: once the statement is put, the surprise is lost. What is more, once the translated direct question is put, it creates an impasse, a categorical denial, with nothing to pursue further. A professional advocate would never take this route... For the magistrate to turn a statement into a question does not therefore help the unrepresented accused conduct his cross-examination as a professional right. It simply ensures that his amateur cross-examination both fails and terminates. The magistrate's "help" is therefore no substitute for defence advocacy. Nor indeed could it be. The magistrate can, as all judges can, ask questions, but his role remains that of an independent judge, he has no involvement in the preparation of cases and he may not take sides. And of course, he does not know the defendant's version beforehand, so the questions he asks are necessarily coloured by the only version he has heard, the Prosecutions. With the best will in the world, he is not in the structural position to do the job of defence advocate.³²¹

Essentially, the duty of the judge to assist unrepresented accused persons is particularly delineated and restricted. As stated by Osei Hwere J in the case of *Banda v. The Republic*,³²²

³¹⁷ *Ibid.*

³¹⁸ *Banda v. The Republic* 54-55.

³¹⁹ COOPA, s 172(4).

³²⁰ MacBarnet 1981 *BJLS* 185.

³²¹ *Id.*

³²² 1975 1 GLR 53-54.

judicial assistance in cross-examination of prosecution witnesses does not mean that the judicial officer:

should vacate his/her role as an impartial and neutral umpire and enter the arena of contest by assuming the cross-examination of prosecution witnesses on behalf of the accused himself, or that he should show uninhibited paternalism towards the accused.³²³

In other words, it does not lie with the judge to assume the role of cross-examining prosecution witnesses on behalf of the self-represented accused. The judge cannot engage in any form of extensive cross-examination of prosecution witnesses. The resolve of the adversarial procedural system is to limit the extent of judicial participation in the proceedings and to prevent the judge from acting as a counsel for the accused within the parameters of judicial impartiality. This procedure, in principle, makes the judge an unfit candidate to provide the necessary assistance to the accused during cross-examination. This notwithstanding, mitigating the harshness of the procedure could however be further achieved by an increase in the level of judicial activity. Without overstepping the boundaries of neutrality and impartiality, the legal framework could still embrace a broader scope of intervention within the framework of judicial enabling.

In practice, judicial officers can assume the responsibility to fill the interrogation gaps arising from patent omissions of cross-examinable matters by probing further such matters of interest to the court and relevant in the determination of issues before the court. Even more particularly within the context of cross-examination in a trial involving a self-represented accused, the judicial officer may serve as the catalyst to expose all questionable matters arising from the Prosecution's case. In all cases, it should be possible for the judicial officer to suggest particular questions or new lines of enquiry by assisting both the Prosecution and the accused to identify gaps left in the evidence before him/her. Through such a mechanism, the criminal justice system may give full effect to the Prosecution's burden of proof and to the right of the accused to a fair trial, in all cases where the trial proceeds without defence counsel.

c) The Duty to Advise the Self-Represented against Putting his/her Character in Issue

In all cases where the accused person is unrepresented, the judicial officer is duty-bound to inform and warn him/her of certain complexities in the law, ignorance of which may strip the accused person of certain procedural protections. Particularly, the law on cross-examination presents certain intricacies regarding the protection of a witness' character, which are arguably

³²³ *Ibid.*

unknown to persons not learned in the law. The Evidence Act describes instances where an accused person's character may be put in issue, especially where s/he adduces evidence of good character in support of his/her credibility.³²⁴ Furthermore, it underlines instances where the character and credibility of the accused may be attacked where s/he cross-examines prosecution witnesses with a view to establishing his/her own good character.³²⁵ In both cases, the courts have consistently held that the judicial officer is mandated to come to the side of the unrepresented accused and warn him/her of these procedures.³²⁶

Additionally, accused persons retain the right under section 129 of COOPA not to answer any question from the Prosecution, which tends to establish a previous conviction or which seeks to expose their bad character.³²⁷ The rule is that the Prosecution is restrained from adducing evidence of bad character of the accused or of a previous conviction for establishing the guilt of the accused regarding an offence charged. This is justified on the assumption that a jury or a judge may be predisposed to convicting an accused person, not on the totality of the evidence pointing to the guilt of the accused, but on an unavoidable prejudice steeped in the evidence of previous conviction and general bad character.³²⁸ The trial judge retains an unfettered discretion to exclude any such evidence, subject to the overriding duty to ensure that the trial is fair.³²⁹ Consequently, judicial officers assume the duty to protect self-represented accused persons by *suo motu*, refusing to admit evidence of bad character unlawfully obtained. Osei-Hwere J held in *Adusei II v. The Republic*³³⁰ that:

[t]he exclusion of evidence of previous conviction of an accused, and I would add of his bad character, is in origin a part of the common law of England. Our courts have consistently applied this common law principle in the protection of accused persons at criminal trials.³³¹

Even more importantly, the courts have held that in all cases where the accused person is unrepresented at the trial, and where improper evidence of character is wrongly admitted at trial, its legal effect on the judge must be considered on appeal. It is held that where the improper evidence has created an impression on the mind of the judge, and s/he has been prejudiced by the improper disclosure, procedural fairness demands that the judicial officer

³²⁴ See Evidence Act, s 83.

³²⁵ COOPA, s 129(1) (b).

³²⁶ See, e.g., Osei-Hwere J in *Adusei II v. The Republic* 1975 GLR 225. See also the Court of Appeal in *Avegavi v. The Republic* 1971] 1 GLR 428 437, holding that "[i]t is necessary in practice for the trial judge to warn an accused, especially where he is unrepresented, that he is going too far in his cross-examination of the prosecution witnesses and thereby exposing himself to cross-examination as to his own credit and antecedents."

³²⁷ COOPA, s 129(1) (b).

³²⁸ *Avegavi v. The Republic* 432.

³²⁹ *Id* at 436.

³³⁰ 1975 GLR 225.

³³¹ *Id* at 236, referring to Taylor J in *Tanoh alias Obeng v. The Republic* 1971 2 GLR 482.

recuses him/herself from further hearing the case. Ultimately, the case is to be referred to a different bench for hearing.³³²

It is common for self-represented accused persons to erroneously opt not to conduct cross-examination of prosecution witnesses. The general rule is that where a party fails to cross-examine an opposing witness on a material fact, s/he will be deemed to have acknowledged and admitted it.³³³ The Prosecution in such cases will not need to call further evidence regarding the facts in issue.³³⁴ The court, on its part, does not attach much weight to the evidence that the accused later gives on that particular issue or fact after the prosecution witness, giving such evidence, has left the witness box.³³⁵

However, where the accused person is unrepresented by counsel, the law presents an exception to the rule on the failure to cross-examine. The legal consequences for failure to cross-examine are generally not strictly applied in cases where a party is not formally educated and is unrepresented during the trial. This is founded on the recognition of the fact that the illiterate person, who is unrepresented, may not appreciate the very essence of cross-examination, even after a thorough explanation of its workings and import. In *Wiafe v. Kom*,³³⁶ the court emphasised the position that “the strict application of the law on [cross-examination] can appropriately be tempered in the case of illiterate litigants who are not versed with the art and intricacies of cross-examination”.³³⁷ Furthermore, to avert any potential miscarriage of justice, the court has held that “[t]he proper test to adopt under such circumstances is to find out whether there is a positive admission of fact in issue and if not, whether there is contrary evidence from the opposing party’s side”.³³⁸ It is thus legitimate and appropriate that where a party is illiterate and unrepresented, and most importantly unversed in the procedural complexities of cross-examination, the judicial officer must draw his/her attention to the relevance and importance of the process as a means of building an effective defence.³³⁹

The various mechanisms of intervention aim to compensate for the self-represented accused person’s want of competency in order to effectively execute his/her substantive obligations of proof. These forms of assistance are quite laudable, even more so as they ensure that the

³³² *Id* at 227.

³³³ *E.g., Quagrainie v. Adams* 1981 GLR 599. *Brobbey Practice & Procedure* 165; Evidence Act, s 119(a).

³³⁴ *Brobbey Practice & Procedure* 165.

³³⁵ *Ibid.*

³³⁶ 1973 GLR 1 GLR 240.

³³⁷ *Id* at 244.

³³⁸ See *Gyan alias Amoah v. Dabrah* 1974 2 GLR 318 325.

³³⁹ See *Brobbey Practice & Procedure* 166, referring to *Kombat v. Lambim* 1989-1990 1 GLR 324 332.

proceedings rise above a sham trial, which would otherwise thrive on the absence of participation of the accused acting without counsel. An appraisal of the guaranteed forms of judicial assistance attests to a positive step in the right direction towards ensuring a fair trial for self-represented accused. The nature of assistance however, largely remains inadequate and quite superficial. In the true adversarial sense of the legal procedure, these interventions in practice do little to assist self-represented accused to appreciate the purpose of and intelligibly conducting examination and cross-examination of witnesses.

9.4.3 Judicial Assistance in Raising Possible Defences

The duty of the judge to assist a self-represented accused person extends to the provision of reasonable assistance to the accused in determining all potential legal defences to the Prosecution's case. It is a fundamental element of procedural fairness to ensure that the conviction of an accused person for a criminal offence is justified on the sole ground that his/her guilt has been established beyond all reasonable doubt. This principle applies to all accused persons irrespective of their status of representation. Therefore, in all cases where the accused person acts without legal assistance, it falls to the judicial officer to ensure that all potential legal defences arising from the facts in the course of the proceedings are raised and judicially considered in support of the accused person's case. The Supreme Court in the case of *Brempong v. The Republic*³⁴⁰ laid a general principle to the effect that:

...whether an accused relies on a specific defence or not, where on the evidence, any legitimate defence was open to the accused, the trial judge must consider it whether raised or not and however stupid or weak it might appear to him to be.³⁴¹

The principle was again reiterated by the Court of Appeal in *Clifford Broni Bediako v. The Republic*.³⁴² The learned judge held, "the law is that where the Prosecution in its evidence has established a *prima facie* case, the judge is duty-bound to consider all the defences put up or open to him [her] on the available evidence".³⁴³ A typical application of the principle is found in the case of *Isaac Cofie v. The Republic*.³⁴⁴ The accused person, a cab driver, was arrested and charged with stealing certain items. A police unit spotted the car at dawn and suspected that the items loaded in the car had been stolen. They ordered the driver to stop but he failed to do so. He drove and at some distance abandoned the car, together with his accomplice on board and ran away. The police impounded the vehicle. Later, the accused reported to the police, and

³⁴⁰ *Brempong II v. The Republic* 1997-1998 1 GLR 467.

³⁴¹ *Id* at 472, *per* Bamford-Addo JSC.

³⁴² [16/12/2010] Suit No: H2/1/2010 (unreported), *per* Dennis D. Adjei JA.

³⁴³ *Ibid*.

³⁴⁴ [31/07/2008] Suit No. E2/87/08 (unreported).

identified himself as the usual driver. In his statement, he averred that on the night of the incident, he gave the car to his friend named Kwasi Slow to work with. When the accused failed to produce the friend at the request of the police, he was arrested and charged with the offence of stealing the items loaded in the car. He was unrepresented throughout the trial. He was eventually convicted. On appeal against the wrongful conviction, the High Court found that the explanation offered by the accused raised a defence of alibi. By the provisions of section 131 of the COOPA, an accused person intending to rely on the defence of alibi must comply with certain procedural requirements. S/he is required to file a notice of the defence to the prosecutor, with particulars as to the time, place and witnesses by whom it is supposed to be proved. Failure to comply renders the plea of alibi inadmissible as a defence. The Court however held that where the accused is unrepresented by an advocate and thus lacks the competence to personally comply with these procedures, the filing of the notice of alibi could be made on the orders of the court *suo motu*.³⁴⁵

Regarding jury trials, the principle is also established that the judicial officer should direct the jury on all the possible defences available to the accused, whether raised during the trial or not.³⁴⁶ The learned judge in *Sene & another v. The Republic*³⁴⁷ thus emphasised the position that “even if the accused person did not rely on a particular defence, if that defence was open on the evidence, the judge was duty bound to put that case to the jury”.³⁴⁸ It is fundamentally the duty of the judge to find out, in such circumstances, whether any mitigating circumstances exist that ought to be taken into account.³⁴⁹

In instances where the self-represented accused refuses to give evidence or any explanation at the trial, the duty of the judge is to closely consider any evidence from the facts, which favours the case of the accused and establishes a defence. This includes the examination of any previous investigatory statements given by the accused to the police and tendered in evidence. Thus, in *Annoh v. Commissioner of Police*,³⁵⁰ the unrepresented accused person was charged with stealing monies he collected on behalf of the Local Council. In his cautioned statement to the police, he denied the charge and explained that he paid over the monies to the fourth and fifth prosecution witnesses. He gave no evidence on his own behalf at the trial and the entire trial

³⁴⁵ See also *Bediako v. The Republic* 1976 GLR 39.

³⁴⁶ See *Zuta Kwabena alias Kwadwo Donkor v. The State* 1963 2 GLR 545 546, 550. Such a duty arises where there is some evidence of a defence, however slight it may be upon which the judge can direct the jury.

³⁴⁷ 1977 1 GLR 434.

³⁴⁸ *Id*, holding 4.

³⁴⁹ See *Asaah alias Asi v. The Republic* 1978 GLR 1 2.

³⁵⁰ *Annoh v. Commissioner of Police* 1963 2 GLR 460.

rested on the evidence adduced by the Prosecution. Unfortunately, the trial judge did not consider his cautioned statement. He was eventually convicted. On appeal against his conviction, the Supreme Court found and held that had the trial judge considered the denial of the charges as contained in the cautioned statement of the accused, the judgment would have been in favour of the accused. Thus, greater vigilance and heightened watchfulness rest on the judge to dig into the facts and evidence, and to consider all potential defences to the offences charged.

9.4.4 Duty of the Court in Sentencing Unrepresented Accused Persons

While sentencing an unrepresented accused person, the judicial officer has the duty to take into consideration all mitigating factors and special circumstances that warrant leniency. This judicial obligation is statutorily founded on certain principles governing the sentencing process. In summary trials, the COOPA mandates the court, where necessary, to receive evidence to inform itself of the proper sentence to be passed.³⁵¹ In trials on indictment, section 288 of COOPA directs that upon conviction of the accused, the Registrar or other officer of the court must proceed to ask the accused to show cause, why sentence should not be passed according to law.³⁵² More importantly, the failure to comply with procedural requirements affects the validity of the proceedings.³⁵³ In *Asaah alias Asi v. The Republic*,³⁵⁴ the accused person pleaded guilty to causing harm to her uterine sister. She was sentenced to six months imprisonment in hard labour without the option of a fine. She was a first time offender and a mother of six children, two of whom were minors. She was not represented by counsel at the trial. On appeal, on the ground that the sentence was harsh and excessive, the court held that:

[s]ince the appellant in this case was not represented by counsel at the trial, it was up to the trial judge to examine the facts himself and anything connected thereto to decide for himself whether the case warranted any lenient consideration. The record however did not reveal any such examination was carried out in respect of the sentence.³⁵⁵

In the opinion of the High Court, several mitigating factors existed on the record, which if considered, would have averted the imposition of the harsh punishment on the accused. These included (a) the accused and complainant were uterine sisters living in the same house with their children; (b) the complainant and appellant had not been on good terms for the past fifteen (15) years due to some misunderstanding and attempts to settle this had failed;

³⁵¹ COOPA, ss 177(2) & 188.

³⁵² COOPA, s 288(1).

³⁵³ *Id*, s 288(2).

³⁵⁴ 1978 GLR 1.

³⁵⁵ *Ibid*. (holding 2).

(c) prior to the day of the incident, the complainant had had a quarrel with the appellant when the complainant refused to be a witness in a case in which the appellant was the complainant; and (d) the circumstances that led to this incident were caused by the daughters of both the appellant and the complainant. In the words of the Court,

All these were factors sufficient enough to be a pointer to the trial magistrate that the whole incident involves aunts and daughters staying under one roof and that the long-standing ill feeling was bound to explode one day as indeed it exploded.³⁵⁶

9.5 LIMITATIONS TO THE STATUTORY INTERVENTIONS

The forms of legislative interventions under the Evidence Act and the COOPA do indeed acknowledge the inadequacy of the mainstream procedural system to fully accommodate the specialty of self-representation. The various duties of the judicial officer, as outlined under the Evidence Act and the COOPA, give credence to the legal system's adherence to the concept of judicial enabling in Ghana. For all practical purposes, the concept remains the principal remedial mechanism in addressing the procedural gaps opened by the absence of defence counsel. However, this legislative approach to providing a compensatory system, through increased judicial activism, remains fragmented and uncoordinated. As a result, several procedural stages of importance to securing the protection of the self-represented accused have been left out of the legislature's considerations. These include lack of statutory intervention regarding such matters, including raising technical legal points, inquiring into circumstances of confession statements, addressing the self-represented accused on reverse burdens of proof, duty to inquire into status of self-representation, and providing judicial assistance to unrepresented accused at addresses.

Under both the Evidence Act and the COOPA, the nature of activism infused in the discharge of the judicial duty simply involves remodelling the operational precept of judicial neutrality and passivity. The various judicial interventions do not wholly depart from the core foundational design of the adversarial system.³⁵⁷ To scholars like Kempinen, the judicial duty of neutrality and impartiality, as an indispensable pivot of the adversary theory of justice, shapes the scope of assistance a trial judge may provide to the unrepresented.³⁵⁸ The extent of judicial assistance under the various statutory interventions is as a result, fundamentally

³⁵⁶ *Asaah alias Asi v. The Republic* 3.

³⁵⁷ See, e.g., Steytler *The Undefended Accused* 6, arguing that the foundational pillar of the adversarial trial system "is predicated on the assumption that each party will party its own interests."

³⁵⁸ Kempinen "The Ethics of Prosecutor Contact with the Unrepresented Defendant" 2006 *Geo. J. Legal Ethics* 1147 1151.

circumscribed. In exercising their duty to assist unrepresented accused persons, judges are careful not to be advocates for the accused or enter into the fray. This caution is important to ensure that the concept of judicial interventionism in cases of self-representation does not overreach realistic boundaries of judicial paternalism. This principle has been given express recognition in the Ghana criminal jurisprudence. Osei-Hwere J in a distinctive pronouncement in the *Banda* case lucidly held regarding the Ghanaian domestic context that:

[t]hough it was one of the recognised functions of the judge in a criminal trial to assist an accused person who was not represented by counsel in putting his defence before the court, it did not mean that the judge should vacate his role of the ‘impartial umpire’ and enter the arena of contest...³⁵⁹

Clearly, it does not lie within the enhanced duties of the judge to assist unrepresented accused persons in devising their defence strategies or to advise them on how to make their case.

It is worth emphasising that within this context of judicial enabling, the advice and instructions of the judge to self-represented accused persons will hardly adequately compensate for the lack of defence counsel.³⁶⁰ Ultimately, the call is for the judge to observe the line between “reasonable accommodations to ensure opportunity for the fair hearing of matters” on the one part, and “offering legal assistance for parties who come to court unprepared, ignorant of procedural requisites, armed with poor strategy or without representation” on the other.³⁶¹

Generally, critics have long underscored the incompatibility of any form of judicial involvement in the process of adjudication with the adversarial philosophy of trial. Generally, active judicial engagement in a trial has been criticised as being inconsistent with the determinative feature of party autonomy and partisan control of proceedings. It is also considered as detracting from the underlying requirements of judicial passivity and impartiality.³⁶² Placed in the proper context however, the concern is not fully supported in theory. Critics of the policy of judicial participation in a trial do agree that even though the adversarial system does not assume equal legal representation on both sides, it operates on the assumption that there will be adequate legal representation for both parties.³⁶³ The presumption of effective operation of the adversarial judicial process thus flops where a party to the criminal trial is completely unrepresented. Consequently, judicial passivity and inertia will be undesirable and ineffectual in achieving an effective, just and fair adjudication in the absence

³⁵⁹ 1975 1 GLR 52, see holding (4).

³⁶⁰ Kempinen 2006 *Geo. J. Legal Ethics* 1151, fn. 15. See a similar observation by Naor 1990 *Isr. L. Rev.* 624; Zuckerman 2014 *C. J. Q.* 368 arguing that the vacuum created by the absence of defence cannot be cured by judicial assistance during the trial.

³⁶¹ Scieszinski 2012-2013 *Drake L. Rev.* 830-831.

³⁶² See, e.g., Saltzburg 1978 *Va. Law. Rev.* 1.

³⁶³ *Id* at 61.

of defence counsel. The remedying process will thus involve any such procedural interventions that are consistent with the duty of impartiality of the judge. It is indisputably possible for a judicial officer to assume a reasonably active role at the trial and to maintain his/her core quality of impartiality.³⁶⁴ Within this context, the reasoning of one commentator, which backs an exploration of the powers of the judge to ensure the balance of trial, becomes a welcome proposition. As he argues:

Anything that the law of procedure or the judge's role can do to equalize opportunity and put a faulty presentation on the right track so that the disputes are more likely to be settled on their merits will in the long run bolster up rather than destroy the adversary system, and will increase the moral force of decisions.³⁶⁵

9.6 CONCLUSION

The criminal procedural system in Ghana offers a number of statutory interventions to assist self-represented accused persons during the trial. These interventions enacted under the COOPA and the Evidence Act attest to the substantive inadequacy of the existing legal regime to fairly deal with self-represented accused persons. The interventions take the form of judicial assistance to self-represented accused persons, and essentially, simulate processes within the inquisitorial system.

Most of these interventions border on such mechanisms that engage heightened judicial activity to ensure that the accused is not wholly disadvantaged by the lack of legal assistance. In all instances of judicial intervention, the nature of assistance provided to the unrepresented accused is carefully circumscribed. The duty of the judge is to provide such assistance as is necessary to help the accused put his/her defence forward. The judge is to be cautious not to assume the role of defence advocate or descend into the arena of conflict. By these limitations, the form of judicial enabling adopted by the criminal procedural system in Ghana justifies its compatibility with the core foundational precept of neutrality and impartiality of the judge.

