



# The Legal Environment of Business and the – Sources of Ghanaian Law

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## INTRODUCTION

The Ghanaian legal system is pluralistic. This article is concerned with the main sources of law in that system. Article 11 of the 1992 Constitution states these plural sources of State law to include the Constitution, statutes, orders, rules and regulation, the existing law and Ghanaian common law. On completion of this chapter, you should be able to outline, discuss and distinguish between the various sources of Ghanaian law.

## SOURCES OF GHANAIAN LAW

Article 11 (1) of the 1992 Constitution of Ghana states the sources of Ghanaian law as following:

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- The Constitution
- Enactments made by or under the authority of the Parliament.
- Orders, Rules and Regulations made by persons or authorities acting under powers conferred by the Constitution.
- The Existing law, and
- The Common law.

## THE CONSTITUTION

A Constitution is a supreme legal document that expresses the fundamental laws or principles by which a state or an organization is governed. The 1992 Constitution is one such example. It establishes the primary laws that govern Ghana, as well as the institutions of governance, among them, the executive, legislature and the judiciary. Article 1(2) declares the Constitution to be the supreme law. All other laws in Ghana must therefore conform to or be compatible with the Constitution.

The provisions of 1992 Constitution are arranged in articles and clauses. Knowledge of these provisions is vital to all business entities, since many of them impose compliance duties on business entities, (remember that businesses are deemed to be artificial legal persons).<sup>2</sup>

The human right provisions in Chapter 5 of the Constitution apply to business of all strips. Every business entity is under an obligation to respect and uphold human rights at the workplace. For example, the Constitution of Ghana explicitly prohibits the use of slave or forced labour (Article 16) at any place of work (office, farm, camp etc), it prohibits companies from polluting the environment (Article 46), and similarly prohibits companies from denying or depriving its employees of their constitutional right to unionize for the

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<sup>2</sup> In *Bimpong-Buta v. General Legal Council and Others* [2003-2005] 1 GLR 738 at P783 Justice Kludze thus rightly observed that “...every justiciable issue can be spun in such a way as to embrace some tangential constitutional implications. Even a simple land dispute can be denominated a constitutional issue because of the implication that taking the property of another person is a constitutional violation. Similarly, the deprivation of liberty by unlawful detention or unlawful imprisonment is arguably inconsistent with the guarantee of personal liberties in the Constitution, 1992.

protection of their interest (Article 21).<sup>3</sup> Recent media reports have revealed growing interest in corporate violation of human and constitutional rights. For example, Newmont Ghana Gold Limited has since 2011, been accused of several human rights violations at its Kenyasi, Ntotroso, and AtronieAhafo mines in Ghana. Livelihood and Environment Ghana (LEG), a human rights and advocacy group alleged that Newmont, had provided unsafe living and working conditions; inadequate compensation and relocation packages; created noise and water pollution and was non-compliant with recommendations by local institutions including CHRAJ.

## PARLIAMENTARY ENACTMENTS

The term enactment refers in law to the whole or part of a legislation. The word "enactment" does not mean the same thing as "Act." An "Act" means the whole Act, whereas a section or part of a section in an Act may be an enactment.<sup>4</sup>

Examples of enactments are Acts of Parliament (also called statutes) and Delegated Legislation. Acts of Parliament are passed by Parliament itself, examples include the Minerals and Mining Law, 1986 (PNDCL 153), the Contract Act (Act 25), 1960, the Insurance Law, 1989 (PNDCL 227) the Banking Law, 1989 (PNDCL 225), the Finance Lease Law, 1993 (PNDCL 331) and the Financial Institution (Non-Banking) Law, 1993 (PNDCL 328).

## ORDERS, RULES AND REGULATIONS

Orders, Rules or Regulations are delegated or subsidiary legislation enacted by persons or authorities acting under powers conferred by Parliament. Delegated legislation is therefore law made on behalf of Parliament. It consists of statutory instruments made by Government

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<sup>3</sup> Article 21 (e) All persons shall have the right to freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest;

<sup>4</sup>In *Wakefield Light Railways Company v Wakefield Corporation*, [1906] 2 KB 140 at 144Ridley J. correctly stated the law thus “ *The word "enactment" does not mean the same thing as "Act." "Act" means the whole Act, whereas a section or part of a section in an Act may be an enactment*”.

ministers using powers delegated by Parliament and the bye-laws enacted by the various Assemblies in Ghana.