The 'hole-plugging' approach to dealing with the procedural challenges through these specific enactments remains however deficient in many respects. For a legal framework originally

³⁶⁴ See, e.g., Goldschmidt 2002 *Fam. Court Rev.* 42, referring to Sward 1989 *Ind. L. J.* 301 312, n. 96, arguing that "[t]here is some tendency in the literature to confuse impartiality with passivity. The two concepts must be distinguished. A judge can be impartial but very active in developing the case, as judges are in the continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not. Those who confuse the two ideas betray a bias in favour of adversarial adjudication."

³⁶⁵ James & Hazard *Civil Procedure* (1977) §1.2 8, quoted by Saltzburg 1978 *Va. Law. Rev.* 61.

designed to rely on lawyers acting for the parties, the non-integrated legislative interventions fall short of developing an all-inclusive remedial regime.



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CHAPTER 10

JUDICIAL INTERVENTIONS AND REFORMS IN FURTHERANCE OF THE RIGHT TO A FAIR TRIAL FOR SELF-REPRESENTED ACCUSED PERSONS

10.1 INTRODUCTION

The courts of Ghana have read the concept of judicial enabling into their duty to safeguard the fairness of criminal proceedings involving self-represented accused persons. They have adopted a number of interventions to address some of the procedural gaps caused by the absence of defence counsel in such proceedings. These interventions in principle supplement the statutory procedures of judicial assistance enacted under the Evidence Act¹ and the Criminal and other Offences Act² (COOPA) discussed in the preceding chapter.

This chapter examines the various interventions made by the courts of Ghana in implementing their duty to enforce self-represented accused persons' right to a fair trial. Part 2 presents the concept of fair trial as the basis of the courts' activism in devising interventional measures for the benefit of self-represented accused persons. Part 3 examines the key interventions made by the courts regarding raising technical points of law and making legal submissions where the burden is on self-represented accused persons, as well as regarding admitting confession statements of such accused persons. Part 4 involves a discussion of certain critical stages of the criminal proceedings that have been glossed over, but which also require judicial intervention in order to reinforce the disadvantaged position of self-represented accused persons. Part 5 is an evaluation of the law on non-compliance with procedural rights and a call for reform for the benefit of self-represented accused persons.

10.2 JUDICIAL ENGAGEMENT AS AN EXPRESSION OF THE DUTY TO ENSURE TRIAL FAIRNESS

The criminal adjudicatory system of Ghana is designed on a constitutional policy of fair trial.³ This policy derives from the key procedural values of judicial impartiality, justice and fair

¹ NRCD 323 of 1975.

² Act 30 of 1960.

³ See also Brobbey *Practice & Procedure in the Trial Courts and Tribunals of Ghana* (2011) 609, arguing that the cornerstones in the administration of justice are judicial independence, judicial impartiality and fair hearing.

hearing guaranteed under the Constitution.⁴ More importantly, these values provide the operational framework for the discharge of judicial duty. Consequently, the courts have severally emphasised the need to preserve the integrity of the judicial process by ensuring a fair administration of criminal proceedings.⁵ Like in any adversarial jurisdiction, judicial officers in Ghana assume the role of ‘finders of justice’. They act as umpires tasked with the overriding responsibility to guarantee the fairness of all legal proceedings.⁶ As Taylor J asserts in *Tanoh alias Obeng v. The Republic*,⁷ “[t]he overriding consideration in [the] criminal justice system [of Ghana] is fair trial. The Prosecution, the trial court and the Defence must be animated by an intense desire for fairness”.⁸

This obligation also flows directly from a mandate assumed by all officers called to the judicial practice in Ghana. Both magistrates and judges take the Judicial Oath under the Constitution to “at all times uphold, preserve, protect and defend the Constitution of the Republic of Ghana”.⁹ As custodians of the Constitution, they are vested with authority to protect and enforce all constitutionally guaranteed rights of individuals. This judicial duty obviously includes the protection of due process rights of accused persons, including their right to a fair trial.¹⁰ The judicial duty to uphold and guarantee all human rights, including accused persons’ right to fair trial, whether or not represented by counsel, is reinforced by article 12 of the Constitution.¹¹ This is a provision, which enacts in unambiguous terms, the constitutional mandate of the judiciary to uphold and protect all human rights.¹²

Human rights under the Constitution assume an even more important character when they become applicable in criminal proceedings. According to the Supreme Court, once human rights are made a “part of our criminal justice system (...) [they] become a valuable standard

⁴ See Ghana Constitution, arts 125(1) & 19(1).

⁵ Taylor J in *Lucien v. The Republic* 1977 1 GLR 351 358, quoting from *Languaye v. The Republic* 1976 1 GLR 1 13, arguing that “the courts have a duty to ensure the integrity of the legal process by ensuring a fair administration of our adversary system.”

⁶ See, e.g., Klamberg *Evidence in international Criminal Trials: Confronting Legal Gaps of the Reconstruction of Disputed Events* (2013) 46. See also; Slater & Finck *Social Work Practice and the Law* (2011) 143, stating that “[t]he overarching role of the judge in a criminal proceeding is to preside over the proceeding and make sure there is an orderly process and a fair trial.” Cole 2010 *U. Botswana L. J* 94, stating that “the expression of the judicial role is founded on the fair trial imperative.”

⁷ 1971 2 GLR 482.

⁸ *Id* at 492.

⁹ Ghana Constitution, Judicial Oath.

¹⁰ Ghana Constitution, art 19(1).

¹¹ It provides that “[t]he 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 agencies, 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.”

¹² *Gabrielle Joanne v. The Republic* 2012 47 GMJ 1 53, Gbadegbe JSC.

by which to measure the essentials of fairness in criminal proceedings”.¹³ Judges therefore assume the principal duty to safeguard all due process rights of accused persons, including the constitutional right to a fair trial. The duty extends to ensuring that unrepresented accused persons are not prejudiced during the trial, by their ignorance of the governing substantive rules and procedural requirements.¹⁴

The legal system’s devotion to the protection of self-represented accused persons and the due realisation of their right to a fair trial justifies the resultant expansion of the role of the judge in the trial. The legal position is, “it is (...) the role of the judge in the fair administration of criminal justice, to assist an accused person who is not represented by counsel in putting his defence before the court”.¹⁵ In implementing this obligation, the courts have adopted certain proactive measures to ensure that the unrepresented accused person is not unduly disadvantaged by his/her lack of representation. These are not entirely novel procedures in criminal justice administration in Ghana. As Taylor J long acknowledged, “quite apart from the statutory provisions which guide our courts, we have also inherited certain conventions which when properly resorted to, do ensure a fair administration of criminal justice”.¹⁶

10.3 KEY INTERVENTIONAL MEASURES ADOPTED BY THE COURTS

10.3.1 Judicial Intervention in Raising Technical Legal Points

The courts of Ghana acknowledge the practical necessity of relieving self-represented accused persons of the duty to discharge certain procedural obligations that involve practical legal technicalities. These principally include procedures associated with raising and taking legal objections to charge sheets and bills of indictment. The filing of the two documents officially mark the beginning of the proceedings in courts. They provide details of the charge, which include the statement of the offence charged, as well as the particulars of the offence.¹⁷

The law regulates the form and contents of the charge sheet and bill of indictment. Generally, the law warns the Prosecution against supplying defective particulars and drafting duplicitous charges, which in a number of situations may lead to convictions on the charges being quashed.

¹³ *Ibid.*

¹⁴ It is a common duty for all adversarial systems in general. See, .e.g., Landsman 2010 “Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings” 2010 *Fordham Urb. L.J* 273 276.

¹⁵ Osei Hwere J in *Adusei II v. The Republic* 1975 2 GLR 225 238.

¹⁶ See *Lucien v. The Republic* 358.

¹⁷ COOPA, ss 112 & 202.

In drafting particulars of offences for example, Edusei J in *Klutse v. The Republic*¹⁸ entreated prosecutors to exercise great care. He held as follows:

I have to point out to all those who undertake prosecution in the courts to observe the wording of the section under which an accused is charged, for in certain cases, failure to observe this may result in an acquittal of an accused person because it may be argued that he has been charged under a non-existent law.¹⁹

Where the contents of the charge sheets or bills of indictment are not compliant with the rules on drafting of charges and particulars and therefore warrant a discharge of the person charged, the COOPA guarantees the accused person a right to object to them. Objections to processes in judicial proceedings must, as a matter of principle, be legally founded. The objector, as of necessity, must have the required knowledge of the substantive and procedural law to substantiate the grounds of his/her objection. By way of procedure, the COOPA prescribes the rules for raising such objections to the charge sheets or bills of indictment. In trials on indictment for example, the COOPA provides the affected accused person with two options. The first involves the right of the accused to file a motion to quash the indictment before his/her plea is taken. This option is more particularly available to the accused person in cases where the indictment does not state and cannot by an authorised amendment be made to state an offence of which the accused can be convicted.²⁰ It directs the accused person to deliver a written statement of the motion to the registrar of the court for it to be entered on the record. The second option is for the accused person to file a motion in arrest of judgment. This procedure involves moving the court, at any time before judgment, in arrest of judgment on the ground that the indictment does not, even after an amendment, which the court has made or has power to make, state an offence that the court has power to try.²¹

The courts have unambiguously held that a self-represented accused person who is unversed in the law may exhibit great incompetence in complying with the laid down statutory requirements and in raising well-reasoned legal objections. For example, in *Commissioner of Police v. Sencherey*,²² the accused was unrepresented by counsel. From the evidence at the trial, there were allegations of two separate and distinct offences that had been charged in one count instead of being made the subject of two counts, as the law requires. In law, the charge was bad for duplicity but the accused person failed to raise the required objection. The Court on appeal held that an accused who was unrepresented by counsel “throughout the trial cannot

¹⁸ 1968 GLR 761.

¹⁹ *Id* at 765-766.

²⁰ COOPA, s 234 (1)

²¹ *Id*, s 289(1).

²² 1959 GLR 225.

be presumed to know the niceties of criminal pleadings, and he could not therefore be expected to object to the defective form of the charge preferred against him". A similar view was held in *Darkurugu v. The Republic*.²³ In that case, the accused was illiterate and self-represented. He was arraigned before the District Court on charges of fraud by false pretences and deceit of public officer on two different charge sheets instead of one. He could have objected to the charge sheet since the charges were not properly laid. On his failure to timeously raise the necessary objection, the Court held that the accused person, who was unrepresented by counsel and illiterate, could not have been expected to raise an objection to the charge sheet.

For lay self-represented accused persons, determining the time to raise a legal objection is as complex as the process of filing the necessary processes itself. Unfortunately, in both decided cases mentioned above, the courts missed an opportunity to clearly lay out the specific duty of the judge, as far raising objections to legal processes are concerned, in instances where the accused is unrepresented. It is therefore imperative to promulgate legal directives on the scope of such a duty. In the spirit of judicial enabling, the judge may assume the task of examining the sufficiency or otherwise of a charge sheet. With such vested power, the court may on its own motion, properly evaluate the legality of the proceedings being instituted against the legally unskilled accused person. As a matter going to the root of the court's jurisdiction, the judicial officer is best positioned to assume the responsibility of ensuring that the charge sheet complies with the requirements of the law.

10.3.2 Judicial Intervention during Opening and Closing Submissions of Self represented Accused Persons

The stage of addresses is an intriguing phase of the criminal proceedings for self-represented accused persons due to the legalities involved in the process. The object of addresses is to enable the parties to present to the judicial officer the facts that have been established or disproved in the course of the hearing.²⁴ It is also an opportunity for the parties to make legal submissions and advance all arguments, which are intended to affect the determination of the case.²⁵ The final judgment of the court partly depends on these final submissions.²⁶ In trials on indictment, accused persons who are not represented by counsel and who do not intend to call

²³ 1989-1990 1 GLR 308.

²⁴ Amissah *Criminal Procedure in Ghana* (1982) 139.

²⁵ *Ibid.*

²⁶ See Brobbey *Practice & Procedure* 582.

any witnesses as to the facts, reserve the right to address the court only if they so desire.²⁷ Where an unrepresented accused person calls witnesses on his/her own behalf, s/he is mandated to address the court.²⁸ S/he sums up his/her case to the jury.²⁹ In summary trials on the other hand, the Prosecution is entitled to address the court at the commencement of its case, as well as at the close of the case of the Defence where the accused person calls witnesses as to the facts other than his/her character.³⁰ An accused person who is unrepresented in a summary trial is entitled to address the court either at the commencement or at the close of his/her case.³¹

In practice however, self-represented accused persons are generally relieved of the need to address the court, on the ground that a person unskilled in the law does not have the required legal competencies to put forth a well-constructed and reasoned legal address. Ruling on the import of section 175 of the COOPA as it applies to self-represented accused persons, the Court of Appeal in the case of *Clifford Broni Bediako v. The Republic*³² justified the position that no miscarriage of justice would be occasioned if the accused person, who is not a lawyer, is not called upon to address the court.

There are several reasons advanced in justification of this position. It is believed that issues of law can only be determined by qualified lawyers or by persons who have received the required judicial or legal training and experience.³³ A person who is not learned in law is not in the position to offer any informed or reasoned opinion on a legal matter. It is therefore the practice of the courts in Ghana to denounce persons who are unskilled in the law and who purport to offer any legal opinion or deliver a legal position on a matter. This is a wide proposition extending even to lay police prosecutors. Thus, in the case of *Anang v. The Republic*,³⁴ a police prosecutor not trained as a lawyer replied to a legal submission that an alleged confession statement was inadmissible. The trial judge upheld the submission of the prosecutor, dismissed the application and admitted the statement in evidence. The Court of Appeal, overruling the decision on appeal held that:

The role of prosecuting officers is to assist the judge to arrive, in accordance with law, at a just and fair decision in the case. Where the judge is a professional lawyer and the prosecuting officer has no training

²⁷ COOPA, s 273(1).

²⁸ Amissah *Criminal Procedure* 138; COOPA, s 273(2).

²⁹ COOPA, s 273(3).

³⁰ *Id.*, s 175(1).

³¹ *Id.*, s 175(2). On its part, s 175(3) provides that "except with the leave of the court, the accused (...) is not entitled to address the court on evidence adduced by the prosecution in reply."

³² [16/12/2010] Suit No. H2/1/2010 (unreported).

³³ Brobbey *Practice & Procedure* 187.

³⁴ 1984-1986 1 GLR 458.

in law, then it is rather incongruous and virtually improper and imprudent for him to profess to make legal submissions in an attempt to elucidate the law for the professional judge.³⁵

Relieving self-represented accused persons of the procedural duty to address the court is a judicial invention that saves such accused persons the trouble of being compelled to perform a task that is outside their personal abilities and competencies. In that context, the relief takes the form of a waiver of the procedural right to address the court, and is essentially well justified. However, due consideration must be given to the legal effect of exercising the right to address the court. An effective legal address at the trial may have significant impact on the strength of the party's case. Indeed, the legislative wisdom in enacting the right to make legal submissions for all accused persons underlines its importance as a vital process of the adjudicative procedure. Therefore, where a self-represented accused person is exempted from making legal submissions, the court ought to give due consideration to that fact in its judgment. This is because the exemption opens up an imbalance in the opportunities and processes in cases involving Prosecuting Attorneys and self-represented accused persons. This position remains a positive approach towards making up for the loss of the right to address the court because of lack of legal representation.

10.3.3 Judicial Intervention in Admitting Confession Statements of Self-Represented Accused Persons

Grounding convictions based on confession statements allegedly given by self-represented accused persons requires critical examination of the processes employed by investigative officers in eliciting the statements. The criminal adjudicatory system of Ghana attaches great importance to the need to safeguard the accused person's right to be presumed innocent in all criminal trials, until otherwise proven guilty.³⁶ This presumption obviously requires paying due regard to the enforcement of the accused person's pre-trial right to silence and to his/her right against self-incrimination.³⁷

It is also trite knowledge that the Prosecution bears the duty to establish the guilt of the accused beyond all reasonable doubt, throughout the proceedings.³⁸ The realisation of this procedural burden is however not independent of the accused person, who for all practical purposes remains the subject of the investigation. In the criminal law of Ghana, any statement by which

³⁵ *Id* at 468.

³⁶ Ghana Constitution, art 19(2) (d).

³⁷ Discussed *supra*, Ch. 7, text at 7.2.

³⁸ Evidence Act, s 11(2).

an accused person admits to a crime charged or which forms the basis of an inference of the commission of the offence charged, is a confession statement.³⁹ Most of the facts adduced by the Prosecution at trial usually emanate from questioning the accused person. It is intriguing to also note the familiar narrative of the Prosecution and its investigative officers regarding incriminating declarations and confession statements elicited from unrepresented accused persons. The general claim advanced in justifying the admissibility of these statements is that accused persons allegedly made them voluntarily during criminal investigations. The Evidence Act requires proof that the accused person indeed made the statement voluntarily, for a confession to be admissible.⁴⁰ Where the statement is given by the accused while under arrest, restriction or detention, there is a further requirement that the statement must be given in the presence of an independent witness.⁴¹ More importantly, where a confession statement is made after the accused person is charged, prior compliance with the Judges' Rules must be established. There must be proof that the statement was actually taken on caution.⁴²

A confession statement when satisfactorily proved to have been made freely and voluntarily, is sufficient to warrant a criminal conviction without the need for corroborative evidence.⁴³ It is however, without a doubt that these conditions alone are not sufficient safeguards to ensure that confession statements are indeed obtained freely and voluntarily by the prosecuting authority. Case law reveals several instances where the police investigative officers unlawfully extract 'confessions' either under duress, influence or by interest. In *State v. Banful*,⁴⁴ the accused person who was unrepresented by counsel during investigation gave a statement denying that he shot a bursar. He rather averred that one of two masters shot him. A senior police officer called him and gave him some slaps, while promising him that he would secure

³⁹ Evidence Act, s 120(1); also *Linda Edzidzor & Joshua Edzidzor v. The Republic* 2014 70 GMJ 87 92.

⁴⁰ Evidence Act, s 120(1); *Asare @ Fanti v. The State* 1964 GLR 70 74 where the court held that "[i]t is correct that where objection is raised to the admission of a statement made by a Defendant in a criminal case on the grounds that the Defendant did not make the alleged statement, or that the said statement was not a voluntary statement, or that it was made under duress or procured by threats or promise, the said issues should be tried and a court should not admit the statement until it is satisfied that it is a voluntary statement made by the Defendant."

⁴¹ Evidence Act, s 120(2).

⁴² The record must show that the accused had been cautioned to the effect that s/he is not obliged to say anything unless s/he wishes to do so, but what s/he says may be put in writing and given in evidence. See rule 2 of *Judges' Rules Home Office Circular No. 31/1964* (1964) as applicable in Ghana. A violation of the principle renders the statement inadmissible. See *Brobbeey Practice & Procedure* 106-107; also *Nti v. The State* 1965 GLR 7; *Duru v. The Republic* 2014 71 GMJ 186 190.

⁴³ *Brobbeey Practice & Procedure* 170, referring to *Billa Moshie v. The Republic* 1977 2 GLR 418; *Ofori v. The State* 1963 2 GLR 452; *Duru v. The Republic* 189 "A confession is sufficient to warrant a conviction"; *State v. Otchere* 1963 2 GLR 463 466, holding that "[a] confession made by an accused person of a commission of a crime is sufficient to sustain a conviction without any independent proof of the offence having been committed by the accused."

⁴⁴ 1965 GLR 433.

his release should the accused give a confession to the offence charged. A similar instance arose in *Commissioner of Police v. Sem*⁴⁵ where the unrepresented accused was induced to make a confession to a charge of defilement upon a promise that the accused's employer would withdraw the case from the police and avert criminal prosecution. In both cases, it was held on appeal that the confession statements were involuntarily made and therefore inadmissible as evidence against the accused persons.

Thus, in all cases where the Prosecution relies on a confession statement to secure a conviction, the court assumes the duty to thoughtfully inquire into the circumstances of the confession. The purpose of such an inquiry is to principally ensure that the confession and other incriminating statements are not made because of threats issued or inducements offered to the accused person. This is most particularly crucial in cases where the confession is the sole piece of evidence and constitutes the prop of the Prosecution's case and based on which a conviction will be founded.⁴⁶ The duty to inquire into the circumstances of the confession is even more vital and heightened where the accused person is not assisted by counsel, who would otherwise have assumed the task of objecting to any such statements or confessions unlawfully obtained. Irrespective of the voluntariness or otherwise of the statement made, an accused person who is unaware of the procedural rules governing confession statements may never raise an objection to its admissibility. Thus, it remains a fundamental obligation of the judge to critically assess its admissibility. S/he assumes the duty to examine and reject as being inadmissible, any confession statements found to have been obtained in violation of the statutory evidentiary requirements.⁴⁷

10.4 ADDITIONAL CRITICAL STAGES OF THE PROCEEDINGS IN NEED OF JUDICIAL INTERVENTION

For a procedural system characteristically designed to operate by using legal representation for the contending parties, a simple tweaking of existing processes to accommodate the particularity of self-representation will inevitably be an imperfect remedial model. Thus, despite the various legislative interventions and internal judicial interventions, the ensuing

⁴⁵ 1962 2 GLR 77.

⁴⁶ Brobbey *Practice & Procedure* 170, referring to *State v. Mawuko Aholo (Practice Note)* 1961 2 GLR 626.

⁴⁷ See *Agogrobisah v. The Republic* 1995-1996 1 GLR 580, per Acquah JA (as he then was) calling for strict compliance with Evidence Act, s 120, referring to Loreburn LC in *Attorney-General v. Birmingham Tame & Read Sea District Drainage Board* 1912 AC 788 795 House of Lords, stating that "a court of law has no power to grant a dispensation from obedience to an Act of Parliament."

‘adjusted’ procedure for the trial of self-represented accused persons remains substantially deficient. Several other processes and stages of the proceedings do present high levels of technical difficulty to lay participants to the trial. For these critical stages of the procedure, the quest to guarantee the fairness of the adversarial trial of self-represented accused persons necessitates further assistance from the judicial officer.

10.4.1 Judicial Intervention in Processes Involving a Reverse Burden of Proof

The duty of the Prosecution to establish the guilt of the accused person beyond all reasonable doubt does not always translate into an obligation to positively establish every single element of the crime charged against the accused. Criminal law introduces a reverse burden of proof that casts the obligation on the accused person to establish the existence or non-existence of a particular fact in proof of innocence in prescribed circumstances. For a self-represented accused person, this remains one of the key procedural challenges at trial.

It is a common feature of modern adversarial legal systems that the legal burden of establishing the guilt of the accused rests entirely with the Prosecution.⁴⁸ In the Ghanaian context, the Supreme Court in the case of *Tsikata v. The Republic*⁴⁹ emphasised this legal principle that:

...it is the Prosecution, which has the onus to prove the guilt of the person they accused of an offence and not the accused who should establish his innocence. The accused should therefore not show his hands until the need arises.⁵⁰

This duty, according to Amissah JA, remains the foundation of Ghana’s criminal adjudicatory procedure.⁵¹ The prosecutorial burden of proof in essence flows from the presumption of innocence of the accused person, which in turn constitutes the bedrock of the adversarial system.⁵² The presumption of innocence imposes on the Prosecution the burden of proving the charges levelled against the accused person beyond all reasonable doubt and gives to the accused the benefit of doubt.⁵³ It is equally understood that the presumption of innocence imposes a high, but not absolute, standard of proof in criminal matters.⁵⁴ In other words, the

⁴⁸ Evidence Act, s 11(2). The Prosecution’s duty to prove the guilt of the accused person beyond reasonable doubt was described by Lord Sankey as the “golden thread” running throughout English Criminal Law in the first half of the twentieth century. See *Woolmington v. D.P.P.* 1935 AC 462; 1936 25 Cr App R 72 95.

⁴⁹ 2003-2005 2 GLR 294.

⁵⁰ *Id* at 360, quoting Ollenu JA in *Atsu v. The Republic* 1968 GLR 716 719.

⁵¹ *Republic v. Bossman* GLR 595 606.

⁵² International Covenant on Civil and Political Rights (ICCPR), *General Assembly Resolution* 2200A (XXI) (1966), art. 14(2), ratified by Ghana Constitution, art 19(2) (c).

⁵³ Human Rights Committee (HRC) *General comment* 32, CCPR/C/GC/32 (2007) para 30.

⁵⁴ Hamer “The Presumption of innocence and Reverse Burdens: A Balancing Act” 2007 *CLJ* 142 148.

proposition that the protections given to accused persons are pitched at their highest in adversarial criminal proceedings yields to some exceptions.⁵⁵

There are practical difficulties associated with the Prosecution's duty to establish the facts and evidence in proof of certain offences that justify the adoption of reverse onus clauses, which call accused persons into matters of proof. The reverse persuasive burden of proof in fact marks a considerable departure from the normal operation of the presumption of innocence. It imposes an obligation on the accused person to displace a presumption, with the consequence that a certain conclusion will follow unless proof or at least evidence to the contrary, is given.⁵⁶ This position of the law is duly supported by the Constitution, which provides in that regard that:

Nothing in or done under the authority of any law shall be held inconsistent with [the accused person's right to be presumed innocent until s/he is proven guilty or has pleaded guilty], to the extent that it imposes on the person charged with a criminal offence, the burden of proving the particular facts.⁵⁷

In Ghana, these usually take the form of presumptions of law, which relieve the Prosecution from the onus of proving certain key elements of the offence. The import of such presumptions is to assume that based on certain established premises, a conclusion of facts is made against the accused. It then behoves the accused person to rebut the presumption and to disprove the conclusion of facts by proving certain elements defined by law.⁵⁸ In such cases, it is assumed that an innocent accused person would be able to easily discharge the matters of proof that the Prosecution would rather find exceptionally difficult to establish beyond doubt.⁵⁹ Relieving the Prosecution from the duty to positively establish a particular element of the offence comes with a reverse fall of the burden of proof unto the accused to prove his/her innocence.⁶⁰ A number of provisions in criminal legislations in Ghana impose reverse persuasive burdens on accused persons. An example is section 148(1) of the Criminal Offences Act⁶¹ (COA), which provides, regarding the offence of dishonestly receiving, as follows:

Where a person charged with dishonestly receiving is proved to have had in possession or under control, anything which is reasonably suspected of having been stolen or unlawfully obtained, and that person does not give an account, to the satisfaction of the Court, as to the possession or control, the Court may presume

⁵⁵ See, e.g., De Speville *Reversing the Onus of Proof: Is It Compatible with Respect for Human Rights Norms* 8th International Anti-Corruption Conference (IACC) (2010) <http://8iacc.org/papers/despeville.html> 6. (Accessed 10-05-2017)

⁵⁶ *Ibid.*

⁵⁷ Ghana Constitution, art 19 (16) (a).

⁵⁸ See Evidence Act, s 20: "A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact." Also *Id.*, s 21(a).

⁵⁹ Hamer 2007 *CLJ* 148-149.

⁶⁰ See, e.g., The African Commission on Human and People's Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), para N(6)(e)(iii) "Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence."

⁶¹ Act 29 of 1960.

that the thing has been stolen or unlawfully obtained, and that person may be convicted of dishonestly receiving in the absence of evidence to the contrary.

The Supreme Court held in that regard that where goods are in the possession of an accused person and the goods are proved to have been recently stolen, the doctrine of recent possession applies to the effect that the accused should be held guilty, if s/he offers no explanation to account for his/her possession of the property.⁶² This position of the law is based on the English principle that “the possession of recently stolen property throws on the possessor the onus of showing that he got them honestly”.⁶³ In such cases, the accused has to explain how s/he obtained the goods and if his/her explanation is consistent with innocence and is proved true, s/he is entitled to acquittal.⁶⁴

In circumstances where an onus is placed on the accused to prove the negative however, the standard of proof is lighter than the Prosecution’s burden and stands on a balance of probabilities.⁶⁵ This position does not however make the process any easier for the accused person. Most importantly, to require an accused person to prove his/her innocence in an adversarial trial significantly increases the risk of mistaken convictions.⁶⁶ Law enforcement would be facilitated, but the innocent accused person would be provided with less protection.⁶⁷ For self-represented accused persons in particular, merely determining the existence of a reverse burden of proof regarding any particular offence from the language of the enacting law may be a difficult or sometimes an impossible task. Where they do not know of the existence of the law, it is more probable they will altogether fail to adduce the necessary evidence in satisfaction of the reverse burden and thereby increase the risk of conviction. Disturbingly, the criminal jurisprudence in Ghana does not impose any judicial duty to explain such unfavourable presumptions of law and facts to self-represented accused persons. In fact, there is no scholarship on the evaluation and assessment of unfavourable legal presumptions, as far as self-represented accused persons are concerned. By extension, no literature exists regarding the duty of the judge when confronted with such matters in proceedings where the accused person is unrepresented.

⁶² *Nyina v. Commissioner of Police* 1964 GLR 452 456.

⁶³ *Salifu v. the Republic* 1974 2 GLR 291 300, quoting Alversone CJ in *Republic v. Powell* 1909 3 Cr. Appr. R 1 2

⁶⁴ *Ibid.*

⁶⁵ Evidence Act, s 11(3), stating that “[i]n a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.”

⁶⁶ Hamer 2007 *CLJ* 148.

⁶⁷ *Ibid.*

With the dearth of local authorities, there is opportunity to refer to judicial practices in other jurisdictions by way of comparative analysis, for purposes of potential legal reforms in Ghana. An intriguing *exposé* of the concept of reverse burden of proof is given by Cole who distinctively examined the legal positions in Namibia and South Africa.⁶⁸ In both jurisdictions, due recognition is given to the notion that without a judicial duty to explain the import and effect of a presumption to self-represented accused persons, they will have no means of knowing them. It thus falls to the judicial officer to bring reverse burdens of proof to the notice of accused persons. The judge assumes the duty to explain to the accused person the existence and implications of any presumptions of law and facts regarding the offence charged, as well as the reverse of the persuasive burden of proof.⁶⁹ In words worth quoting at length, Cole rationalised the duty of the judge as follows:

... The judicial officer should give the unrepresented accused sufficient and detailed information of what is required for her to put up a proper rebuttal. The accused carries the risk of non-persuasion and it is therefore vitally important that this is brought to her attention. It will amount to 'trickery' to convict an accused with the aid of a statutory presumption which effectively excuses the Prosecution from proving an element of an offence because that element is proved by virtue of the presumption, while at the same time demanding that the accused disproves the presumed facts, if the accused is unaware of the onus or evidential burden placed on her.⁷⁰

Ghana may adopt the same position of the law to reinforce the position of self-represented accused persons at trial. The call at this point is for judges to assume the responsibility to assist self-represented accused persons in order to meet their obligations under the reverse onus clauses.

10.4.2 Need for the Judge to Inquire into Accused Persons' Status of Self-Representation

The omission by the legislature to enact, and the courts to impose, a judicial duty to inquire into accused persons' status of self-representation during the trial leaves a lot to be desired. It is tritely stated that a right is meaningless to its bearer if s/he is unaware of its existence.⁷¹ Across modern adversarial jurisdictions, it is commonly admitted that the right to counsel remains the most fundamental right through which other trial rights of the accused person are ultimately protected.⁷² To that extent, scholars like Cole powerfully describe the right to counsel as the 'rights of all rights'.⁷³ However, beyond its textual enactment, the adjudicatory

⁶⁸ Cole 2010 *U. Botswana L. J.* 108-109.

⁶⁹ Referring to *S v. Kau* 1993 NASC 2; 1995 NR1; *S v. Cross* 1971 (2) 356 (RAD).

⁷⁰ Cole 2010 *U. Botswana L. J.* 109.

⁷¹ *Id* at 94-95.

⁷² Discussed *supra*, Ch.3, text at 3.5.2.

⁷³ Cole 2010 *U. Botswana L. J.* 94-95.

system in Ghana barely recognises an obligation for judges to facilitate the realisation of the accused person's right to counsel of his/her choice during the trial. The only time in the criminal procedure where the Constitution requires an accused person to be informed of the right to counsel, is upon arrest regarding pre-trial proceedings.⁷⁴ Beyond the duty of the arresting officer to inform the accused person of his/her right to counsel upon arrest, the due process rights of accused persons do not include any further right to be informed of the right to counsel during the trial.

The courts have also not interpreted and extended the meaning of the provision of article 19(2) (f) of the Constitution on the right to counsel of choice to include the court's duty to inform the accused person of the existence of the right. Thus, in the jurisprudence of the Ghanaian courts, the judge has no duty to inquire into the circumstances of the accused person's status of self-representation; neither is s/he mandated to bring the right to the assistance of counsel to the notice of the accused person during the trial. In simple terms, the procedural system bears no commitment to ensuring that the accused person is expressly informed and advised on the right to legal representation during the trial.⁷⁵ With this position of the law in Ghana, the risk of having accused persons appear unrepresented at the trial, out of sheer ignorance of their right to legal representation, is unreasonably high.

The only implicit recognition of the court's duty to lead a preliminary enquiry into the accused person's status of self-representation lies with the exercise of the court's power to assign state-funded counsel by way of legal aid to indigent accused persons.⁷⁶ While discharging this function, judges proceed by firstly examining the circumstances of the accused person's lack of representation. At the barest minimum, this duty mandates the judge to at least satisfy him/herself that the self-represented accused person is indeed aware of his/her right to counsel and that s/he is unrepresented due to lack of affordability. Eventually, it falls to the judge to determine whether the accused's appearance in court without legal representation is a deliberate waiver of the right to counsel or an act of indigence. Unfortunately, the courts in practice seldom exercise their power to assign state-funded counsel by way of legal aid.⁷⁷ By

⁷⁴ Ghana Constitution, art 14(2).

⁷⁵ This can be contrasted with the position in South Africa, which shows a deeper sense of commitment to ensure that the accused is not self-represented by ignorance. See, e.g., Bekker *et al. Criminal Procedure Handbook* (2009) 80. In effect, the Constitution of the Republic of South Africa, 1996, s 35(3)(f) guarantees for every accused person at trial, the right to be promptly informed of the right to choose and to be represented by a legal practitioner. See Cole 2010 *U. Botswana L. J.* 94-96.

⁷⁶ Courts Act (Act 459 of 1993), s 114.

⁷⁷ Discussed *supra*, Ch. 6, text at 6.5.1.

default therefore, judges lead no inquiry into accused persons' awareness or otherwise of their right to legal representation.

To give full effect to the unrepresented accused person's right to a fair trial, an enquiry must be made into the reason for his/her 'self-represented' status. The law must boldly have regard to the need to ensure that the self-represented accused person is not acting out of ignorance of his/her right to legal representation. The criminal adjudicatory system must guarantee a legitimate expectation and procedural presumption of a judicial duty to inform the unrepresented accused of the existence of the right to counsel. The constitutional wisdom recommending that the pre-trial right to counsel under article 14(2) be brought to the knowledge of the accused, must have a corresponding application at the trial stage. The point must be emphasised that even the aggregate sum of all the various legislative and judicial interventions by way of assistance to self-represented accused persons cannot compare to the value attached to the role of defence counsel. The right to counsel must always be jealously protected, especially where there is opportunity for the accused person to have access to a lawyer. As Cole states regarding the invaluable role of counsel:

Lawyers sometimes take over cases midstream from self-actors who would be faring badly in defending themselves due to their lack of legal knowledge. In such cases, due to their legal skills, the lawyers would be able to turn around the fortunes of an accused, where a conviction had previously seemed imminent. One can therefore never conjecture what effect legal representation could have had on the process. (...) There are issues that only a lawyer could unearth due to her legal skills. Therefore, the evidence against the accused may very well be overwhelming, not because she is guilty, but because she did not have adequate representation. In this regard, failure to advise an accused of her right to legal representation is not a mere technical matter that can be overlooked. Such failure by itself, should render the trial unfair except where it is shown that the accused was aware of the right.⁷⁸

Thus, while endeavouring to find alternatives to compensate for the absence of defence counsel, care must be taken to ensure that an accused is not self-represented out of sheer ignorance of his/her right to counsel. Judges must take a more pro-active role in bringing the existence of the right to counsel to his/her knowledge.

10.5 REVIEWING THE LAW ON NON-COMPLIANCE WITH STATED PROCEDURAL PROTECTIONS OF SELF-REPRESENTED ACCUSED PERSONS

The legal effect of non-compliance with procedural rights in criminal proceedings in Ghana is not stringent enough to protect self-represented accused persons. As far as the criminal procedural regime is concerned, non-compliance with accused persons' procedural rights

⁷⁸ Cole 2010 *U. Botswana L. J.* 113.

during the trial is statutorily mitigated by the prejudice clause. Therefore, failure to comply with key rights and procedural entitlements during the trial does not necessarily vitiate the process or the trial, unless it results in a miscarriage of justice. Such violations may be procedurally cured by sufficient evidence to establish the guilt of the accused beyond reasonable doubt. According to section 406 of the COOPA:

A finding, sentence or order passed by a court of competent jurisdiction shall not be reversed or altered on appeal or review on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or any other proceedings before or during the trial or in an enquiry or any other proceedings under this Act, unless the error, omission, irregularity has in fact occasioned a miscarriage of justice.

This provision is reinforced by section 31(2) of the Courts Act,⁷⁹ according to which:

The court shall dismiss [an] appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted upon that charge or indictment.⁸⁰

To that effect, the Supreme Court in the case of *Bonsu @ Benjillo vs. The Republic*⁸¹ underscored the principle that despite any procedural irregularities, where existing evidence justifies the conviction of the accused, the ‘no miscarriage of justice’ effect inevitably trumps, and the conviction is irreversible.⁸² In the case of *Banda v. The Republic*,⁸³ the High Court boldly held that failure to give an accused person the right to cross-examine a prosecution witness was an irregularity that did not occasion a miscarriage of justice to warrant a reversal of the conviction. The Court had found that the evidence against the appellant was overwhelming and substantial to substantiate guilt after the testimony of the prosecution witnesses.⁸⁴

Without a doubt, the machinery of criminal procedure is a complex and rigid system. Criticisms against the tendency to easily allow appeals and set aside convictions on merely technical grounds, when no prejudice to the accused or substantial miscarriage of justice has

⁷⁹ Act 459 of 1993.

⁸⁰ *Bonsu @ Benjillo v. The Republic* 1999-2000 1 GLR 199 234. “[t]he provisions of section 31(2) of Act 459 are not fundamentally different from the provisions of section 406(1) of the COOPA and both are designed to achieve the same object.” *Per* Atuguba JSC

⁸¹ *Ibid.*

⁸² *Ibid.*; also at 219, holding as follows: “The effect of those saving provisions has been judicially determined in Ghana and in England, under similar provisions. The construction placed on them is that if the jury (or court) properly directed, would have inevitably or without doubt convicted the accused, then the proviso to those provisions would validate the conviction and an appeal therefrom would be dismissed.”

⁸³ 1975 1 GLR 52.

⁸⁴ *Ibid.*

been caused, may be justified.⁸⁵ It must however be noted that the application of the prejudice rule in certain cases of procedural irregularity is a cause for concern. The negligible weight attached to procedural errors and violations of the rights of accused persons in certain cases constitute serious drawbacks in the efforts to reinforce the disadvantaged position of self-represented accused persons at trial. Irregularities resulting from violation of procedural rights may indeed prejudice the accused's ability to establish the necessary defence to the Prosecution's case. An accused person may be unable to put forth a solid defence, for example, by way of discrediting a prosecution witness when unlawfully deprived of the right to cross-examine. In the end, evidence that would otherwise be discredited or have no probative value if effectively challenged in cross-examination, acquires a high probative value as evidence on record against the accused. In such cases, to allow a conviction to stand because the evidence is overwhelming in proof of guilt not only maligns the fairness of the procedure of the trial, but also stands out of place in the adversarial context. In all cases where the accused person is unrepresented, due regard must be given to the imperative of ensuring total compliance with all procedural rights and entitlements of the accused as a means of guaranteeing the effective realisation of the right to a fair trial.

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10.6 CONCLUSION

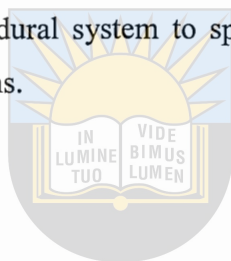
The duty of the courts to guarantee trial fairness in criminal proceedings in Ghana entitles the courts to adopt a more participative approach to assisting self-represented accused persons, within the parameters of the concept of judicial enabling in Ghana. The courts have widely interpreted their core mandate to do justice through fair trial. To that end, they have adopted a practice of judicial interventionism to give effect to that overriding responsibility. Beyond the statutory measures to provide judicial assistance to unrepresented accused persons, the courts have adopted a number of guidelines for the implementation of their judicial duty.

Firstly, and regarding raising technical legal points, the courts have reaffirmed their obligation to provide the necessary assistance to the unrepresented accused by being more proactive. Secondly, they have adopted a system of intervention that seeks to relieve self-represented accused persons of the burden of making legal submissions. Thirdly, the courts have also adopted a procedure, which involves a focused inquiry into the circumstances surrounding the

⁸⁵ See, e.g., Burdick "Criminal Justice in America: Possibility of Improvement by Statutory Changes and Constitutional Amendments Affecting Procedure" 1925 *ABA* 510 514.

taking of confession statements from unrepresented accused persons in order to determine their admissibility.

Many untouched but critical areas however, remain of concern to the need to ensure substantial protection of self-represented accused persons during trial. These include matters dealing with reverse burden of proof, inquiry into status of self-representation during the trial, and the principle of irregularity as far as non-compliance with stated procedural protections are concerned. The overall scope of assistance is in need of expansion to cover these critical procedural stages where the 'guiding-hand' of the umpire is indispensable. It behoves lawmakers and the judiciary to consider the various suggestions to effectively reinforce the position of self-represented accused persons during trial. Any reform should consider erecting a more comprehensive normative procedural system to specifically deal with proceedings involving self-represented accused persons.



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CHAPTER 11

CONCLUSIONS AND RECOMMENDATIONS

11.1 INTRODUCTION

This concluding chapter seeks to summarise and synthesise the findings regarding the way self-representation has been conceived and dealt with within the framework of the adversarial system of criminal adjudication of Ghana. Furthermore, it seeks to develop a normative reasoning, which introduces a strategy by which the adversarial model of criminal adjudication can better accommodate the peculiarity of self-representation for the ends of fairness and criminal justice.

The central question of this study as presented in the introductory chapter sought to investigate the process by which the adversarial procedure of criminal adjudication can effectively guarantee access to justice for self-represented accused persons in Ghana. This study presents a three-pronged answer to this lead question as follows: the criminal justice system must conceptualise fairness into the concept of self-representation. It must take into account the inherent disadvantaged position of self-represented accused persons within the core adversarial framework caused by the absence of defence counsel. Finally, it must develop interventional measures at all stages of the proceedings, tailored to the needs of unrepresented accused persons to ensure equality of arms, effective participation in the proceedings, and due realisation of the right to a fair trial. This answer is explained in more detail following the structure provided by the research questions and objectives that underlie the central question of the study.

11.2 SELF-REPRESENTATION IN THE ADVERSARIAL IDEOLOGY OF CRIMINAL ADJUDICATION

The concept of self-representation is weakly grounded in the core philosophy and operational framework of the modern adversarial criminal trial. From the perspective of its conceptual growth and operational assumptions, the underlying philosophy of the adversarial criminal trial reveals a clear movement away from self-representation to a firm reliance on legal representation for accused persons.