#### THE EXISTING LAW

The existing law refers to written and unwritten laws of Ghana which existed immediately before the promulgation of the Constitution. Examples of the existing law therefore include (i) Laws of the Gold Coast (1951 Rev); (ii) the 1952-57 Ordinances of the Gold Coast; (iii) 1957-60 Acts of Ghana; (iv) 1960-66 Acts of the First Republic; (v) 1966-69 Decrees of National Liberation Council; (vi) 1969– 72 Acts of the Second Republic; (vii) the 1972– 79 Decrees of the National Redemption Council and the Supreme Military Council; (viii) 1979 Decrees of the AFRC; (ix) the 1979– 81 Acts of the Third Republic; and (x) the Laws made by the PNDC since 31 December 1981, including enactments from the colonial era till date, which have not been repealed are binding.

#### GHANAIAN COMMON LAW

Article 11 (2) points to Ghanaian common law as another major source of law in Ghana. The source of Ghanaian common law for the most part is English law. Ghanaian common law comprises three species of law, the English common law, (which is a body of law that developed through “case law” or cases decided by judges); the Doctrines of Equity (which refer to the body of rules that were developed by the Court of Chancery in the 15th century to administer justice to parties aggrieved with common law remedies) and the rules of customary law including those determined by the Superior Court of Judicature. Ghanaian customary law refers to the rules of law, which by custom are applicable to particular communities in Ghana.

By its nature therefore customary law is not easily ascertainable. Customary laws, are however, largely unwritten, and have to be discovered from reported decisions of the courts, and from a handful of textbooks.

## THE COMMON LAW – A CONCISE HISTORY

The origins of English Common Law could be traced from AD 1066, when William the Conqueror, was crowned English King. Unlike previous monarchs, William decreed that he alone would resolve disputes in the Kingdom. He vested lands in the Crown, and parceled out use of such lands in exchange for services to his kingdom, thereby establishing a system of government that became known as feudalism.

Being inundated with cases he reluctantly delegated his powers to representatives,—judges—to decide disputes in his name, subject to his review.

The judges realized gradually that their decisions in similar cases had to become consistent across England. They met regularly, reported and studied each other's cases. If a case presented similar facts or issues, they followed the reasoning and the rule of law laid down by the judge in a preceding or similar case. Following a rule established in a similar case (i.e. a precedent), became known as the doctrine of stare decisis (Latin for “stand by that decided”). Judges over time made their judicial decisions common to all England - this became known as the common law.

## JUDICIAL PRECEDENT– DOCTRINE OF STARE DECISIS

The doctrine of stare decisis or judicial precedent required that, decisions of higher courts, bind courts that were lower in the hierarchy. The doctrine binds judges to apply established principles laid down by superior courts in previous cases to current cases possessing similar facts. Where appropriate, the courts may apply settled legal principles established in superior courts in other common law jurisdictions such as England, the United States, Canada, Nigeria, etc. except that (as indicated by Justice Cardozo):

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideals of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiments, to vague and unregulated benevolence. He is to exercise a discretion informed

by tradition, methodized by analogy, disciplined by system, and subordinated to 'the premodial necessity of order in social life'.

### **Ratio Decidendi**

Not every decision of a court sets a binding precedent. A rule of law which is laid down or abstracted from the facts of the case, is known as the ratio decidendi of the case, which in effect becomes the binding precedent.

### **Obiter dictum**

Every statement of the law that is not an essential part of the ratio decidendi is merely superfluous. It does not automatically set a binding precedent and such a statement is referred to as obiter dictum; generally they are of persuasive authority only.

### **THE LAW OF EQUITY – A CONCISE HISTORY**

During the course of the 13th and 14th centuries, judges in the English courts developed the common law – a system of accepting and deciding cases based on principles of law developed and shaped by preceding cases. Aggrieved parties, who felt that they were being denied justice due to the absence of an enabling statute or precedent, began sending their petitions directly to the King, who referred such requests to another royal court, known as the Chancery. The Chancery was headed by a Chancellor who possessed power to settle disputes and order equitable remedies according to his conscience. The decisions of the Chancellor were made without regard for the common law, and they gradually became the basis of the law of equity.

### **EQUITABLE REMEDIES**

The Courts of Equity gave what is called equitable remedies. This came in several forms, such as, specific performance, by which a judge could order a party to perform a specific act. For example, a seller who had breached a contract for sale of the house, could be ordered to completion of the sale, instead of repaying the money to the buyer or a restraining order or an Injunction, by which a court could order a party to do or refrain from doing a something, or

rescission, by which a court could discharge the parties from their obligations under a contract.

## THE DOCTRINES OF EQUITY

### **The Equitable Doctrine of Notice**

Notice refers to knowledge of existing facts – therefore the buyer of a legal estate with notice of a prior equitable interest affecting the property takes the property subject to the prior equitable interests. There are three types of notices.