Beginning from its early stages in the medieval times to the nineteenth century when it fully developed, the adversarial criminal trial recognised and sometimes imposed a policy of self-representation on accused persons at several stages of its evolution. The various instances of the practice were based on key theoretical values that informed the strategy of adjudication during the early stages of development of the adversarial criminal trial. The final stage of development of the adversarial criminal trial is however associated with the rise of defence counsel for all accused persons. The contemporary criminal trial is characterised as a contest in which the defence lawyer assumes the professional role of probing and testing the case of the Prosecution.¹ It is associated with a new philosophy, which defines the trial as a 'lawyer-conducted' or 'lawyer-controlled' trial, and more specifically, as a contest between competing lawyers. In effect, the configuration of the adversarial criminal trial emphasises the autonomy and competence of the Prosecution and accused person who take control of the proceedings in pursuit of their respective interests.² Both parties formally argue their facts and evidence before the neutral and passive judicial officer.³ Most importantly, the trial takes the form of a 'contest' between the Prosecution and the accused where each party is incentivised to vigorously participate in the trial and win.

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The reason for the institutionalisation of the role of defence counsel as a structural component of the adversarial criminal trial is to even up for the procedural and institutional advantages of the public, Prosecution in the adversarial proceedings. In Ghana, public prosecutors consist of trained lawyers and public officials professionally trained in criminal law and practice and resourced by the state who are pitched against individual accused persons in criminal trials. The complexities of the evidentiary and procedural rules that govern the adversarial adjudicatory procedure make defence counsel indispensable for an unskilled person in the law. Reliance on legal assistance for the accused is to secure procedural fairness and equality between a professional and state-resourced Prosecution, and the private and lay status of the accused. Legal representation also exhibits certain beneficial values for the criminal justice system beyond its benefits to the accused person. It assumes the distinctive role of reinforcing the reliability of the guilt-determining process and the integrity of the trial by contributing to the objective of ensuring that guilt is found for the sole reason that the accused person

¹ 4.5.

² 3.2.

³ 2.6.1.1

committed the offence charged. It boosts the public confidence in the efficiency of the court system and its ability to deliver just results through a vigorous and fair contest.

In configuring the modern adversarial criminal trial, self-representation appeared as a default procedure for those who could not afford or did not want legal representation. It was not rationalised as an integral element contributing to the ability of the adversarial criminal trial to achieve fair trial, procedural equality, protection of accused persons, and ultimately justice.

11.3 SELF-REPRESENTATION IN THE HUMAN RIGHTS CONTEXT IN GHANA

Self-representation in criminal proceedings in Ghana operates within the scope of fair trial rights of accused persons. In this study, it is first examined from its perspective as a liberty right of accused persons to opt to represent themselves at will in criminal proceedings. It is in that context guaranteed under article 14(3) of the International Covenant on Civil and Political Rights (ICCPR) and ratified under article 19(2)(f) of the Constitution of Ghana. An examination of the substance of the right to self-representation exposes its weak theoretical values and contributions to the scope of protections that guarantee the accused person's right to a fair trial.



The right to self-representation embodies values of personal autonomy and dignity of the accused person. Its essence is to give accused persons the opportunity to take control of their destiny at trial. The law grants accused persons an almost unqualified right to defend themselves in person, if they so wish. However, the promotion of personal autonomy does not necessarily guarantee the competence of accused persons to adequately defend themselves and effectively discharge their substantive and procedural obligations during the trial. The rationalisation of the right to self-representation therefore gives little consideration to the concerns of procedural equality and fairness of the trial itself. This study therefore finds that there are no defined reasons that justify the worth and expediency of the right to self-representation for realising the fairness of the trial, especially in adversarial proceedings.

The policy of the legal system of Ghana in matters of criminal prosecutions is rather aligned with the promotion of the right to assistance of counsel. There have not been any parallel endeavours to exalt the right to self-representation. This position of the legal system stems from the acknowledgement that legal representation offers the best means of legal defence in criminal proceedings and against infringements of legal rights and freedoms in criminal trials.

Secondly, the practice of self-representation in Ghana is also analysed from the interpretation and practical implementation of the internationally recognised right of indigent accused persons to legal aid. The finding that poverty is a major cause of self-representation in criminal trials in Ghana is incontrovertible. The socio-economic realities in Ghana, where about 24.4 % of the population lives below the poverty line, make legal services accessible to a limited scope of the population, especially the financially privileged.⁴ The vast majority of suspects and accused persons in criminal proceedings in Ghana are unable to afford the increasingly high legal fees charged by members of the Ghana Bar. To that end, the right to legal aid, as enacted under article 14(3) (d) of the ICCPR, provides the needed relief.

Several issues arise regarding the implementation of the right to state-funded counsel, which inhibit the practical realisation of the right for the benefit of indigent accused persons in Ghana. The mode of ratification of the right to state-funded counsel and the strategies of its implementation are a great contributing factor to the very common practice of self-representation in the Ghanaian courts. Suffice it to state that Ghana has not explicitly ratified the right to legal aid in criminal proceedings. The public schemes of legal aid are also fraught with various financial, legislative, institutional and logistical challenges that affect their capacity to deliver the needed services to the large number of indigent suspects and accused persons in need of legal aid. The effect of these inefficiencies is a constant rise in the number of accused persons appearing unrepresented in criminal proceedings in Ghana.

As far as the right to self-representation continues to provide a procedural option for a number of accused persons in criminal proceedings, there is the need to ensure that those who appear unrepresented in criminal proceedings, for any reason whatsoever, are not disadvantaged in the proceedings as to render the trial unfair.

11.4 SELF-REPRESENTED ACCUSED PERSONS IN CRIMINAL PROCEEDINGS IN GHANA

11.4.1 Due Process Rights of Self-Represented Accused Persons in the Pre-Trial Phase of the Proceedings

The criminal procedural regime of Ghana guarantees a number of rights for securing the protection of accused persons in pre-trial proceedings. These include the pre-trial right to

⁴ 6.2.

silence, the right to information on the charge, the right to seek bail, and the right to adequate time and facilities to prepare a defence, which in practice suffer violations in the absence of defence counsel to secure their enforcement.

The Constitution guarantees a pre-trial right to counsel for all accused persons before and during all police interrogations, as soon as the investigation process mutates into an accusatorial procedure.⁵ Many accused persons are simply not informed of the pre-trial right to counsel upon arrest. Where they are informed of the existence of the right, they do not have, in most cases, the means to hire counsel by themselves. Opportunities for enforcement of the right are limited for self-represented accused who desire counsel at this stage.⁶ Public legal aid services are poor and not in the position to assist the great number of persons arrested daily and subjected to police interrogations. The courts have developed the remedy of exclusion of any statements obtained from self-represented accused persons and suspects in violation of their pre-trial right to counsel as being inadmissible, even if made voluntarily. Unfortunately, the benefit of this remedy may not be available to self-represented accused persons or suspects, particularly those who plead guilty to the offence charged. This is because upon a guilty plea, the procedure for full trial during which pre-trial matters are assessed, is truncated.

Every person arrested upon suspicion of having committed a criminal offence enjoys a right to silence, which invokes an obligation on the part of police investigative officers to caution accused persons and suspects of their right to refuse to answer any police interrogatories. This right is however, not constitutionally or statutorily guaranteed. It emanates from the courts' reliance on the English Judges' Rules of 1964. The courts have also adopted the Miranda Rules as devised under American law to protect accused persons' right to silence. The weak legal grounding of the right exposes it to breaches by the Prosecution while some courts erroneously imply guilt from accused persons' decision to remain silent during pre-trial investigations. Furthermore, the criminal procedural regime has not clearly determined the standards of what will constitute an intelligent, voluntary and knowing waiver of pre-trial right to counsel and silence by self-represented accused persons.

Every suspect or accused person is also guaranteed a right to information on the charge, which in practice applies firstly, at the time of arrest and secondly, upon formally charging the accused person. Generally, the information is disclosed through the content of the charge sheet in

⁵ 7.2.1.1.

⁶ 7.1.1.2.

summary trials and of the bill of indictment in trials on indictment. According to the Criminal and Other Offences Act (COOPA)⁷, the information contained in a charge sheet or bill of indictment shall be sufficient, if it contains a statement of the offence with which the accused person is charged, together with the particulars necessary for giving reasonable information as to the nature of the charge. It shall not contain any further particulars and need not state all the essential elements of the offence. Even where substantive details of the charges, which ought to be provided to the accused, are omitted, the charge will not be invalidated provided the Prosecution supplies the necessary evidence on the omitted particulars during the trial.⁸ The main problem associated with the implementation of the law relates to the scope of disclosable information, which even defence lawyers claim is not adequate for purposes of preparing a defence, especially in summary trials. This observation exposes the plight of unrepresented accused persons who are unskilled in the law but duty-bound to prepare their defence based on the content of information provided in the charge sheet.

In both summary trials and trials on indictment, at the stage of arraignment, the law requires that the substance of the charge sheet or bill of indictment be read and explained to accused persons in the language that they understand and at the time when they are called upon to plead. For self-represented accused persons, this procedure comes too late in the day, because this may be the first time the accused person becomes fully aware of the nature of the case against him. The courts in Ghana have also insisted that where the accused is unrepresented, the judge must ensure that s/he indeed understands and appreciates the charges in a language that s/he understands. The records of the court must capture the details of the explanation, including the language used and the manner in which the explanation is given.

In addition, every suspect or accused person remanded in custody pending trial reserves the right to seek bail. The law does not guarantee an absolute right to bail but there is a presumption of bail in favour of all accused persons irrespective of the nature of the offence charged, especially with the abolition of the concept of non-bailable offences in Ghana. The courts do not always exercise their right to *suo motu* consider bail for self-represented accused persons. Self-represented accused persons rarely file formal bail applications obviously due to their lack of legal knowledge. There are no forms of institutional assistance to assist self-represented accused persons through the process of bail applications. Generally, such persons make

⁷ Act 30 of 1960.

⁸ 7.3.2.2.

informal oral applications, which the courts consider as valid bail applications. In considering such bail applications, the courts usually adopt a relaxed procedure and eschew the technicalities and confrontational adversarial argumentation, which characterise motions in cases where both parties are represented by counsel. This is a vital step towards providing meaningful assistance to self-represented accused persons.

Furthermore, certain statutory procedures prescribed for bail applications, present many difficulties for self-represented accused persons remanded in custody. These include bail applications made by accused persons subjected to committal proceedings before the District Courts in offences triable on indictment. Such applications are made to the High Court or Circuit Court, which has jurisdiction to try the substantive offence after close of the committal proceedings. A similar difficulty arises regarding the exercise of accused persons' procedural right to seek a review of bail decisions handed down by the police and the District Courts before the Circuit Courts and High Court. These procedures present an unsurmountable task for remanded self-represented accused persons and suspects, especially since the criminal justice system provides no form of institutional assistance. The situation requires the adoption of key strategies to ease up the entire process of bail applications for such self-represented accused persons.

Finally, every accused person has a right to adequate time and facilities to prepare a defence. This is an important right, which figures at the heart of the concept of fair trial and equality of arms. Any accused person may apply to the court to be given enough time to prepare his/her defence. Where the accused is unrepresented, s/he must do it in person. The courts in Ghana, in that vein, have sought to protect self-represented accused persons who apply to the court for extension of time either to prepare their own defence or to seek legal assistance. Largely however, the practice of the courts is to begin trials when the Prosecution is ready for proceedings to commence. Very little consideration is given at that point to the readiness of the accused person. It will however be in the interest of justice and procedural fairness that self-represented accused persons especially be given the same protections and privileges.

Regarding the right to adequate facilities to prepare a defence, it has been interpreted to include giving accused persons access to appropriate information, files and documents in preparing their defence. In proceedings on indictment in Ghana, this right is relatively fully enforced because the Prosecution is mandated to furnish the accused person with the list of witnesses and the summary of each witness' evidence, as well as a list of all documents to be relied upon

by the Prosecution at trial. In summary trials, the process is quite different, as the Prosecution bears no such duties. Self-represented accused persons may be led to contest the Prosecution's case without full prior knowledge of the case against them. This procedure may affect their ability to present an effective defence.

Many interventions are therefore needed to reinforce the position of self-represented accused persons at the pre-trial phase of the proceedings. Because this stage provides the factual and evidentiary foundations of the entire criminal prosecution, care must be taken to ensure that the minimum procedural guarantees for the protection of accused persons are fully complied with. Beyond compliance, the legal system must also provide the practical means and support to ensure effective realisation of these rights for self-represented accused persons.

11.4.2 Professional and Ethical Responsibilities of Public Prosecutors in Trials of Self-Represented Accused Persons

Insofar as self-representation remains an essential feature of the criminal justice system in Ghana, the need to establish some substantial level of procedural equality between the public prosecutor and the self-represented accused towards a fair adversarial contest is indispensable. The criminal justice system of Ghana does not have a comprehensive system that clearly lays out the specific duties of prosecutors to self-represented accused persons for the purposes of redressing the imbalance caused by the absence of defence counsel. This situation is not however peculiar to Ghana. The various international instruments on the roles and duties of public prosecutors do not expressly distinguish between the statuses of the prosecutor's adversaries, especially in adversarial criminal proceedings.

Public prosecutors consist of Prosecuting Attorneys who are qualified lawyers. The state also employs a group of non-lawyer public officers who are trained in the relevant fields of the law to undertake the task of prosecuting offences, albeit at the lower courts.⁹ Most of the prosecutors' obligations to self-represented accused persons, which are identified in this study, are read and adapted from their duties to accused persons in general.

Besides the overarching duty to do justice, prosecutors are enjoined not to initiate prosecutions except upon a probable cause. They are required to assist self-represented accused persons where the interests of justice demand, while at the same time, they are directed to refrain from advising them due to the nature of their conflicting interests. There are also other important

⁹ 8.2.

obligations to self-represented accused persons, but which bind Prosecuting Attorneys only. These include the duty to disclose material information and evidence, both incriminating and exonerating, to the accused person and the obligation not to exploit the ignorance or incompetence of the self-represented accused. There is therefore minimum control to ensure compliance with the last two obligations as far as lay public prosecutors are concerned. It makes sense to subject lay prosecutors to the same standard of responsibility for the benefit of self-represented accused persons. It is noted that this category of public prosecutors prosecute the majority of criminal offences in the country where most accused persons also appear unrepresented.

The scope of prosecutorial duties to self-represented accused persons in Ghana does not however fully cover all the critical interventions needed on the part of the prosecutor to ensure adequate protection and fairness. Such important duties such as (i) the duty to advise self-represented accused persons of the right to counsel and its benefits, and of the procedure to obtain counsel; (ii) the duty to inform self-represented accused persons of the prosecutor's adverse interest in the trial; and (iii) the duty of the prosecutor not to seek a waiver of the procedural rights of the accused person, must all be considered in setting up the general framework of prosecutorial duties to self-represented accused persons.¹⁰

11.4.3 Judicial Engagement and Duties in Trials of Self-Represented Accused Persons

By the conventional structure of the adversarial system, great emphasis is placed on the need to insulate the judge from the proceedings. It is for each party to champion his/her interests and responsibilities. It is believed that judicial involvement in the proceedings will introduce a potential for bias and partiality, which is incompatible with the judicial duty to do justice.

The phenomenon of self-representation in the adversarial criminal trial however calls for certain structural adjustments in order to sustain the adversarial ideology of justice. Meaningful access to justice in such cases requires an enhancement of the judicial role beyond its conventional boundaries. It is mainly through a structural adjustment of the position of the judge and reliance on the concept of judicial enabling that the system can guarantee and realise its commitment to justice in the trial of self-represented accused persons.

The procedural and evidentiary rules of criminal adjudication in Ghana prescribe a number of statutory interventions, which take the form of judicial assistance or obligations to self-

¹⁰ 8.5.

represented accused persons in the course of proceedings. These include the duty of courts to take account of the special status of self-represented accused persons in applying the rules of evidence and the duty to assist in matters of admissibility of evidence. Judicial assistance is equally mandated at the stage of guilty plea taking. Judges are also required to inform accused persons about their procedural choices at the opening of their defence and to compel attendance of defence witnesses in court to give testimony on their behalf. Judges are equally required to assist self-represented accused persons during cross-examination of prosecution witnesses, to raise all possible defences on their behalf and to consider all mitigating factors on their behalf before sentencing, in cases where they are convicted.

These judicial interventions acknowledge the inadequacy of the mainstream procedural system to fully accommodate the case of self-represented accused persons. However, this legislative approach to providing a compensatory system through increased judicial activism is fragmented and uncoordinated. For a legal framework originally designed to rely on lawyers acting for the parties, the non-integrated legislative interventions fall short of developing an all-inclusive remedial regime. The statutory provisions can only fill in the few identified gaps in the proceedings and provide a partial relief.

Beyond the scope of assistance provided by statutes, the procedural system exhibits other critical stages where unrepresented accused persons stand in dire need of judicial intervention. In such cases, the courts in Ghana have devised certain internal measures to assist unrepresented accused persons. The courts in that context have defined their power to assist, as deriving from their constitutional duty, to ensure the realisation of the accused person's right to a fair trial. Firstly, by their own internal measures, judges have found it necessary to relieve self-represented accused persons from the obligation to raise technical legal points and objections. Secondly, in dealing with confession statements of unrepresented accused persons, it is established that self-represented accused persons who are unaware of the rules governing the process of eliciting a confession statement may never raise objections to their admissibility. It behoves the courts to inquire into the circumstances surrounding the confession statements or any incriminating statements given by self-represented accused persons to determine whether the procedure for their extraction complied with due process of law. Thirdly, the courts have also intervened to relieve self-represented accused persons of the technical processes of making opening and closing addresses. The reason is clearly attributed to their lack of ability to make reasoned legal submissions. Although, of assistance to the self-represented accused person, the beneficial effect of legal addresses to the parties' respective cases in court must

also be considered. Therefore, where a self-represented accused person is exempted from making legal submissions, the court must give due consideration to that fact in its judgment. This position remains indeed the only reliable approach towards making up for the loss of the right to address the court due to lack of legal representation.

Despite these judicial interventions, the adversarial system of criminal adjudication in Ghana remains far from being perfect. Certain procedural stages of the proceedings require serious legal interventions to assist self-represented accused persons. Firstly, the Constitution of Ghana does not guarantee a due process right to be informed of the right to counsel during trial. This is a serious omission in the law. The courts in Ghana have also not interpreted the right to assistance of counsel during trial to include the right to be informed of the right. This generates the risk of having accused persons standing without legal representation out of sheer ignorance of their right to counsel during trial. Secondly, regarding reverse onus clauses, a self-represented accused cannot be expected to know the intricacies of the law. At all times, where the burden of proof shifts unto the accused person, it will be rational for the judge to assume the duty to bring it to the knowledge of the accused and to direct him/her as to what is exactly required of him or her. Judicial assistance will still be required in such instances. In the end, a more holistic approach must be taken to address the peculiarity of self-representation in the adversarial criminal trial of Ghana.

11.5 TOWARDS A MORE EFFICIENT SYSTEM OF PROSECUTION OF SELF-REPRESENTED ACCUSED PERSONS IN GHANA

11.5.1 Integrating Procedural Equality and Fairness into the Concept of Self-Representation in the Adversarial Criminal Trial

There must be the right motivation for recognising the right and practice of self-representation as a legitimate alternative procedure to the widely recommended process, which involves representation by an advocate. In the interests of justice, a theory of fairness is developed that involves instituting a measure of parity and equity in the beneficial interests associated with legal representation and self-representation in criminal proceedings. The two procedures must be made equally attractive.

Both international law and domestic legal regimes, including the Ghana legal system, duly recognise the status of self-representation in the adversarial trial. Unfortunately, very little is done in terms of assigning a proper weight to the interests of the accused person affected by

the lack of legal representation. The universal policy governing the procedure of self-representation, and as duly implemented in countries adherent to the adversarial system, is to simply guarantee accused persons the option to conduct their defence in person. This legal position regrettably takes very little account of self-represented accused persons' aptitude and competency to defend themselves and protect their procedural rights at trial. To that end, self-represented accused persons have been extensively marginalised from the broad consideration of fairness as far as the adversarial criminal trial is concerned. Fairness in this context is contextualised and analysed from a perspective that considers not only the presence of procedural mechanisms that guarantee formal procedural equality between the parties. It is also conceptualised from the perspective of self-represented accused persons' ability to efficiently and meaningfully participate in the adversarial proceedings in person.

From a process-oriented perspective, fairness of the adversarial process may be considered as the result of a "symmetry of the dialectic process".¹¹ This presumption alludes to the idea that fairness of the proceedings is determined in the course of interaction between the Prosecution and the accused person, as equal parties acting in furtherance of their respective interests before a neutral judge. However, the adversarial criminal trial today is more than a simple process that pitches presumably equal parties in a contest and where each party simply fights for his/her interests. The criminal process acknowledges the inherent procedural advantage of the Prosecution over the accused person. It is for this reason that the institutionalisation of the body of fair trial rights becomes important to reinforce the disadvantaged position of the accused person, most importantly by providing him/her the opportunity to defend him/herself. However, in adversarial criminal proceedings involving self-represented accused persons, fair trial goes far beyond a superficial and mechanical application of the individual guarantees within the scope of fair trial rights.¹² The rhetoric of fair trial rights must seek a practical realisation of their full benefits to self-represented accused persons.

Ensuring procedural equality between the Prosecution and the self-represented accused person in the adversarial criminal trial requires a "balanced empowerment", which translates into "the allocation of respective prerogatives appropriate to the different roles of Prosecution and

¹¹ Uviller *The Titled Playing Field: Is Criminal Justice Unfair?* (1999) 8.

¹² United States Institute for Peace, "Chapter 4: Rights of the Suspect and the Accused" <http://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf> 115. (Accessed 16-08-2016). See also Human Rights Committee (HRC) *General Comment 32* (2007) para 25, stating that "the notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entail the absence of any direct or indirect influence, pressure intimidation or intrusion from whatever side and for whatever motive."

Defence in criminal litigation”.¹³ The criminal justice system must always consider what prerogatives should be given to self-represented accused persons to effectively participate in the proceedings, put forward in his/her case in rebuttal of the Prosecution’s accusations where necessary, and protect his/her interests and rights. In cases of self-representation, the individual rights of the accused person and the various procedures and processes of the trial must be analysed, interpreted and implemented towards achieving these objectives. These considerations provide the context for the proper analysis of the principle of fair trial in proceedings involving self-represented accused persons in adversarial proceedings in general.

The readiness of the adversarial legal system of Ghana to admit self-representation as a valid mode of appearance before the court must uncompromisingly have a corresponding willingness to make it as attractive, reliable and efficient as the mode of appearance by legal representation. The ability of the legal system to guarantee trial fairness in cases of self-representation in turn validates its ability to ensure justice for self-represented accused persons.

11.5.2 Required Interventions

11.5.2.1 Constitutional and Legislative Interventions

The key procedural issues associated with self-representation in the adversarial criminal trial of Ghana are partly steeped in law and procedure. Therefore, the quest to address these problems requires a number of constitutional and legislative reforms either by way of filling in the existing gaps in the law or amending existing legal principles in deserving cases to suit the needs of self-represented accused persons.

Firstly, this study recommends the following constitutional reforms to duly incorporate the under-listed rights within the cluster of due process rights of accused persons.

- (i) Article 19 of the Constitution, guarantees the due process rights of accused persons, and expressly excludes the right to assignment of counsel in cases of indigence. The provisions of article 294 on legal aid in constitutional proceedings, which attempt to fill in the gap remain very fluid and without due incorporation of the essence of the right to legal aid under international law. Steps must be taken to properly ratify the provision of article 14(3) of the ICCPR on the right to legal aid. This must translate into a clear enactment of a right to legal aid and elevated to the level of a constitutional right among

¹³ Uviller *The Titled Playing Field* 21.

the scope of fair trial rights in order to ensure its full implementation and benefits for indigent accused persons.¹⁴

- (ii) There are presently no constitutional guarantees of the pre-trial right to silence. Beyond the professional directive to police officers to respect accused persons' right to silence during pre-trial interrogations, the law must constitutionalise an entitlement to such a right among the due process rights of suspects and accused persons.
- (iii) In order to prevent accused persons from representing themselves during criminal trials in ignorance of their right to counsel, particularly during the actual trial, there must be a clear constitutional enactment of the right of the accused to be informed of the existence of the right.

In addition to the constitutional interventions, a number of other legislative interventions are equally required.

- (i) Reforms must target the operations of the legal aid schemes in Ghana to make them more effective. Particularly, the legislative instrument required for the implementation of the Court-Assigned Counsel Scheme (CACS) must be duly passed in accordance with section 116 of the Courts Act.¹⁵ The realisation of this legislative obligation will change the status of the Scheme from its dormant state to a more vibrant system of legal aid. Furthermore, the requirement of section 114(2) of the Courts Act that decisions to assign legal aid to deserving indigent accused persons in the District and Circuit Courts, must be referred to the Chief Justice for approval and must be discarded for purposes of efficiency. The requirement merely adds to the unnecessary bureaucratic bottlenecks that stifle institutional operations. In addition, the criteria for qualification for legal aid under the Ghana Legal Aid Scheme (GLAS) as far as it relates to the means test requiring legal aid to be granted to persons who earn not more than the minimum wage under section 2(2) of the Legal Aid Scheme Act,¹⁶ must be reviewed. The aim is to address the interpretational gap and to guarantee legal aid for persons who meet the minimum wage but are unable to pay for legal services, which are highly priced.

¹⁴ See, e.g., UN Guidelines and Principles UN/67/187, principle 1 (14).

¹⁵ Act 459 of 1993.

¹⁶ Act 542 of 1997.

- (ii) In implementing the right to information on the charge, the law insists on the fact that the nature of the information be 'immediately' disclosed to the accused person upon being charged. To give full effect to the right, the Prosecution must immediately read and explain the content of the charge sheet or bill of indictment to the accused as soon as the charges are drafted. Any subsequent reading and explanation of the charges in court will then serve the purposes of satisfying the judge that the accused person before him/her understands and appreciates the nature of the offence for which s/he is standing trial. The brief facts of the case of the Prosecution do not form part of the scope of information disclosable to the accused through the charge sheet in summary trials or the bill of indictment in trials on indictment. It is however noted that the facts provide accused persons with a better understanding of the basis of the charges against them. Thus, in interpreting the right to information on the nature of the charge, due consideration must be given to need to also furnish self-represented accused persons with the details of the facts pleaded by the Prosecution.
- (iii) The present procedure where the Prosecution has no duty to disclose all material facts, prosecution witnesses and the summary of their evidence to the self-represented accused in summary trials provide accused persons must be reviewed. To guard against leading self-represented accused persons to trial without full prior knowledge of the case against them is unfair. The law must clearly enact an obligation on the part of the Prosecution to furnish and disclose all relevant obligations to the accused to the extent applicable in trials on indictment. Finally, the present procedure where the Prosecution has no duty to disclose all material facts, prosecution witnesses and the summary of their evidence to the self-represented accused in summary trials must be reviewed. To guard against leading self-represented accused persons to trial without full prior knowledge of the case against them, the law must clearly enact an obligation on the part of the Prosecution to furnish and disclose all relevant obligations to the accused to the extent applicable in trials on indictment.
- (iv) The need to secure a workable procedure through which all self-represented accused persons can effectively benefit from the guarantee of the right to bail is imperative. Judges and magistrates must assume the overall responsibility to safeguard the personal liberty of self-represented accused persons in criminal proceedings. The duty mainly extends to ensuring that unrepresented accused persons are not prejudiced in the course of proceedings, simply because of their ignorance of the governing substantive rules

and procedural requirements.¹⁷ Judges must exercise their power to *suo motu* consider bail for all self-represented accused persons appearing before them, make a formal determination, and give a reasoned ruling on their decision to grant or otherwise refuse bail. They must equally at their own motion raise and periodically re-evaluate the conditions for the detention of self-represented accused persons, after they have been remanded, upon their first appearance or in the course of proceedings.¹⁸

Furthermore, the inter-court procedural challenges faced by remanded self-represented accused persons must be addressed. The rule that District Courts, presiding over committal proceedings have no jurisdiction to grant bail to the accused persons, except the High Court or Circuit Court with competent jurisdiction to try the substantive offence, must be reviewed. This exclusion of jurisdiction shuts the doors of pre-trial release to self-represented accused persons remanded in custody. It is procedurally expedient to authorize District Magistrates to consider bail for all accused persons appearing before them for committal proceedings.

For purposes of engaging the review jurisdiction of the Circuit Courts and High Court regarding bail decisions rendered by the District Court and the police during investigations, under section 96(2) of the COOPA, practical interventions are vital to give effect to the law where the accused or suspect is unrepresented. A practical suggestion involves instituting a process by which all formal orders of the District Courts and the police either denying bail or granting bail on onerous terms are automatically forwarded to the High Court or Circuit Courts for review within a stipulated time. It is acknowledged that this procedure will involve various procedural, administrative, financial and logistical interventions. The implementation of these remedial mechanisms must go beyond mere judicial directives. They must be embodied in regulations and have a binding force. It is only in such circumstances that due entitlements to bail may be guaranteed under the law, a violation of which may entail a legal remedy.

- (v) Finally, a more holistic system of statutory interventions in the nature of judicial assistance to self-represented accused persons is desired. The existing interventions

¹⁷ It is a common duty for all adversarial systems in general. See, .e.g., Landsman 2010 “Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings” 2010 *Fordham Urb. L. J* 273 276.

¹⁸ Human Rights Committee *General comment 35 CCPR/C/GC/35* (2014) para 12.

under the procedural and evidentiary rules provide a good start to addressing the procedural concerns associated with self-representation. However, much more needs to be done to provide a workable document, which is comprehensive enough to specifically address the various procedural challenges faced by self-represented accused persons, especially with regard to seeking compliance with the trial rules and enforcing their trial rights in the course of the proceedings in the absence of defence counsel.

11.5.2.2 Institutional Developments and Reforms

The criminal adjudicatory process is a consortium of various state institutions that partake in the delivery of criminal justice. To that end, the various institutions, including the courts, the police, the Prosecution, all have separate but interlinked roles to play.

- (i) The impact of state investigative agencies is most felt at the pre-trial stage of the proceedings, and especially in matters of investigations. Unfortunately, they hold a very limited level of accountability to the fairness of the proceedings. Because trials are founded on predetermined matters during pre-trial proceedings, the police and other investigative agencies must be subject to a code of ethics guiding the discharge of their investigative duties. The envisaged code must also prescribe punishment for any form of professional misconduct in terms of blatant violations of the pre-trial rights of accused persons in general and self-represented accused persons in particular.

As far as the Prosecution is concerned, the need to lay down clear guidelines for trial of self-represented accused persons is highly recommended. From the time of arrest of the suspect to the close of submissions during the trial, a comprehensive set of regulations must prescribe the various obligations of the public Prosecutor to self-represented accused persons. The ideal situation must target the creation of a comprehensive body of professional and ethical rules for all public prosecutors that promote the overarching duty of the prosecutor to do justice. These rules must consequently cover all critical interventions needed on the part of the prosecutor to ensure adequate protection for self-represented accused persons and the fairness of their trial. They must include prosecutorial responsibilities such as (a) a duty to advise self-represented accused persons of the right to counsel and its benefits, and of the procedure to obtain counsel; (b) a duty to inform self-represented accused persons of the

prosecutor's adverse interest in the trial; and (c) a duty of the prosecutor not to unlawfully seek a waiver of the procedural rights of an unrepresented accused person.

Furthermore, both Prosecuting Attorneys and lay prosecutors must be subject to the same ethical and professional obligations to be delivered to self-represented accused persons. The underlying reason is that lay prosecutors may not have acquired the full training of lawyers but their special training and courtroom experiences make them knowledgeable in the theory and practice of the law and give them some professional advantage over ordinary unrepresented accused persons.

- (ii) In addition, the general concern of inadequate training of police prosecutors must be addressed. The fate and lives of accused persons cannot be entrusted into the hands of a half-trained prosecutor with very little knowledge and appreciation of the practical details of criminal prosecutions. The Attorney-General's Office must ensure adequate training in matters of criminal law and procedure, if police prosecutors are to be maintained as an integral part of the prosecutorial body. Even more importantly, critical consideration must be given to the need to attune the competencies and skills of police prosecutors to the peculiar status and needs of self-represented accused persons at trial.
- (iii) The Ghana Legal Aid office must be decoupled from the office of the Attorney-General. It must be fully funded and it must operate independently to meet its commitment to assist self-represented accused persons as a public defence system. It must fight its way to the forefront of criminal justice and obtain the same prominence as the office of the Prosecution.
- (iv) The various operative and financial problems that have engulfed the smooth operation of legal aid in the country must be addressed. The criminal justice system of Ghana must take cue from the strategies, laid forth by the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa,¹⁹ to advance the cause of legal aid in Ghana. The first proposition is to expand the scope of legal services providers. Legal aid services providers should include a wide range of stakeholders, including non-governmental organisations (NGOs), community-based organisations (CBOs), non-religious organisations, faith-based organisations, professional bodies, and associations, as well as academic institutions.²⁰ Judi-care programmes, justice centres

¹⁹ 2004.

²⁰ *Id*, principle 1.

and law clinics can be developed and added to present legal aid schemes.²¹ The efforts of the NGOs, which are already in the business of providing legal aid, must be commended and coordinated. In addition, the criminal justice system must also aim at diversifying legal aid service providers in the country.

Presently, only lawyers qualify to provide legal aid services in pre-trial and trial proceedings in criminal matters. The number of lawyers in criminal and legal practice however is insufficient to attend to the legal needs of the rising number of suspects and accused persons in need of legal aid in the country. To that effect, the legal system must consider giving recognition to the status of non-lawyers in criminal proceedings, including law students in legal clinics, legal assistants and paralegals.²² It is also important for government to exhibit a political will to address the financial challenges of public legal aid schemes. The state must allocate sufficient funds to legal aid schemes to ensure their effective operations.²³ Essentially, the funds of the schemes must be sufficient to meet the costs of their administrative and operation needs.²⁴ Government and the private sector must collaborate to raise the necessary funding.²⁵ Finally, the legal bar and the judiciary must define standards for provision of *pro bono* services by lawyers. *Pro bono* legal services must be recognised as an important duty of the legal profession. Lawyers should be provided and assisted with the necessary logistical and professional support systems to ensure an effective system of *pro bono* legal services. In the absence of any legislation mandating the provision of *pro bono* legal services in Ghana, lawyers must be encouraged to offer such free services as part of their ethical duties.

- (v) It is also noted that the Constitution of the Republic of Ghana guarantees for every accused person, the right to have legal representation during the trial.²⁶ However, the enactment of a right does not pragmatically connote its widespread knowledge and appreciation by the Ghanaian population with an appreciable level of illiteracy.²⁷ The presumption of knowledge of the law by all and sundry is clearly rebutted by the blatant

²¹ *Id*, principles 6 & 7; UN *Guidelines and principles UN/RES/67/187* guideline 16(70).

²² *Lilongwe Declaration*, principle 7; UN *Guidelines and principles UN/RES/67/187*, guidelines 14(67); 16(71) (e).

²³ *Lilongwe Declaration*, principles 1 & 9.

²⁴ UN *Guidelines and principles UN/RES/67/187*, guideline 12 (16) (a).

²⁵ *Lilongwe Declaration* principle 9.

²⁶ Ghana Constitution, art 19(2) (f).

²⁷ <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html>. The CIA World Factbook fixes the illiteracy rate in Ghana for the year 2015 at 23.3%. (Accessed 23-12-2016).

realities that expose the people's ignorance of their rights. The National Commission on Civic Education (NCCE) is a state institution established by the Constitution to among others, "formulate, implement and oversee programmes intended to inculcate in the citizen of Ghana, awareness of their civic responsibilities and an appreciation of their rights and obligations as free people."²⁸ The NCCE however, has missed this constitutional obligation due to inadequate funding to perform this constitutional mandate.²⁹ Any systemised efforts at reinforcing the strength of the legal system in Ghana must however begin with public education of the people about their rights. Ensuring this form of empowerment of the public will require that the NCCE is first empowered to meet its obligations to the people of Ghana.

- (vi) Finally, this study proposes a possible reconsideration of the system of private criminal prosecutions. As a procedural model, which relies primarily on the parties for adjudication, it eschews all issues of procedural advantage associated with public prosecutions. The criminal justice system may consider further research into the practice of 'private prosecution' to identify its prospects and feasibility within the present scheme of criminal adjudication.

11.5.2.3 Judicial Interventions

- (i) The duty to deliver justice in criminal trials ultimately rests at the door of the judiciary. It is judges and magistrates who conduct the prosecution of self-represented accused persons, and witness first-hand the problematic areas of the adversarial proceedings, as they apply to unrepresented accused persons. The constitutional obligation of judges to ensure the protection of rights, ensure trial fairness, and deliver justice must take priority over the form of the trial. The 'sporting' ideology of the adversarial system is inappropriate in modern criminal trials, which must see more activism on the part of the judiciary towards the enforcement of accused persons' rights. Even in the absence of legislative interventions, the judiciary must be proactive in seeking the protection of unrepresented accused persons within the limits of judicial enabling.

²⁸ See Ghana Constitution, art 233 (d); also Asmah "Deficiencies in Our State Institutions Worrying" <http://www.graphic.com.gh/features/civic-realities/deficiencies-in-our-state-institutions-worrying.html> (Accessed 23-12-2016).

²⁹ Ghana News Agency "Resource NCCE Adequately to make it deliver" <http://www.ghananewsagency.org/social/resource-ncce-adequately-to-make-it-deliver-atuguba--88628> (Accessed 23-12-2016).

- (ii) The courts of Ghana have not yet made a pronouncement on the duties of the court in allowing an accused person to represent him/herself at the trial beyond the mere affirmation that all accused persons are entitled to represent themselves in criminal proceedings at will. It is beyond doubt that the right to self-representation involves a waiver of the protections that legal representation provides. Consequently, judges must be instructed to fully inform accused persons of the inherent dangers and disadvantages of self-representation in order to assist them make an informed choice of representation in court.
- (iii) The courts must clearly define the parameters of a valid waiver of due process rights especially by self-represented accused persons. The rights in perspective in this context include the pre-trial rights to silence and to counsel during custodial interrogation. The Prosecution must have a positive duty to prove a valid waiver. A valid waiver in turn must necessarily invoke an obligation on the part of investigating officers to inform self-represented accused persons and suspects to be aware of the dangers and disadvantages of waiving the pre-trial rights to counsel and to silence.³⁰
- (iv) The law mandates the courts to inform accused persons of their procedural choices at the opening of their defence. The accused person at this stage has the benefit of being informed of the right to testify on his/her own or to make an unsworn statement from the dock, and of the right to call witnesses and address the court. This is a good initiative to introduce the accused to the procedures ahead of the trial. The real issues beyond informing the accused person of these procedural rights lie with his/her competencies to execute them. For purposes of ensuring that the accused person's right to a fair trial has been complied with, steps must be taken to put him/her in the position to understand the procedure and make intelligent and well-informed choices. S/he must also be clearly assisted to wisely determine whether to give evidence on oath or speak from the dock, with knowledge of the implications of each choice.³¹
- (v) Guilty pleas entered against self-represented accused persons must be factually founded. The accused person must know the charges s/he is pleading to, and the consequences of such a plea, and more importantly, the judge must ascertain the motivation for the guilty plea.

³⁰ 7.2.3.

³¹ 9.4.2.

- (vi) The law in Ghana is silent on the procedure for examining self-represented accused persons and their witnesses in court. The study proposes a more effective approach to taking the testimonies of the unrepresented accused and defence witnesses. It requires judges to bridge the procedural gap caused by the absence of defence counsel by assuming a strand of inquisitorial powers. In leading the self-represented accused person, the court must clearly lay out the issues for trial and clearly direct the accused to speak to those issues thoroughly. A lot of judicial activity may be required on the part of the judge. Though s/he will not step in the shoes of an advocate for the accused, s/he must expose all areas of doubt in the Prosecution's facts. The judge must suggest questions and new lines of enquiry to assist both the Prosecution and the accused person to fill the gaps left in the evidence.
- (vii) Finally, as far as cross-examination of prosecution witnesses by self-represented accused persons is concerned, judicial officers can assume the responsibility to fill the interrogation gaps arising from patent omissions of cross-examinable matters, by probing further into such matters of interest to the court, and relevant in the determination of issues before the court. The judicial officer may serve as the catalyst to expose all questionable matters arising from the Prosecution's case. In all cases, it should be possible for the judicial officer to suggest particular questions or new lines of enquiry by assisting both the Prosecution and the accused to identify gaps left in the evidence before him/her.

In the end, the vision of the criminal justice system is to make the adversarial criminal trial more accommodating of the uniqueness of self-representation and efficient enough to attain the procedural goals of fairness, procedural equity and justice of self-represented accused persons.

BIBLIOGRAPHY

TEXT

- Abbey, E. E. 2016. *Training of police prosecutors in Ghana*. [Online] Available from <http://www.graphic.com.gh/news/general-news/fifty-police-prosecutors-complete-training-in-accra.html> [Accessed: 21 November 2016].
- Abraham, G. S. 1960. The state and the accused: Balance of advantage in criminal procedure. *The Yale Law Journal*, 69(7): 1149-1199.
- African Commission on Human and People's Rights. (n.d.). *Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa*. [Online] Available from http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_arrest_police_custody_detention.pdf [Accessed: 03 May 2015].
- Amankwah, E. H. 2005. Human rights and the criminal process in Ghana. *KNUST Law Journal*, 2: 111-128.
- Amankwah, H. A. 1970. Ghanaian Law: Its evolution and interaction with English Law. *Cornell International Law Journal*, 4(1): 37-57.
- Amidu, M. K. 1992. The right to state appointed counsel in criminal justice administration under the Constitution. *Review of Ghana Law*, 159-181.
- Amissah, A. N. 1969. The police and the courts. *Review of Ghana Law*, 1, 31-44.
- Amissah, A. N. 1982. *Criminal procedure in Ghana*. Sedco Publishing Limited.
- Amissah, A. N. E. 1967. The machinery of criminal justice in Ghana. *University of Ghana Law Journal*, 1: 80-109.
- Amissah, A. N. E. 1969. Police and the courts. *Ghana Law Review*, 1: 31-44.
- Amissah, A. N. E. 1970. Practical problem No.3, private prosecutions. *Review of Ghana Law*, 2: 115-120.
- Amissah, A. N. E. 1970. Titles of cases: Different names for the same legal personality. *Review of Ghana Law*, 3: 183-184.
- Amnesty International. 2014. *Fair Trial Manual*. 2nd Edition.
- Amnesty International. *Ghana 2017/2018 Report*. [Online] Available from <https://www.amnesty.org/en/countries/africa/ghana/report-ghana/> [Accessed; 24 February 2018].
- Appiahene-Gyamfi, J. 1995. Alternatives to imprisonment in Ghana: A focus on Ghana's criminal justice system. Simon Fraser University.