Actual notice would exist for example where a buyer had actual or express notice of a prior interest, at the time of purchase, or before a purchase was completed. Thus in *Sempa Mbabali v W K KidzaOdoki J* held that a plea by the defendants, 'of being bona fide purchasers could not stand as they knew, and were aware all along, that a part of land they had purchased was actually for burial grounds, further that the seller had sold them that land well before his own share of the entire land had been ascertained, which therefore meant that their hands were not clean.

Constructive notice was defined by Salden J in *Williamson v Brown* to exist where a purchaser had prior knowledge of any fact sufficient to put him on inquiry as to the existence of a right or title in conflict with that which he was about to purchase. Such a purchaser was presumed to have made the inquiry and to have ascertained the extent of such prior right or to have been guilty of a degree of negligence equally fatal to his claim. The rule that a prior interest in land should always be put into consideration was illustrated in *U.P.T.Cv Lutaaya* where *Karokora JSC* held thus "A proprietor takes land subject to the interests of any tenant in the land in possession even if he or she had no actual notice of the tenant".

**Imputed notice** – where notice is neither actual nor constructive it may be imputed to the buyer through actual notice to the agent. It is well established in agency law that notice to an agent is taken as having knowledge of whatever the agent gets to know.

## **The Equitable Doctrine of Election**

The doctrine of election means that a person cannot claim benefits and reject burdens under the same instrument. Thus in *Codrington v Codrington* per Lord Cairns a person cannot accept a benefit under a deed or will without the same time conforming to all its provisions.

## **The Equitable Doctrine of Satisfaction**

The doctrine of satisfaction is based on the maxim “equity imputes an intention to fulfill an obligation” and may be best explained with an illustration. Suppose W is under an obligation to give X something of value, but does not and he gifts X something of value, it will be presumed that W’s gift was made with the intention of satisfying his obligation to X.

## **The Equitable Doctrine of Performance**

The doctrine of performance is based on the maxim that “equity imputes an intention to fulfill an obligation” – where a person covenants to perform a particular act and later performs an act “which may be converted to a completion of this covenant”, it will be supposed that he meant to complete his covenant per Kenyon MR, in *Sowden v Sowden*.

**Equitable Conversion** – Under the doctrine of equitable conversion, a Court of Equity can order the completion of a sale when the death of a seller occurs between the signing of the sale agreement and the date of the actual sale. In such a case, a judge will convert the title to the purchaser. This is in fulfillment of the time-honored Maxim that "Equity looks upon that as done which ought to have been done."

**Equitable Distribution** – Under the doctrine of equitable distribution, a Court of Equity could order the fair allotment or division of for instance property between a Husband and Wife upon Divorce. Under this doctrine, the needs and contributions of each spouse are considered when property is divided between them.

**Equitable Estoppel** – Under the doctrine of equitable estoppels, a Court of Equity could prevent, or stop a person from claiming a legal right, out of fairness to the opposing party.



**Equitable Lien** – A lien is an interest in property given to a creditor to secure the satisfaction of a debt. An equitable lien may arise from a written contract if the contract shows an intention to charge a party's property with a debt or obligation. An equitable lien may also be declared by a judge in order to fairly secure the rights of a party to a contract.

**Equitable Recoupment** – The doctrine of equitable recoupment prevents a party from collecting the full amount of a debt if she or he is holding something that belongs to the debtor. It is usually invoked only as a defense to mitigate the amount a defendant owes to a plaintiff.

**Equity of Redemption** – Equity of redemption is the right of a homeowner with a mortgage (a mortgagor) to reclaim the property after it has been forfeited. Redemption can be accomplished by paying the entire amount of the debt, interest, and court costs of the foreclosing lender. With equity of redemption, a mortgagor has a specified period of time after default and before fore-closure, in which to reclaim the property

### **Maxims of Equity**

Over the years Equity developed its own hackneyed principles, such as the following:

**Where equity and the law conflict, equity prevail** – This maxim means that where rules of law and equity are at variance on some particular point, the rules of equity ought to prevail.<sup>5</sup>

**He who seeks equity must do equity** – Anyone who wishes to be treated fairly must be ready to treat others fairly.

**Where the equities are the same, the law must prevail** – The law should be used to determine the outcome of a controversy in which the merits of both sides are equal.

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<sup>5</sup> Cheshire's Modern Real Property [9th ed], p 350

**He who seeks equity must come with clean hands** — This maxim means that a party who comes seeking fairness from a Court of Equity should him/herself equally not have acted unfairly or dishonestly against the other party.