- Aquah, C. K. 1991-1992. Customary offences and the Courts. *Review of Ghana Law*, XVIII, 36-67.
- Arrigo, B. A., & Bardwell, M. C. 2000. Law, psychology and competency to stand trial: Problems with and implications for high profile cases. *Criminal Justice Policy Review*, 11(1): 16-43.
- Asante, S. K. 1987. Over a hundred years of national system in Ghana. A review and critique. *Journal of African Law*, 31: 70-92.
- Ashworth, A., & Horder, J. 2013. *Principles of Criminal Law*. (7th ed.). Oxford University Press.
- Asimow, M. Winter 2007. Popular culture and the adversary system. *Loyola of Los Angeles Law Review*, 40(2): 651-684.
- Assy, R. 2011. Revisiting the right to self-representation in civil proceedings. *Civil Journal Quarterly*, 30, 267-282.
- Awuku, S. K. 2011. *Disclosure in our criminal process*. [Online] Available from <https://www.modernghana.com/news/352403/1/disclosure-in-our-criminal-trial-process.html> [Accessed; 12 February 2017].
- Babcock, B. A. 1982. Fair play: Evidence favorable to an accused and effective assistance of counsel. *Stanford Law Review*, 34, 1139.
- Backus, M. S., & Marcus, P. 2005-2006. The right to counsel in criminal cases: A National Crisis. *Hastings Law Journal*, 57(6): 1031 -1130.
- Banaszak, R. A. 2002. *Fair trial rights of the accused: A documentary history*. Greenwood Publishing Company Group.
- Baron, P., Corbin, L., & Gutman, J. 2014. Throwing babies out with the bathwater? *Monash University Law Review*, 40(2): 283-304.
- Barrett, E. F. 1962. The adversarial system and the ethics of advocacy. *Notre Dame Law Review*, 37(4): 479-488.
- Barrett, K. 2012. Legal Counsel. In W. R. Miller, *The History of Crime and Punishment in America* (pp. 997-1104). Sage Publications.
- Bassiouni, M. C. 1993. Human rights in the context of criminal justice: Identifying international procedural protection and equivalent protections in national constitutions. *Duke Journal of Comparative and International Law*, 3(2): 235-297.
- Beany, W. M. 1955. The right to counsel in American courts. *The Yale Law Journal*, 64(7): 1089-1095.

- Beattie, J. M. 1986. *Crime and the courts in England 1660-1800*. Oxford: Clarendon Press.
<http://hdl.handle.net/2027/heb.00346.0001.001>.
- Beattie, J. M. 1991. Scales of justice: Defence counsel and the English criminal trial in the eighteenth and nineteenth centuries. *Law and History Review*, 9(2): 221.
- Bekker, P. M. 1991. The undefended accused/defendant: A brief overview of the development of the American Indian and South African positions. *The Comparative and International Law Journal of Southern Africa*, 24(2): 151-188.
- Bekker, P. M. 2004. The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa. *The Comparative and International Law Journal of Southern Africa*, 37(2): 173-195.
- Bekker, P. M., Geldenhuys, T., Swanepoel, J., Terblanche, S. S., Merwe, B. v., & Merwe, S. E. 2009. *Criminal Procedure*. 9th ed. J. Joubert, Ed. Juta & Company Ltd.
- Bennion, F. 1962. *The constitutional law of Ghana*. London: Butterworths.
- Berry, M. M. 1999. Accessing justice: Are pro se clinics a reasonable response to the lack of pro bono services and should law school clinics conduct them? *Fordham Law Review*, 67(5): 1879-1926.
- Bimpong-Buta, S. Y. 2007. *The role of the Supreme Court in the development of constitutional law in Ghana*. Accra - Ghana: Advanced Legal Publications.
- Black's Law Dictionary*. 1979. 5th ed.
- Block, M. K., Parker, J. S., Vyborna, O., & Dusek, L. 2000. An experimental comparison of the adversarial system versus inquisitorial procedural regimes. *American Law and Economics Review*, 2(1): 170-195.
- Brick, S. A. 1971. Self-representation in criminal trials: The dilemma of the pro se defendant. *California Law Review*, 59(6): 1479-1513.
- Boateng, J. O. 2000. *The Ghana law of evidence*. Waterville Publishing House.
- Brobbey, S. A. 2011. *Practice & procedure in the trial courts and tribunals of Ghana*. 2nd ed. Advanced Legal Publications.
- Bundy, S. M. 1992-1993. The policy in favour of settlement in an adversary system. *Hastings Law Journal*, 44: 1-78.
- Burdick, C. K. 1925. Criminal justice in America: Possibility of improvement by statutory changes and constitutional amendments affecting procedure. *American Bar Association Journal*, 11, 510-515.
- Burnham, W. 1999. *Introduction to the law and legal system of the United States*. (2nd ed.). West Group

- Buxton, T. 2002. Foreign solutions to the US pro se phenomenon. *Case Western Reserve Journal of International Law*, 34(1): 103-147.
- Caenegem, W. V. 1999. Advantages and disadvantages of the adversarial system in criminal proceedings. *Law Faculty Publications*. Paper 224: 69-102.
- Caianiello, M. 2011. Law of evidence at the International Criminal Court: Blending accusatorial and inquisitorial models. *North Carolina Journal of International Law and Commercial Regulation*, 36: 287-303.
- Cairns, D. J. 1999. *Advocacy and the making of the adversarial criminal trial 1800-1865*. Oxford University Press.
- Cape, E., Namoradze, Z., Smith, R., & Spronken, T. 2010. Effective criminal defence in Europe - Executive summary and recommendations. In E Cape, Z Namoradze, R Smith & T Spronken (eds), *Effective Criminal Defence in Europe*. *Ius Commune Europaeum*, no. 87, Intersentia, Antwerp, 613-631.
- Carmier, N. L. 2009-2010. Controlling the wrath of self-representation: The ICTY's crucial trial of Radovan Karadzic. *Valparaiso University Law Journal*, 44(3): 957-1013.
- Cassim, F. 2003. The rights of child witnesses versus the accused's right to confrontation: A comparative perspective. *Comparative and International Law Journal of Southern Africa*, 36(1): 65.
- Cavise, L. 2007. The transition from the inquisitorial to the accusatorial system of trial procedure: Why some Latin American lawyers hesitate. *Wayne Law Review*, 53(2): 785-816.
- Cerruti, E. 2009. Self-representation in the international arena: Removing a false right of spectacle. *Georgetown Journal of International Law*, 40, 919-984.
- Chan, G. K. 2007. The right of access to justice: Judicial discourse in Singapore and Malaysia. *Asian Journal of Comparative Law*, 2(1): 1- 40.
- Chernykh, S., & Elkins, Z. 2008. Commitments and diffusion: How and why national constitutions incorporate international law. *University of Illinois Law Review*: 201-238.
- Chynoweth, P. 2009. Legal research. In A. Knight, & L. Ruddock (Eds.), *Advanced research methods in the build environment*. Wiley-Blackwell.
- Colbert, D. L. 2006. Coming soon to a court near you - convicting the unrepresented at bail stage: An autopsy of a state's High Court sua sponte rejection of indigent defendants' right to counsel. *Seton Hall Law Review*, 36: 653-714.

- Colbert, D. L. 2012. When the cheering (for Gideon) stops: The defence bar and representation at initial bail hearings. In *The Champion - Perspectives on Gideon at 50* (pp. 10-14). National Association of Criminal Defence Lawyers.
- Cole, R. J. 2010. Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective. *University of Botswana Law Journal*, 11: 81-116.
- Cole, R. J. 2010. Equality of arms and aspects of the right to a fair trial in Botswana. University of Stellenbosch.
- Commonwealth Human Rights Initiative; UNDP and Open Society Justice Initiative. 2013. *The socioeconomic impact of pre-trial detentions in Ghana*. Open Society Foundations.
- Corrado, M. L. 2009-2010. The future of adversarial systems: An introduction to the papers from the first conference. *North Carolina Journal of International Law and Commercial Regulations*, 35(2): 285-296.
- Correll, M. 2011. Finding the limits of equitable liberality: Reconsidering the liberal construction of pro se appellate briefs. *Vermont Law Review*, 35: 863-899.
- Coughland, S. G. 1993. The "Adversary System": Rhetoric or Reality? *Canadian Journal of Law and Society*, 8(2): 139-170.
- Council of Europe and European Court of Human Rights. 2014. *Guide on Article 6 of the European Convention on Human Rights* 2014. [Online] Available from <http://www.ejtn.eu/PageFiles/15659/2013%20ECtHR%20Case-law%20Guide%20Article%206%20criminal.pdf> [Accessed: 05 November 2016].
- CPS. 2016. *Private Prosecutions*. [Online] Available from http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/ [Accessed: 16 November 2016].
- Cramton, R. C. 2002. Furthering justice by improving the adversary system and making lawyers more accountable. *Fordham Law Review*, 70: 1599-1614.
- Creswell, J. W. 2014. *Research design: Qualitative, quantitative and mixed methods approaches*. 4th ed. Sages Publications.
- Damaška, M. 1973. Evidentiary barriers to convictions and two models of criminal procedure - A comparative study. *University of Pennsylvania Law Review*, Volume 121, 506-589.
- Damaška, M. 1974-1975. Presentation of evidence and fact-finding precision. *University of Pennsylvania Law Review*, 123: 1083-1106.

- Damaška, M. 1975. Structures of authority and comparative criminal procedure. *Yale Law Journal*, 84: 480-544.
- Damaška, M. 1991. *The faces of justice and state authority: A comparative approach to the legal process*. Yale University Press.
- Damaška, M. R. 1997. *Evidence law adrift*. Yale University Press.
- Damaška, M. R. 1998. Truth in adjudication. *Hastings Law Journal*, 49: 289.
- David, M. 2009. *The correspondence theory of the truth*. [Online] Retrieved from Stanford Encyclopaedia of Philosophy: <http://plato.stanford.edu/entries/truth-correspondence/> [Accessed: 03 February 2016]
- Decker, J. F. 1996. The sixth amendment right to shoot oneself in the foot: An assessment of the guarantee of self-representation twenty years after Fareta. *Seton Hall Constitutional Law Journal*, 6(2): 483-598.
- Dershowitz, A. n.d. *Is the criminal trial a search for the truth?* [Online] Available from www.pbs.org/wgbh/pages/frontline/oj/highlights/dershowitz.html [Accessed: 03 December 2015].
- De Speville, B. 2010. Reversing the Onus of Proof: It is Compatible with Respect of Human Rights Norms? [Online] Available from <http://8iacc.org/papers/despeville.html> [Accessed: 10 March 2015]
- Donovan, D. A. 2002. Levelling the playing field: The judicial duty to proceed and enforce the constitutional rights of an accused unrepresented by Counsel. *Ethiopian Law Review*, 27-61.
- Du Plessis, W. 2004. *A self help guide - Research methodology and dissertation writing*. [Online] Available from http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/Du_Plessis_Research_Methodology_FINAL.pdf [Accessed: 20 May 2015].
- Ebbe, O. N. n.d. *World factbook of criminal justice systems*. [Online] Available from <https://www.bjs.gov/content/pub/pdf/wfbcjsg.pdf> [Accessed: 20 August 2015].
- Ebbe, O. N., & Abotchie, C. 2000. Ghana (Post-Traditional Nation-State). In G. Barak (Ed.), *Crime and crime control: A global view* (pp. 49-65). Greenwood Publishing Group Inc.
- Editorial. 2014. *Reviewing the law on criminal prosecutions*. [Online] Available from <http://www.ghanaiantimes.com.gh/reviewing-the-law-on-criminal-prosecution/> [Accessed: 21 November 2016].
- Edmond, G., & Roberts, A. 2011. Procedural fairness, the criminal trial and Forensic Science and Medicine. *Sydney Law Review*, 33: 359-394.

- El-Sheikh, I. A. 1997. Preliminary remarks on the right to a fair trial under the African Charter on human and people's rights. In D. Weissbrodt, & R. Wolfrum (Eds.), *The right to a fair trial*.
- Engler, R. 1999. And justice for all - Including the unrepresented poor: Revisiting the roles of judges, mediators and clerks. *Fordham Law Review*, 67(5): 1987-2070.
- Erasmus, D. 2009. Procedural explanations and choices: The undefended accused in minefield. *Law Democracy and Development*, 13(1): 13-39.
- Essien, V. 2012. *Update: Research Ghanaian Law*. [Online] Available from <http://www.nyulawglobal.org/globalex/Ghana1.htm> (Global law and justice website) [Accessed: 23 May 2015].
- Evans, M., & Murray, R. (Eds.). 2008. *The African Charter on Human and People's Rights, The System in Practice 1986-2006*. 2nd ed. Cambridge University Press.
- Farrow, T. C. 2014. What is access to justice? *Osgoode Hall Law Journal*, 51(3): 957-988.
- Fassler, L. 1991. The Italian penal procedure code: An adversarial system of criminal procedure in continental Europe. *Columbia Journal of Transnational Law*, 29: 245.
- Fedovora, M. I. 2012. *The principle of equality of arms in international criminal proceedings* School of Human Rights Research Series, 55(1).
- Ferreira, G., & Ferreira-Snyman, A. 2014. The incorporation of public international law and regional law against the background of the dichotomy between monism and dualism. *PER/PELJ*, 17(4): 1471-1496.
- Findley, K. A. 2011/2012. Adversarial inquisitions: Rethinking the search for the truth. *New York Law School Review*, 56: 911-940.
- Finegan, S. 2008-2009. Pro se criminal trials and the merging of inquisitorial and adversarial systems of justice. *Catholic University Law Review*, 58(2): 445-499.
- Fines (Penalty Units) (Amendment) Instrument (L.I 1813), 2005. (n.d.).
- Finkelstein, R. 2011. The adversarial system and the search for truth. *Monash University Law Review*, 37(1): 135-144.
- Flowers, R. K. 1999-2000. Prosecution law symposium. *Stetson Law Review*, 29(1).
- Fong, J. 2014. Bringing guns to a fight: Why the adversarial system is best served by a policy compelling attorneys to ethically mine for metadata. *Washington University Jurisprudence Review*, 7(1): 107-130.
- Frank, J. 1950. *Courts on trial*. Princeton University Press.
- Frankel, M. E. 1975. Search for the truth: An umpireal view. *University of Pennsylvania Law Review*, 123(5), 1031.

- Freedman, M. H. 1990. *Understanding lawyers' ethics*. 5th Edition. Carolina Academic Express.
- Freedman, M. H. 1998. Our constitutionalized adversary system. *Chapman Law Review*, 1(1): 58-90.
- Frey, C. 1999. The state v. the self-represented: A Florida prosecutor's concerns when litigating against a pro se defendant in a criminal trial. *Stetson Law Review*, 29(1): 181-194.
- Frimpong, K. 1981-1982. The Contribution of the courts to government. *Review of Ghana Law*, 13 &14: 239-243
- Frimpong, K. 2005-2007. Ghana's contribution to legal development in Botswana. *University of Ghana Law Journal*, 23: 93-128.
- Frosini, J. O. 2015. Ghana: The complements of successful centralization: Checks, balances and informal accommodation. In A. J. Kuperman, *Constitutions and conflicts management in Africa. Preventing civil war through constitutional design* (pp. 117-135). Philadelphia: University of Pennsylvania Press.
- Fuller, H. 2009. From cowries to coins: Money and colonialism in the Gold Coast and British West Africa in the early 20th century. In C. Eagleton, H. Fuller, & J. Perkins, *Money in Africa* (pp. 54-61). London: British Museum Research Publications.
- Fuller, L. L., & Randall, J. D. 1958. Professional responsibility: Report of the joint conference. *American Bar Association Journal*, 44: 1159.
- Fuller, L. L., & Winston, K. I. 1978. The forms and limits of adjudication. *Harvard Law Review*, 92(2): 353-409.
- Gallanter, M. 1974. Why the "haves" come out ahead: Speculations on the limits of legal change. *Law and Society Review*, 9(1): 95-160.
- Gardner, B. A. 2001. *A dictionary of modern legal usage*. Oxford University Press.
- Garner, B. A. 1979. *Black's Law Dictionary*. (5th ed.).
- Gélinas, F., Camion, C., Bates, K., Anstis, S., Piché, C., Khan, M., & Grant, E. 2015. *Foundations of civil justice - Towards a value-based framework for reform*. Springer Publishers.
- Geography of Ghana*. n.d. [Online] Available from <http://geography.about.com/od/ghanamaps/a/ghanageography.htm> [Accessed: 18 December 2015].
- Ghana Bar Association. 2015. *Scale of Fees*. Accra.
- Ghana: Factbook*. 2015, 12 18. [Online] Available from <http://www.indexmundi.com/ghana/>

- Ghanaweb. n.d. *Congestion in Ghana Prisons*. [Online] Available from <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=298552> [Accessed: 03 May 2015].
- Ginzburg, C. 1991. Checking the evidence: The judge and the historian. *Critical inquiry*, 18(1): 84.
- Glenn, H. P. 2006. The aims of comparative law. In J.M. Smits (ed) *Elgar Encyclopaedia of Comparative Law*, Cheltenham: Edward Elgar.
- Goldschmidt, J. 2002. The pro se litigant's struggle for access to justice: Meeting the challenge of bench and bar resistance. *Family Court Review*, 40(1): 36-62.
- Goldstein, A. S. 1974. Reflections on two models: Inquisitorial themes in American criminal procedure. *Stanford Law Review*, 26(5): 1009 -1025.
- Goldstein, A. S., & Goldstein, J. 1971. *Crime, law and society*. Free Press, Collier Macmillan Publishers, London.
- Goldstein, A. S., & Marcus, M. 1977. The myth of judicial supervision in three "inquisitorial" systems: France, Italy and Germany. *Yale Law Journal*, 87(2): 240-283.
- Goodpaster, G. 1986. The adversary system, advocacy and effective assistance of counsel in criminal cases. *New York University Review of Law and Social Change*, 14, 59-92.
- Goodpaster, G. 1987-1988. On the theory of American adversary criminal trial. *Journal of Criminal Law and Criminology*, 78(1): 118-154.
- Government of Ghana. n.d. Ministry of Justice and Attorney-General - Ghana. [Online] Available from <http://ghana.gov.gh/index.php/blog-categories/blog-donec-eu-elit-in-nisi/94-ministries-info/380-ministry-of-justice-attorney-general> [16 August 2017].
- Griffith, B. 1936. *A note of the history of the British Courts in the Gold Coast Colony*.
- Groma, J. 2014. Overall human values in context of institute of criminal procedural compulsory measures. *SHS Web of Conferences 10, 00010*, 1- 6. [Online] Available from <http://www.shs-conferences.org> or <http://dx.doi.org/10.1051/shsconf/2014> [Accessed: 13 may 2016].
- Gross, J. P. 2013-2014. What matters more: A day in jail or a criminal conviction? *William & Mary Bill of Rights Journal*, 22(1): 55-90.
- Grunewald, R. 2014. Comparing injustices: Truth, justice and the system. *Albany Law Review*, 77(3): 1139-1200.
- Gustafsson, M. 2004. On Rawls' distinction between perfect procedural justice. In *Philosophy of Social Sciences*, 34(2): 300-305. Sage Publications.

- H. Lloyd King, J. 1999. Why prosecutors are permitted to offer witness inducements: A matter of constitutional authority. *Stetson Law Review*, 29(1): 155-181.
- Hale, S. B. 2004. *The discourse of court interpreting: Discourse practices of the law, the witnesses and the interpreter*. John Benjamins.
- Hamer, D. 2007. The presumption of innocence and reverse burdens: A balancing act. *The Cambridge Law Journal*, 66(1): 142-171.
- Hamilton, J. 2008. *Non prosecutorial functions of the prosecutor in common law countries*. [Online] Available from European Conference of Prosecutors: https://www.dppireland.ie/filestore/documents/Speech_to_European_Conference_of_Prosecutors_2_July_2008_PDF.pdf [Accessed: 10 October 2016].
- Harr, J. 1995. *A Civil Action*. New York: Random House.
- Harvey, W. B. 1962. The evolution of Ghana since independence. *Law and Contemporary Problems*, 27: 581-604.
- Harvey, W. B. 1966. *Law and social change in Ghana*. N.J: Princeton University Press.
- Harvey, W. B. 2015. *Law and social change in Ghana*. Princeton University Press.
- Hashimoto, E. 2007. Defending the right of self-representation: An empirical look at the pro se felony defendant. *North Carolina Law Review*, 85(2): 423-487.
- Hashimoto, E. J. (2010). Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case. *Boston University Law Review*, 90: 1148-1187.
- Hawkins, W. 1716-1721. *A treatise of the pleas of the crown*. London.
- Hawkinson, A. 2008. The right of self-representation revisited: A return to the star chamber's disrespect for defendant autonomy? [Indiana v. Edwards, 128 S.Ct. 2379]. *Washburn Law Journal*, 48(2): 465-498.
- HelpLaw Ghana. n.d. [Online] Available from <http://www.globalgiving.org/projects/provision-of-legal-aid-for-indigents-in-ghana> [Accessed: 03 May 2015].
- Ho, H. L. 2008. *A philosophy of evidence law: Justice in the search for truth*. Oxford University Press.
- Hodgson, J. 2006. Conceptions of the trial in inquisitorial and adversarial procedure. In A. Duff, L. Farmer, S. Marshall, & V. Tadros, *The trial on trial, Volume 2 Judgment and Calling to Account*. (pp. 233-242). Oxford: Hart Publishing.
- Hoecke, M. V. (Ed.). 2011. *Methodologies of legal research, which kind of research for what kind of discipline?* Hart Publishing Oxford and Portland, Oregon.

- Hoffmann, L. H., & Zeffert, D. T. 1988. *South African Law of Evidence*. Durban: Butterworths.
- Home Office Circular 31/1964, Judges' Rules. 1964.
- Home Office Circular No. 31/1964. *Judges' rules and administrative directions to the police*. London HMSO, 1064.
- Hornberger, J. 2005. *Due process of law*. [Online] Available from Jacob Hornberger "Due Process" o<https://www.lewrockwell.com/2005/03/jacob-hornberger/due-process-of-law/> [Accessed: 24 December 2015].
- Hough, M., Jackson, J., & Braford, B. 2013. Legitimacy, trust and compliance: An empirical test of procedural justice theory using the European social survey. *SSRN Electronic Journal*, 1-26. [Online] Available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234339 [Accessed: 23 December 2015].
- Hunt, L. 1996. *The French Revolution and human rights: A brief documentary history*. (L. Hunt, Ed.)
- III, E. M. 1987. Promoting truth in the courtroom. *Vanderbilt Law Review*, 40(2): 271.
- Itoh, L. 2012. Why South Africa should embrace Gideon: An analysis of the right to counsel and why it should be extended to all defendants. *International Law and Politics*, 44: 951-997.
- Jackson, J. D. 2005. The effects of human rights on criminal evidentiary processes: Towards convergence, divergence or realignment? *Modern Law Review*, 68(5): 737-764.
- Jackson, R. H. 1945. Agreement and Charter, International Conference on Military Trials. London. [Online] Available from <http://avalon.law.yale.edu/imt/jack60.asp> [Accessed: 15 March 2016].
- Johnson, C. 2004-2005. The law's hard choice: Self-inflicted injustice or lawyer-inflicted indignity. *Kentucky Law Journal*, 93(1): 39-142.
- Johnson, R. B., Onwuegbuzie, A. J., & Turner, L. A. 2007. Towards a definition of mixed methods research. *Journal of Mixed Methods Research*, 1(2): 122-133.
- Johnson, T. E. 1966. Judges' rules and police interrogation in England today. *Journal of Criminal Law and Criminology*, 57(1): 85-92.
- Jonakait, R. N. 2009. The rise of the American adversary system: America before England. *Widener Law Review*, 14(2): 323-356.
- Jones, G. B. 2004. *Early Africa*. Milliken Publishing Company.

- Jones, R. K. 2008-2009. Untangling the right to self-representation in the international criminal tribunal for the former Yugoslavia. *Georgia Law Review*, 43(1): 1285-1319.
- Jørgensen, N. H. 2004. Notes and comments - The right of the accused to self-representation before international criminal tribunals. *American Journal of International Law*, 98(4): 711-726.
- Joy, P. A., & McMunigal, K. C. 2005-2006. Are a prosecutor's responsibilities "special"? *Criminal Justice, Volume 20*, 58-61.
- Jr., E. H. 1966. Right to counsel at the preliminary hearing. *Missouri Law Review*, 31(1): 109-126.
- Judicial Training Institute, Ghana. 2011. *The Judiciary of Ghana - Criminal Bench Book*.
- Leitner Centre for International Law and Justice. 2016. *Access to justice in Africa: The experience of legal aid scheme in Ghana*. [Online] Available from <http://leitnercenter.org/news/94>
- K, A. G. 1991-1992. Customary offences and the courts. *Review of Ghana Law*, XVIII, 36-67.
- Keane, A. & McKeown, P. 2008. *The modern law of evidence*. 2nd Edition. Oxford University Press.
- Kelsen, H. 1957. *What is justice? Justice, law and politics in the mirror of science*. Berkeley and Los Angeles: California Press. *American Journal of International Law*, 51(4), 830-834.
- Kempinen, B. 2006. The ethics of prosecutor contact with the unrepresented defendant. *Georgetown Journal of Legal Ethics*, 19: 1147-1185.
- Kessler, A. D. 2004-2005. Our inquisitorial tradition: Equity procedure, due process and the search for an alternative to the adversarial. *Cornell Law Review*, 90: 1181-1276.
- Kessler, A. D. 2012. Recalling past convergence: Equity procedure and the United States' forgotten inquisitorial tradition. *Cuadernos de la Maestria en Derecho*, 2: 45-74.
- Kim, H. B. 1987. Legal education for pro se litigant: Step towards a meaningful right to be heard. *Yale Law Journal*, 96(7): 1641-1660.
- Kimble, D. 1963. *A political history of Ghana 1850-1928*. New York: Oxford University Press.
- Klamberg, M. 2013. *Evidence in international criminal trials: Confronting legal gaps of the reconstruction of disputed events*. Martinus Nijhoff Publishers.
- Knoops, G-J. A. 2004. The dichotomy between judicial economy and equality of arms within international and internationalized criminal trials: A defence perspective. *Fordham International Law*, 28(6): 1595-1644.

- Kohen, A. 2006. The problem of secular sacredness: Ronald Dworkin, Michael Perry and human rights foundationalism. *Journal of Human Rights*, 5: 235-256.
- Kothari, C. R. 2004. *Research methodology. Methods and techniques*. New Age International Publishers.
- Krumrey-Quinn, J. 2012. Enhancing "access to justice": Recognition of informal criminal justice mechanisms in international human rights law. 1-28. [Online] Available from http://www.lawfoundationsa.com.au/resources/Winning_Essays/Essay2012.pdf [10 April 2017].
- Ladd, M. 2004-2005. In the matter of the prosecutor's ethics. *State and Local Law news*, 28: 9-10.
- Landsman, S. 1980. The decline of the adversary system: How the rhetoric of swift and certain justice has affected adjudication in American Courts. *Buffalo Law Review*, 29: 487.
- Landsman, S. 1983. A brief survey of the development of the adversary system. *Ohio State Law Journal*, 44(3): 713-740.
- Landsman, S. 1984. *The adversary system: A description and a defence*. American Enterprise Institute for Public Policy Research.
- Landsman, S. 1988. *Readings on adversarial justice: The American approach to adjudication*. West Publishing Company.
- Landsman, S. 1990. Rise of the contentious spirit: Adversary procedure in the eighteenth century England. *Cornell Law Review*, 75(3): 497-609.
- Landsman, S. 2009. The growing challenge of pro se litigation. *Lewis and Clark Law Review*, 13(2): 439-460.
- Landsman, S. 2010. Nothing for something? Denying legal assistance to those compelled to participate in ADR proceedings. *Fordham Urban Law Journal*, 37(1): 273-302.
- Landsman, S. 2015. Are the federal rules of evidence dynamite? *Boston University International Law Journal*, 33(2): 101-116.
- Langbein, J. 1973. The origins of public prosecution at common law. *American Journal of Legal History*, 17(4): 313-335.
- Langbein, J. H. 1978. The criminal trial before the lawyers. *University of Chicago Law Review*, 45(2): 263.
- Langbein, J. H. 1999. The prosecutorial origins of defence counsel in the eighteenth century: The appearance of solicitors. *Cambridge Law Journal*, 58(2): 314-365.
- Langbein, J. H. 2003. *The origins of the adversary criminal trial*. Oxford University Press.

- Langford, I. 2009. Fair trial: The history of an idea. *Journal of Human Rights*, 8(1): 37-52.
- Latham & Watkins. 2015. Pro bono practices and opportunities in Ghana. In Latham & Watkins LLP for the Pro Bono Institute, *A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions*, pp. 87-91.
- Laudan, L. 2008. *Truth, error and criminal law: An essay in legal epistemology*. Cambridge University Press.
- Lawrence, P., & Aarons, D. 1997. *Unrepresented accused and the language of the magistrates court*. Law, Race and Gender Unit, University of Cape Town.
- Lawyers Committee for Human Rights. 2017. *What is fair trial? A basic guide to legal standards and practice*. [Online] Available from https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf
- Lea, J. 2006. *Criminal court trials in England and Wales*. [Online] Available from <http://www.bunker8.pwp.blueyonder.co.uk/cjs/26905.htm> [03 October 2015].
- Leedy, P. D., & Ormrod, J. E. 2010. *Practical research: Planning and design*. 9th Edition. Upper Saddle River, NJ: Merrill.
- Lefstein, N. 2004. In search for Gideon's promise: Lessons from England and the need for federal help. *Hasting Law Journal*, 55: 835-930.
- Legal Aid Scheme Ghana. 2016. *Welcome to legal aid scheme, Ghana*. [Online] Available from <http://www.legalaidghana.org/web/>.
- Leventon, A. R. 1976. Constitutional law - Criminal procedure - Independent right of self-representation in sixth amendment permits defendant to act as own lawyer at state criminal trials. *Cornell Law Review*, 61(6): 1019-1044.
- Lind, E. A., & Tyler, T. R. 1988. *The social psychology of procedural justice*. Melvin J, Lerner ed.
- Lind, E. A., Kanfer, R., & Early, P. C. 1990. Voice, control and procedural justice: Instrument and non-instrumental concerns in fairness judgments. *Journal of Personality and Social Psychology*, 59(5): 952-995.
- Lininger, T. 2005-2006. Article: Bearing the cross. *Fordham Law Review*, 74(3): 1353-1423.
- Lopez, M. D. 1999. What is justice? (Review of Christian justice and public policy by Duncan B. Forrester). *Brigham Young University Law Journal Review*, 1999(3) 933-992.
- Luban, D. 1984. The adversary system excuse. In D. Luban (Ed.), *The good lawyer - Lawyers' roles and lawyers' ethics* (pp. 86-122). Maryland studies in public philosophy. Totowa, N.J.: Rowman and Allanheld.

- Luban, D. 1988. *Lawyers and justice: An ethical study*. Princeton: Princeton University Press.
- Ma, Y. 2008. Exploring the origins of public prosecution. *International Criminal Justice Review*, 18(2): 190-211.
- Maitland, F. W., & Pollock, S. F. 1923. *History of English law before the time of Edward I* (Volume 2). Making of Modern Law Gale.
- Marcus, M. 1992. Above the fray or into the breach: The judge's role in New York's adversarial system of criminal justice. *Brooklyn Law Review*, 57(4): 1193-1219.
- McBarnet, D. 1981. Magistrates' court and the ideology of justice. *British Journal of Law and Society*, 8(2): 181-197.
- McBarnet, D. 1981. The royal commission and the judges' rules. *British Journal of Law and Society*, 8(1): 109-117.
- McEwen, J. 2012. Self-represented accused and the trial judge's duty to assist. *Advocate Vancouver*, 70(4): 537-548.
- McLaughlin, J. M. 1987. An extension of the right of access: The pro se litigant's right to notification of the requirements of the summary judgment rule. *Fordham Law Review*, 55(6): 1109-1137.
- Meckstroth, M. S. 2014-2015. Note - The case against self-representation in capital proceedings. *Minnesota Law Review*, 99(5): 1935-1973.
- Meernik, J. D. 2002-2003. Equality of arms? The individual v. the international community in war crime tribunals. *Judicature*, 86(6): 312.
- Menkel-Meadow, C. 1996. The trouble with the adversary system in a postmodern, multicultural world. *William and Mary Law Review*, 38(1): 5-44.
- Meuti, M. D. 2004. Legalistic individualism: An alternative analysis of Kagan's adversarial legalism. *Hastings International and Comparative Law Review*, 27: 319-349.
- Milani, A. A., & Smith, M. R. 2002. Playing God: A critical look at sua sponte decisions in appellate courts. *Tennessee Law Review*, 69: 1-72.
- Miller, F. P., Vandome, A. F., & McBrewster, J. (Eds.). 2009. *History of Ghana: Gold Coast (British colony), History of Ghana (1966-1979), Elmina Castle, Ghana Empire, Ashanti Empire, Anglo-Ashanti Wars, John Kufuor, Osei Kofi Tutu, Kofi Abrefa Busia, Ignatius Kutu Acheampong*. Alphascript Publishing.
- Ministry of Justice and Attorney-General Department, Medium Term Expenditure Framework for 2017-2019, 2017 Budget Estimates. (2017). [Online] Available from <https://www.mofep.gov.gh/sites/default/files/pbb-estimates/2017/2017-PBB-MoJAGD.pdf> [Accessed: 16 August 2017]

- Moohr, G. S. 2004. Prosecutorial power in an adversarial system: Lessons from current white collar cases and the inquisitorial model. *Buffalo Criminal Law Review*, 8(1): 165-220.
- Morhe, R. A. S. 2012. An overview of legal aid for criminal cases in Ghana: The history and challenges of providing legal aid. *Commonwealth Law Bulletin*, 38(1): 105-117.
- Moulton, J. 1983. A paradigm of philosophy: The adversary method. In S. Harding, & M. B. Hintikka, *Discovering reality: Feminist perspectives on epistemology, metaphysics, methodology, and philosophy of science* (pp. 149-164). Kluwer Academic Publishers.
- Mourer, S. A. 2015. Believe it or not: Mitigating the negative effects, personal belief and bias on the criminal justice system. [Online] Available from http://works.bepress.com/sarah_mourer/3 [Accessed: 29 October 2015].
- Mutungi, O. K. 2001. The Constitutionalization of Basic Rights. *KECKRC Constitution of Kenya Review Commission*. [Online] Available from <http://www.commonlii.org/ke/other/KECKRC/2001/4.html> [Accessed: 06 August 2016].
- Mwalili, J. J. 1997. *The role and function of prosecution in criminal justice*. Resource Material Series No.53, 218-236. [Online] Available from http://www.unafei.or.jp/english/pdf/RS_No53/No53_23PA_Mwalili.pdf [Accessed: 04 October 2016].
- Myers, M. S. 1975-1976. A fool for a client: The supreme court rules on the pro se right. *University of Pittsburgh Law Review*, 37: 403-415.
- Naor, M. 1990. Procedure and evidence in criminal trials. *Israel Law Review*, 24(3-): 622-627.
- Negri, S. 2005. The principle of "equality of arms" and the evolving law of international criminal procedure. *International Criminal Law Journal*, 5(4): 513-571.
- Newman, G. L. 2002-2003. Human rights and constitutional rights: Harmony and dissonance. *Stanford Law Review*, 55(5): 1863-1900.
- Ogg, J. T. 2013. Adversary and adversity: Converging adversarial and inquisitorial systems of justice - a case study of the Italian criminal trial reforms. *International Journal of Comparative and Applied Criminal Justice*, 37(1): 31-61.
- Olsen, C., & George, M. M. 2004. *Cross-sectional design and data analysis*. College Entrance Examination Board.
- Opoku-Agyemang, M. 2009. *Constitutional law and history of Ghana*. Admax Series.
- Ormerod, D. 2011. *Smith and Hogan's criminal law* (13th Edition). Oxford University Press.
- OSIWA, AfriMap, & IDEG. 2007. *Ghana: Justice Sector and the Rule of Law*. Open Society Initiative for West Africa. A review: Discussion paper.

- Padmore, G. 1953. *The Gold Coast revolution: The struggle of an African people from slavery to freedom*. London: Dennis Dobson Ltd.
- Parisi, F. 2002. Rent-seeking through litigation: Adversarial and inquisitorial systems compared. *International Review of Law and Economics*, 22(2): 193-216.
- United States Institute for Peace. *Chapter 4: Rights of the suspects and the accused*. [Online] Available from <http://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf> [Accessed: 06 August 2016].
- Peachy, P. 2014. Two-tier justice: Private prosecution revolution. *Independent*. [Online] Available 2016, from <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html> [Accessed: 16 November 2016].
- Pearson, J. H. 1984. Mandatory advisory counsel for pro se defendants: Maintaining fairness in the criminal trial. *California Law Review*, 72(4): 697-719.
- Piper, A., & Finnane, M. 2017. Access to legal representation by criminal defendants in Victoria 1861-1961. *University of New South Wales Law Journal*, 40(2): 638-663.
- Pizzi, W. T. 1999. *Trials without truth*. New York University Press.
- Quansah, E. 2010. An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana. In M. Killander (Ed.), *International law and domestic human rights litigation in Africa* (pp. 37-57). Pretoria University Law Press.
- Quashigah, K. 2008. The historical development of the legal system of Ghana: An example of co-existence of two systems of law. *Fundamina*, 14(2), 95-114.
- Rawls, J. 1999. *A theory of justice*. The Belknap Press of Harvard University Press, Cambridge, Massachusetts.
- Read, J. S. 1962. Ghana: The criminal code, 1960. *The International and Comparative Law Quarterly*, 11(1): 272-279.
- Read, J. S. 1963. Criminal law the Africa of today and tomorrow. *Journal of African Law*, 7(1): 5-17.
- Redwar, H. W. H. 1909. *Comments on some ordinances of the Gold Coast Colony with notes on few decided cases*. London: Sweet and Maxwell.
- Rhode, D. L., & Schwartz, M. L. 1985. Ethical perspectives on legal practice. *Stanford Law Review*, 37: 589-595.
- Richard, U. H. 1999. *The titled playing field: Is criminal justice unfair?* New Haven: Yale University Press.

- Ristea, I. 2009. The protection of human rights in criminal law. 3 *Contemporary Readings in Law and Social Justice*, 3(2): 278-283.
- Roberts, P., & Zuckerman, A. 2010. *Criminal evidence* (2nd Edition.). Oxford University Press.
- Robinson, P. (2010). The right to a fair trial in international law, with specific reference to the work of the ICTY. *Publicist*, - *Online Publication of the Berkeley Journal of International Law*, 3. [Online] Available from <http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html> [Accessed: 20 April 2016].
- Rodell, F. 1949. Courts on Trial: Myth and Reality in American Justice by Jerome Frank. *Indiana Law Journal*, 25(1): 114-119.
- Roodt, C. 2003. Fact finding, fairness and judicial participation in criminal proceedings. *Codicillus*, XLIV(2): 68-85.
- Roodt, C. 2004. A historical perspective on the accusatory and inquisitorial systems. *Fundamina*, 10: 137-158.
- Rubinson, R. 2015. There is no such thing as litigation: Access to justice and the realities of adjudication. *The Journal of Gender, Race and Justice*, 18(1): 185-210.
- Sabelli, M., & Leyton, S. 2000. Train wrecks and freeway crashes: An argument for fairness and against self-representation in the criminal justice system. *Journal of Criminal Law and Criminology*, 91(1): 161-236.
- Saltzburg, S. A. 1978. The unnecessarily expanding role of the American trial judge. *Virginia Law Review*, 64: 1-81.
- Salzburg, S. 1985-1986. Lawyers, clients and the adversary system. *Mercer Law Review*, 37: 647-700.
- Sanders, A., & Young, R. 2000. *Criminal Justice*. Butterworths.
- Sarbah, J. M. 1906. *Fanti National Constitution*. London.
- Scharf, M. P. 2006. Self-representation versus assignment of defence counsel before international criminal tribunals. *Journal of International Criminal Justice*, 4(1): 31-46.
- Scharf, M. P., & Rassi, C. M. 2005. Do former leaders have an international right to self-representation in war crimes trials? *Ohio State Journal on Dispute Resolution*, 20(1): 3-41.
- Schwartz, M. L. 1983. The zeal of the civil advocate. *American Bar Foundation Research Journal*, 8(3): 543-563.

- Schwikkard, P. 2012. A constitutional revolution in South Africa criminal procedure? In P. Robert, & J. Hunter. (eds), *Criminal evidence and human rights: Reimagining common law tradition*.
- Scieszinski, A. J. 2012-2013. Not on my watch: One judge's mantra to ensure access to justice. *Drake Law Review*, 61(3): 817-844.
- Sevier, J. 2013. The truth-justice tradeoff: Perceptions of decisional accuracy and procedural justice in adversarial and inquisitorial legal systems. *Psychology, Public Policy and Law*, 20. [Online] Available Retrieved 11 03, 2015, from <http://ssrn.com/abstract=2396962> [Accessed: 03 November 2015].
- Shapiro, B. J. 1986. To a moral certainty: Theories of knowledge and Anglo-American juries 1600-1850. *Hastings Law Journal*, 38: 153.
- Shroeder, P. 2010. *The adversarial legal system: Is justice served*. [Online] Available from <http://www.thelawinsider.com/insider-news/the-adversarial-legal-system-is-justice-served/> [Accessed: 20 October 2015].
- Silbert, J. E., & Doufekisas, J. D. 2006. Under the pressure to catch the crooks: The impact of corporate privilege waivers on the adversarial system. *American Criminal Law Review*, 43: 1225.
- Silver, J. S. 1990. Equality of arms and the adversarial process: A new constitutional right. *Wisconsin Law Review*, 1007-1041.
- Skillern, F. L. 1976. Taming the dragon: An administrative law for prosecution decision-making. *American Criminal Law Review*, 13: 473.
- Slater, D. L., & Finck, K. R. 2011. *Social work practice and the law*. Springer Publishing Company.
- Slobogin, C. 2014. Lessons from inquisitorialism. *Southern California Law review*, 87(3): 699- 732.
- Sobel, A. D. 2002. What is justice? *Judicature*, 85: 170-170.
- Sogabe, K. R. 2000. Exercising the right to self-representation in United States v. Farhad. *Golden Gate University Law Review*, 30(1): 129-166.
- Speville, B. D. 2017. *Reversing the onus of proof: Is it compatible with respect for human rights norms*. IACC. 8th International Anti-corruption Conference. [Online] Available from <http://8iacc.org/papers/despeville.html>
- Spottswood, M. 2015. Ordering proof: Beyond adversarial and inquisitorial trial structures. *Tennessee Law Review*, 83. Scholarly Publications.
- Stacy, T. 1991. The search for the truth in constitutional criminal procedure. *Columbia Law Review*, 91(6): 1369-1451.

- Steytler, N. 1998. *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa, 1996*. Butterworths.
- Steytler, N. C. 1988. *The undefended accused at trial*. Juta.
- Storm, L. 2016. *Criminal procedure*. Lulu Publishing.
- Strauss, K. E. 2005-2006. Between the defendant's Scylla and Charybdis: Brooks v. McCaughtry and the right to a fair trial and the right to self-representation. *University of Toledo Law Review*, 37(1): 235.
- Strier, F. 1996. *How much justice can you afford?* University of Chicago Press.
- Stuntz, W. J. 1995. The substantive origins of the criminal procedure. *Yale Law Journal*, 105(2): 393- 417.
- Summers, S. 2007. *The European criminal procedure tradition and the European court of human rights*. Oxford: Hart, Publishing.
- Swank, D. 2005. The pro se phenomenon. *Brigham Young University Journal of Public Law*, 19(2): 373-386.
- Swank, D. A. 2005. In defence of rules and roles: The need to curb extreme forms of pro se assistance and accommodation in litigation. *American University Law Review*, 54(6): 1537-1591.
- Sward, E. E. 1989. Values, ideologies and the evolution of the adversary system. *Indiana Law Journal*, 64(2), 301-355.
- Talen, A., & Alhstrand, T. 2011. The public prosecutor, its role, duties and powers in the pre-trial stage of the criminal process - A comparative study of the French legal systems. *Revue Internationale de Droit Pénal*, 82(3-4): 523- 540.
- Taylor, J. N. 1993-1995. The scope of human rights in Ghana. *Review of Ghana Law*, 19: 84-105.
- Teddlie, C., & Tashakkori, A. 2011. Mixed methods research: Contemporary issues in an emerging field. In N. K. Denzin, & Y. S. Lincoln (Eds.), *The Sage handbook of qualitative research* (p. 285).
- Tetteh, S. K. 2011. *Civil procedure - A practical approach*.
- The Word Factbook*. n.d. [Online] Available from <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> [15 December 2015].
- The Yale Law Journal Notes. 1976-1977. The jailed pro se defendant and the right to prepare a defence. *Yale Law Journal*, 86(2): 292-316.