**Equity will not suffer a wrong to be without a remedy** — Equitable relief will be awarded, when there is a right to a relief, and there is no relief available at law.

**Equity regards substance rather than form** — This maxim implies that a Court of Equity is more concerned with fairness and justice rather than with mere legal technicalities.

**Equity aids the vigilant, not the indolent** — This maxim implies that a Court of Equity will not assist a party who neglect/sleep on their rights for an unreasonable period of time.

**Equity follows the law** — This rule of equity means that, a Court of Equity will neither depart from statutory law nor refuse to follow common law rules except in exceptional cases. For example, in a land dispute, a Court of Equity will respect and not override the legal interest if shown evidence of valid land registration documents.

**Equity imputes an intention to fulfill an obligation** — Where a party is obliged to perform an act and that party did some other act which could be regarded as a performance of it, then it will be so regarded by a Court of Equity. The text writers give an example of a debtor leaving a legacy to his creditor equal or greater to his obligation. A Court of Equity will regard such a gift as performance of the obligation to the creditor. Thus the creditor will not be permitted to claim both the legacy and payment of the debt.

**Equity regards as done which ought to be done** — This maxim means that where a contract is specifically enforceable, a Court of Equity will regard the promisor as having done what he has promised to do.

**Equity acts in personam** — This rule of equity implies that, a Court of Equity has jurisdiction over a party personally. The personal nature of this jurisdiction is illustrated by the fact that failure to comply with the order such as specific performance or an injunction is a contempt of court punishable by imprisonment.

**Delay defeats equity** – This rule of equity means that, a Court of Equity will assist a vigilant and not an indolent party. This is the primary foundation for the doctrine of laches and acquiescence where a party who slept on his rights cannot obtain equitable relief. Anytime a party suffers some wrong or injury, that party must act immediately or timeously. When you relax on your rights a court of fairness cannot assist you right a wrong that you could have prevented if you had been vigilant.

**Equity does not require an idle gesture** – This rule of equity means that, a party cannot compel a Court of Equity to undertake a vain thing or issue empty orders. For example, It would be an idle gesture for a Court of Equity to grant rectification of a contract and then to deny to a prevailing party the opportunity to perform it as modified.

**Equity delights to do justice and not by halves** – This maxim means that, where a Court of Equity is presented with a good claim to equitable relief, and in the same breath it is clear that a party has also sustained monetary costs, a Court of Equity has jurisdiction to as well give the injured party, legal reliefs like monetary damages. A Court of Equity will therefore not stop at granting only an equitable relief, but will proceed to give a complete raft of remedies

Equity will not allow a statute to be used as a cloak for fraud – This maxim means that, a Court of Equity will prevent a party from relying upon an absence of a statutory formality, if to do so would be unconscionable and unfair. This can occur in secret trusts and also constructive trusts and so on.

## STATUTORY INTERPRETATION

The interpretation of statutes forms an important function of our courts. To apply a piece of legislation, however, a judge must determine its meaning, and to achieve do, judges applied one of three rules - the literal, golden, or mischief rule.

### **The literal rule**

Under this rule, the judge considers what the statute actually says rather than what it might mean. To achieve this, the judge must give the words in the statute its literal meaning, that

is, their plain, ordinary, everyday meaning, even if this will produce an otherwise unjust or undesirable outcome.

### **The golden rule**

This rule is applied in circumstances where applying the literal rule will probably lead to an absurd result. Except that the court is not at liberty to ignore, or replace, statutory provisions merely on the basis that it considers them absurd.

### **The mischief rule**

When there is ambiguity in a statute, a court of law may go beyond the actual wording of a statute to consider the problem or mischief that the statute was enacted to remedy. In applying the mischief rule the court must, however, consider the following four elements, as indicated in Heydon's case (1584): what was the common law before the passing of the statute; what was the mischief in the law which the common law did not adequately deal with; what remedy for that mischief had Parliament intended to provide; and what was the reason for Parliament adopting that remedy?

### **CONCLUSION**

In sum, the main point of our discourse is this - the primary sources of Ghanaian law comprise the Constitution, Parliamentary Enactments, Orders, Rules and Regulations, the Existing law, and Ghanaian common law. The common law was built up over centuries, through the application of judicial precedent. Equity developed rules of fairness, at the courts of chancery, to deal with rigidities of the common law.

The judiciary is required to interpret statutes made by the legislature. To do this, judges may resort to the literal, golden or mischief rule. The following rules apply - words should be given their literal meaning; words should be interpreted within context; words should be interpreted according to the purpose of the statute, and the meaning to be assigned general words should be limited to the type or class of things mentioned by specific words.