- Thibaut, J., & Walker, L. 1975. *Procedural justice: A psychological analysis*. Hillsdale, NJ Erlbaum.
- Thibaut, J., & Walker, L. 1978. A theory of procedure. *California Law Review*, 66: 541.
- Thornburg, E. G. 1995. Metaphors matter: How images of battle, sports and sex shape the adversary system. *Wisconsin Women's Law Journal*, 10: 225-281.
- Tomkovicz, J. 1988. An adversary system defence of the right to counsel against informants: Truth, fair play, and the Massiah Doctrine. *University of California Davies Law Review*, 21(1): 1-92.
- Tomkovicz, J. J. 2002. *The right to the assistance of counsel: A reference guide to the United States constitution*. Greenwood Publishing Group.
- Trechsel, S. 2002. Comparative observations on human rights law and criminal law. *St. Louis-Warsaw Transatlantic Law Journal*, 2000: 1-27.
- Trechsel, S. 2011. The significance of international human rights for criminal procedure. *National Taiwan University Law Review*, 6: 178-204.
- Tulkens, F. 2011. The paradoxical relationship between criminal law and human rights. *Journal of International Criminal Justice*, 9(3): 577-595.
- Tuzet, G. 2012. Arguing on facts: "Truth, trials and adversary procedures". In C. Dahlman, & E. Feteris, *Legal argumentation theory: Cross-disciplinary perspectives* (pp. 207-224).
- Tyler, T. R. 2006. Psychological perspectives on legitimacy and legitimation. *Annual Review of Psychology*, 57: 375-400.
- Tyler, T. R. 2007. Court review: Volume 44, Issue 1/2 - Procedural Justice and the Courts. *The Journal of the American Judges Association*, 44(1-2): 26-31.
- UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. 1994. Report of the sub-commission on prevention of discrimination and protections of minorities on its 46th session, U.N. Doc. E/CN.4/Sub.2/1994/24. [Online] Available from <http://hrlibrary.umn.edu/demo/1994min.html> [Accessed: 06 June 2016].
- UNAFEI. 2017. *Relationship Between the Prosecution with the Police and Investigative Responsibility. Resource Materials Series N. 53-29RC-Group 1*. [Online] Available from http://www.unafei.or.jp/english/pdf/RS_No53/No53_29RC_Group1.pdf [Accessed: 15 February 2017].
- United Nations Human Rights. 2016. *What are human rights?* [Online] Available from <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> [Accessed: 17 May 2016].

- United Nations Office on Drugs and Crime - Access to Legal Aid in Criminal Justice Systems in Africa – Survey Report (2011).
- Uviller, R. H. 1999 *The titled playing field: is criminal justice unfair?* New Haven: Yale University Press.
- Van der Walt, T., & de la Harp, S. 2005. The right to pre-trial silence as part of the right to a free and fair trial: An overview. *African Human Rights Law Journal*, 5(1): 70-88.
- Van Kessel, G. 1991-1992. Adversary excesses in the American criminal trial. *Notre Dame Law Review*, 67: 403-451.
- Walpin, G. 2003. America's adversarial and jury systems: More likely to do justice? *Harvard Journal of Law and Public Policy*, 26(1): 175-186.
- Wash, D. 2002. *Criminal procedure*. Thompson Round Hall.
- Webster's Third New International Dictionary of the English Language Unabridged*. 1961.
- Weigend, T. 2003. Is the criminal process about truth? A German perspective. *Harvard Journal of Law and Public Policy*, 26: 168.
- Weigend, T. 2011. Should we search for the truth, and who should do it? *North Carolina Journal of International Law and Commercial Regulation*, 36(2): 389-415.
- Weinstein, J. 1997-1998. And never the twain shall meet: The best interest of children and the adversary system. 52(1), 80-175.
- Weinstein, J. B. 1966. Some difficulties in devising rules for determining truth in judicial trials. *Columbia Law Review*, 66(2): 223-246.
- Weissbrodt, D. S. 2001. *The right to a fair trial under the universal declaration of human rights and the international covenant on civil and political rights*. Martinus Nijhoff Publishers.
- Westerman, P. C. 2011. Open or autonomous? The debate on legal methodology as a reflection on the debate on law. In M. V. Hoecke, *Methodologies of legal research* (pp. 87-110). Oxford and Portland, Oregon.
- White, J. P. 1992. Rethinking the standards for waiver of counsel and proceeding pro se in Iowa. *Iowa Law Review*, 78: 205.
- Wigmore, J. H. 1974. *Evidence in trial at the common law* (Volume 5). (J. H. Chadbourn, Ed.) Little, Brown.
- William J. Brennan, J. 1961. The bill of rights and the States. *New York University Law Review*, 36: 761.
- Wm. C. Plouffe, J. 2012. Adversarial justice. In W. R. Miller, *The history of crime and punishment in America* (pp. 18-19). Sage publications.

- Worldreader "Literacy in Ghana".* n.d. [Online] Available from <http://www.worldreader.org/wp-content/uploads/2015/07/Ghana-Literacy.pdf> [Accessed: 15 December 2015].
- Wright, R. F. 2012. Community prosecution, comparative prosecution. *Wake Forest Law Review*, 47: 361.
- Yeboa, K. Y. 1991-1992. The history of the Ghana legal system: The evolution of unified system of court. *Review of Ghana Law*, XVIII: 1-35.
- Young, W. G., Pollets, J. R., & Poreda, C. 2008. *Operation of the adversary system - Purpose of the law of evidence, 19 Mas. Practice: Evidence s 120.1* (2nd ed.).
- Zacharias, F. C. 1991. Structuring the ethics of prosecutorial trial practice: Can prosecutors do justice? *Vanderbilt Law Review*, 44(1): 45-114.
- Zuckerman, A. 2014. No justice without lawyers - The myth of an inquisitorial solution. *Civil Justice Quarterly*, 34(3): 355-374.

CASES

- Ababio & others v. Mensah & others* [1989-1990] 1 GLR 560-572.
- Abiam v. The Republic* [1976] 1 GLR 270-272.
- Adjei-Ampofo v. Attorney-General* [2003-2004] 1 SCGLR 411 (Supreme Court).
- Adusei II v. The Republic* [1975] 2 GLR 225-242 (High Court).
- Afenuvor v. The Republic* [1961] 2 GLR 655.
- Affail v. The Republic* [1975] 2 GLR 69.
- Agbo Kwashie & Solomon and Solomon Sawa v. The Republic* [1998] CA No. 2/98.
- Agogrobisah v. The Republic* [1995-1996] 1 GLR 557-581.
- Air Canada v. Secretary of State for Trade* [1983] No.2, 2 A.C 394.
- Akrong v. The Republic* [1968] GLR 748-754.
- Al Rawi v. Security Service* [2010] EWCA Civ. 482.
- Alan William Hodgson* [2009] No. J3/1/2009 (Supreme Court 07 15, 2009).
- Aliboeva v. Tajikistan* [2001] Communication No. 985 (ECHR 2001).
- Alpha Zabrama v. The Republic* [1976] 1 GLR 291.
- Amidu v. President Kuffour* [2001-2002] SCGLR 86 (Supreme Court).

Amoo v. The State [1967] GLR 67-75.

Anang v. The Republic [1984-1986] 1 GLR 458.

Annoh v. Commissioner of Police [1963] 2 GLR 460.

Apaloo and others v. The Republic [1978] 1 GLR 156.

Appiah v. The Republic 2 GLR 377 (1987-1988).

Argersinger v. Hamlin [1972] 407 US 25.

Armah Mensah v. The Republic [1971] 2 GLR 17-24.

Artic v. Italy [1980] Application No. 6694/74 (ECHR).

Asaah alias Asi v. The Republic [1978] GLR 1-4.

Asante v. The Republic [1972] 2 GLR 177-197.

Asare & others v. The Republic (No.3) [1968] GLR 804-925.

Asare alias Fanti v. The State [1964] GLR 70.

Atinga Frafra v. The Republic [1968] GLR 85-88.

Avegavi v. The Republic [1971] 1 GLR 428-438.

Banda v. The Republic [1975] 1 GLR 52-59 (High Court).

Barnabas Adjei v. The Republic [2009] CA No. E12/32/09 (unreported) (03 30, 2009).

Barreto Leiva v. Venezuela [2009] Inter-American Court (2009) §62.

Bediako v. The Republic [1976] GLR 39.

Billa Moshoe v. The Republic [1977] 2 GLR 418.

Bilson v. Apaloo [1981] GLR 24-103 (High Court).

Bonsu alias Benjillo v. The Republic [1999-2000] 1 GLR 199-236.

Brempong II v. The Republic [1997-1998] 1 GLR 467.

British Airways v. Attorney-General [1997-1998] 1 GLR 55-75.

Chidia v. The Republic (Practice Note), [1978] 1 GLR 81-82.

Clifford Broni Bediako v. The Republic [2010] Suit No. H2/1/2010 delivered [16/12/2010] (Court of Appeal).

Clifford Broni Bediako v. The Republic [31/07/2008] Suit No. E2/1/2010.

Colorado vs. Connelly [1986] 479 U.S. 157.

Commissioner of Customs and Excise v. A & D Goddard (a firm) [2001] S. T. C 725.

Commissioner of Police v. Sem [1962] 2 GLR 77-82.

Commissioner of Police v. Sencherey [1959] GLR 225-229.

Cossier v. Avadetsi (Practice Note) [1968] GLR 985-986.

Crawford v. Washington [2004] 54 US 36.

Dabla & ors v. The Republic [1980] GLR 501-520.

Darkurugu v. The Republic [1989-1990] 1 GLR 308-324.

Dayana v. Turkey [2009] (7377/03), European Court (2009).

Dochie v. The State [1965] GLR 208.

Dom v. The Republic (Practice Direction) [1968] GLR 767.

Donkor v. The Republic [1961] GLR 694-695.

Dorvlo v. The Republic [2001-2002] 1 GLR 679-690.

Duru v. The Republic [2014] 71 GMJ 186-200.

Emmanuel Kwame Debrah v. Daniel Afari Larbi [2008] Suit No. E1/35/2008 [30/07/2008].

Ennin v. The Republic [1976] 1 GLR 326.

Escobedo v. Illinois [1963] 378 US 378.

Faretta v. California [1975] 422 US 806.

Francis Agyare v. The Republic [2016].

Ferdinand Nahimana, Jean Bosco Barayagwiza & Hassan Ngeze v. The Prosecutor [2007] ICTR-99-52-A (11 28, 2007)

Gabrielle Joanne v. The Republic [2012] 47 GMJ 1-60.

Gideon v. Wainwright [1963] 372 U.S. 335.

Godinez v. Moran [1993] 509 US 389 (Supreme Court).

Gorman v. The Republic [2003-2004] SCGLR 784 (Supreme Court).

Granger v. KU [1990] Application No. 11932/86 (ECHR).

Gyan alias Amoah v. Dabrah [1974] 2 GLR 318.

Hadi Jemaldeen v. A-Z Law Solicitors [2012] EWCA Civ. 1431.

Hausa v. The Republic [1981] GLR 840-847.

In Re Ashalley Botwe Lands, Adjetey Agbosu v. Kotey [2003-2004] SCGLR 420 (Supreme Court of Ghana).

Isa v. The Republic [2001-2002] 2 GLR 298-334.

Isaac Cofie v. The Republic [2008] Suit No. E2/87/08, delivered [31/07/2008] (High Court).

Issah Amadu v. The Republic [2008] Case No. D16/04/08 (unreported).

James Awuku v. The Republic [21/06/2010] Case No. F22/24/2010.

Johnson v. Zerbst [1938] 304 U.S. 458.

Jones v. National Coal Board [1957] 2 QB 55.

Juma v. Attorney-General [2003] AHRLR 179.

Klutse v. The Republic [1968] GLR 761-766.

Kofi alias Fiozo v. The State [1965] GLR 28-2.

Kombat v. Lambim [1989-1990] 1 GLR 324.

Kpekero v. The Republic [1980] GLR 580-591.

Kwaku v. The Republic [1978] GLR 279.

Kwakye v. Attorney-General [1981] GLR 944 -1071.

Lanquaye v. The Republic [1976] 1 GLR 1.

Liesbeth Zegveld and Mussie Ephrem v. Eritrea [2003] (250/2002), African Commission, 17th Annual Report.

Linda Edzidzor & Joshua Edzidzor v. The Republic [2014] 70 GMJ 87-117.

Lindon v. Australia [1995] Communication No. 646 (ECHR).

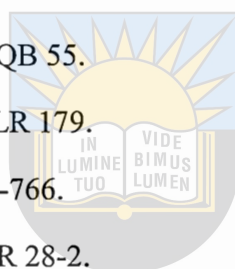
Lucien v. The Republic [1977] 1 GLR 351-359.

Mackey v. Montrym [1979] 443 US 1.

Marfo v. The Republic [1981] GLR 722 -728 725.

Martin Kpebu v. Attorney-General [2016] [05/05/2016] Case No. J1/13/2015 (Supreme Court).

Martinez v. Court of Appeals [2000] 528 U.S. 152.



University of Fort Hare
Together in Excellence

Massiah v. United States [1964] 377, US 201.

Miranda v. Arizona [1966] 384 US 436.

Mireku v. The Republic [1997-1998] 1GLR 925.

Mohammed Abdulai v. The Republic [17/09/2007] Case No. F22/6/07.

Moro v. The Republic [1979] GLR 256-262 (High Court).

Murray v. United Kingdom [1996] 22 EHRR 22.

Mywill Limited v. Issah Abdulai [2008] [24/02/ 2008] Case No. E12/38/07

National Patriotic Party v. Attorney-General [1996-1997] SCGLR 729 (Supreme Court).

New Patriotic Party v. Inspector-General of Police [1993-1994] 2 GLR 459 (Supreme Court).

Nkansah v. The Republic [1980] GLR 184 - 189.

Nsor Ayine v. The Republic [7/05/2010] Case No. D15/10/2010.

Nti v. The State [1965] GLR 7.

Nyina v. Commissioner of Police [1964] GLR 452.

Official Solicitor v. K [1965] AC 201.

Ofori v. The State [1963] 2 GLR 452.

Okoe v. The Republic [1976] 1 GLR 80.

Okorie alias Ozuzu and another v. The Republic [1974] 2 GLR 2727-282 (Court of Appeal)

Okyere & another v. The Republic [1972] 1 GLR 99-109.

Oppon v. Ackinie [1887] Sar FCL 232.

Oregon vs. Hass [1975] 420 U.S. 714.

Osei v. The Republic No.2 [1974] 1 GLR 449-454.

Pakelli v. Germany [1983] Application No 83981/78 (ECHR).

Pension vs. Ohio [1988] 488 US 75.

Polk County v. Dodson [1981] 454 US 312.

Powell v. Alabama [1932] 287 U.S. 45.

Prosecutor v. Jean Paul Akayesu [2001] ICTR-96-4-A (ICTR 11 23, 2001)

Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao [2009] SCSL-04-15-T (03 02, 2009)

Prosecutor v. Milošević [2003] No. IT-02-54. (ICTY 04 04, 2003). [Online] Available from <http://www.un.org/icty/milosevic/trialc/decision-e/04043.htm> [Accessed: 22 April 2016]

Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa [2004] SCSL 04-14-T (06 08, 2004)

Prosecutor v. Sesay, Kallon and Gbao [2004] SCSL-04-15-T (07 06, 2004)

Prosecutor v. Slobodan Milosevic [2004] IT-02-54-T (ICTY 09 22, 2004).

Prosecutor v. Tadic [1999] Case No. 11-94-1-A (ICTY 07 15, 1999).

Prosecutor v. Vojislav Šešelj [2003] IT-03-67-PT (ICTY 05 03, 2003). [Online] Available from www.un.org/icty/seselj/trialc/decision-e/030509.html [Accessed: 15 April 2016].

Quagraine v. Adams [1981] GLR 599.

Quaranta v. Switzerland [1991] Application No.12744/87 (ECHR).

R v. Swain [1991] 1 S.C.R 933.

R v. Woodward [1944] KB 118.

Re Akoto [1961] 2 GLR 523 (Supreme Court).

Regina v. Christie [1914] AC 545.

Republic v. Adu Boahen & ors. [1993-1994] 2 GLR 324-342.

Republic v. Bossman & ors. [1968] GLR 595-606.

Republic v. Bright [1974] 2 GLR 12.

Republic v. High Court (Fast Track Division), Ex parte Tsatsu Tsikata, [2007-2008] SCGLR 1200-1229.

Republic v. Isaac Taye [2008] F12/67/2008 (High Court 6 2008, 19).

Republic v. Leckey [1943] ALL ER 665.

Republic v. Lukman & another [2003-2005] 1 GLR 125-134.

Republic v. Nana Osei Kwadwo II [2008] [07/11/2008] CA No.2/2002 (Supreme Court).

Republic v. Registrar of High Court, ex parte Attorney-General [1982-1983] GLR 407.

Republic v. Selormey [2001-2002] 2 GLR 424-456.

Republic v. Tsatsu Tsikata [2003-2004] SCGLR 1068.

Saidova v. Tajikistan [2001] Communication No. 964 (ECHR).

Salduz v. Turkey [2008] (36391/02), European Court Grand Chamber.

Salifu & another v. The Republic [1974] 2 GLR 291-303.

Sammy Crabbe v. Attorney-General [2009] [18/08/2009] HRCM 04/09 (High Court -Human Rights Division).

Sasu & another v. Amuah-Sekyi & ano [1987-1988] 1 GLR 294-312 (Supreme Court)

Scott v. Illinois [1979] 440 U.S. 367.

Sealar Tarza v. The Republic [29/07/2008] Suit No. E2/87/08.

Seidu v. The Republic [1978] GLR 65.

Sene & another v. The State [1977] 1 GLR 434-440.

Slobodan Milošević v. Prosecutor [2004] IT-02-54- AR 73.7 (ICTY 11 1, 2004).

State v. Banful [1965] GLR 433-444.

State v. Khanyile & another [1988] (3) SA 795 (N).

State v. Mawuko Aholo (Practice Note) [1961] 2 GLR 626.

State v. Otchere & others [1963] 2 GLR 463.

Strickland v. Washington [1984] 466 U.S. 668.

Tanoh alias Obeng v. The Republic [1971] 2 GLR 482.

Terry v. Ohio [1968] 392 U.S. 1.

Teye and Bardjo v. The Republic, [1974] 2 GLR 438-445.

Tsikata v. The Republic [2003-2005] 2 GLR 294.

Tuffuor v. Attorney-General [1980] GLR 637.

United States v. Chronic [1984] 466 US 648.

United States v. Farhard [1999] F.3d 1097 (9th Cir 1999).

United States vs. Havens [1980] 446 U.S. 620.

Wewura Feli v. The Republic [02/07/2010] Case No. D16/21/09.

Wiafe v. Kom [1973] 1 GLR 240.

Woolmington v. DPP [1953] AC 462; [1936] 25 Cr. App. R. 72.

Yeboah & another v. The Republic [1999-2000] 1 GLR 149.

Yeboah v. J. H. Mensah [1998-1999] SCGLR 492 (Supreme Court).

Yuill v. Yuill [1945] 2 All ER 183.

Zanaibu Naske Bako-Alhassan v. Attorney-General [2013] Suit No. J1/22/2012 (04 24, 2013).

Zuta Kwabena alias Kwadwo Donkor v. The State [1963] 2 GLR 545-553.

STATUTES AND INTERNATIONAL INSTRUMENTS

Constitution of the Republic of Ghana (1992).

Constitution of the Republic of South Africa (1996).

Courts Act of Ghana, 1993 (Act 459).

Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

Criminal Offences Act, 1960 (Act 29).

Evidence Act, 1975 (Act 323).

Ghana Code for Prosecutors (not dated)

Ghana Police Service Act, 1970, (Act 350).

International Association of Prosecutors. *Standards of professional responsibility and statement of the essential duties and rights of prosecutors* (1999).

International Covenant on Civil and Political Rights (1966).

Juvenile Justice Act, 2003 (Act 653).

Law Officers Act of Ghana 1974 (NRDC 279).

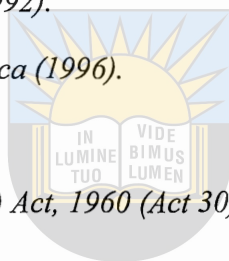
Laws of Ghana (Revised Edition) Act, 1998 (Act 562).

Legal Service Act of Ghana, 1993 (PNDCL 320).

Limitation Decree, 1972 (NRDC 54).

Lower Courts and Tribunals Instruments, 1993 (L.I 1574).

National Redemption Council Decree of Ghana 1974 (Act 279).



University of Fort Hare
Together in Excellence

Penal Reform International. *Lilongwe declaration on accessing legal aid in the criminal justice system in Africa*. Conference on legal aid in Criminal Justice: the role of lawyers, non-lawyers and other service providers in Africa. (2004).

The Constitution, Code of Ethics and Regulations of the Ghana Bar Association (1994).

UN Human Rights Committee. *General Comment no 32, article 14. Right to Equality before the Courts and Tribunals and to a Fair Trial*- U.N. Doc. CCPR/C/GC/32. (2007) [Online] Available from <http://www.refworld.org/docid/478b2b2f2.html> [Accessed: 20March2015].

UN Human Rights Committee. *General Comment 35, article 9 (Liberty and security of person)*, CCPR/C/GC/35. (2014) [Online] Available from <http://www.refworldl.org/docid/553e0f984.html>

United Nations *Guidelines on the Role of Prosecutors*. United Nations Congress on the Prevention of Crime and Treatment of Offenders (1990).

United Nations. *Draft body of principles on the right to fair trial and remedy*. U.N. Doc. E/CN.4/Sub.2/1994/24 (1994.)

United Nations. *Principles and guidelines on legal aid in criminal justice systems*. UN/RES/67/184 (2012).

United States Constitution.

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