
Articles: pages 189-236

HUMAN RIGHTS FOR JUSTICE

JUSTICE SIR DENNIS ADJEI
Court of Appeal, Ghana

Abstract

The persons who occupy public office—including those created by the Constitution of Ghana 1992 and any other enactments—and private organizations and institutions that perform public functions or receive public resources are accountable to the citizenry, particularly those whose taxes are used to set up public offices and pay their salaries either in whole or in part, or to provide or support private bodies to perform public functions. The term “public institutions” has a broader meaning within the context of access and the right to information than its ordinary meaning.

The technical meaning of “public institutions” within the context of the right to information covers institutions created by the Constitution, any other enactments and private organizations or institutions that perform public functions or receive public resources. The author uses “public institutions” in its technical sense in this article to avoid repetition of private institutions or organizations that provide public services or receive public resources.

In most cases, public institutions fail to observe the culture of accountability and transparency and decide on the types of information to disclose and those not to be disclosed, to render the citizenry impotent to hold them accountable. The persons who occupy offices in public institutions hold those offices in trust for the citizenry, and, as trustees and fiduciaries they are required to be accountable, transparent, prudent, faithful, honest and not to commingle their personal properties with the properties that they hold in trust for their citizenry.

Discretion was hitherto exercised by public institutions as to the information which may be disclosed to the public or not did not have statutory backing, as a result of which some of them have acted capriciously. In order to make the officers of public institutions accountable and transparent, most states have enacted Right to Information Acts to give statutory backing to persons who may seek information from occupiers of public institutions to ensure that they discharge their mandates as

trustees and are accountable to the nationals of their respective countries.

Furthermore, the enactments on right to information are intended to give a clear exemption to information that cannot be disclosed with the sole aim of protecting the public interest in democratic societies in accordance with the Oath of Secrecy taken by public officers and which prevents them from revealing matters that shall be brought under their consideration or knowledge through the discharge of their official duties.

This article discusses the international law position of the right to information, taking into account the International Covenant on Civil and Political Rights 1965, the European Convention on Human Rights 1950, the American Convention on Human Rights 1969 and the African Charter on Human and Peoples' Rights 1981; and further discusses the Right to Information Act 2019 (Act 989) in Ghana and its effectiveness in promoting the culture of accountability, transparency and faithfulness within the public space; and, furthermore, assesses its impact on democracy and the justification for some of the exemptions provided by law to protect public interest in democratic countries.

The right to freedom of expression includes the freedom to seek, receive, hold opinions and impart information and ideas without public interference, except for restrictions imposed by the state which have been enacted into law and are necessary. The laws that are necessary in a democratic society to restrict freedom of expression must take into account the interests of national security or public order, territorial integrity or public safety, the protection of health or morals, the respect of the rights or reputation of others, the prevention of crime or disorder, and the disclosure of information received in confidence, and for the maintenance of the authority and impartiality of the courts.¹

There will also be a brief discussion on freedom of information and access to information concerning the environment held by public officers and private institutions and organizations that provide public functions.

Keywords: freedom of expression; international law; freedom of information; journalism; Ghana.

¹ Articles 19 of the ICCPR, 10 of the ECHR, and 9 of the ACHPR.

[A] INTRODUCTION

Information exists in different forms, including documentary, electronic, digital, scientific, real and demonstrative, and human beings require it for their own good and democratic development. There is some information that those in possession of same would like to disclose for several reasons, while others would not wish it to be disclosed for obvious reasons.

There is information in the custody of public officers who come by it in the course of their official duties and hold it in trust for the people of the country, while private entities who neither perform public functions nor receive support from the state are not accountable to anyone and would not ordinarily disclose information they have in their custody unless there is a law compelling them to disclose. States know that freedom of expression is a fundamental human right but should be regulated for several reasons, including protection of the public interest, security of the state, reputation, other rights of others, prevention of crime and morality, and protection of information affecting international relations.

Governments that are dictatorships and rule by tyranny suppress information in their custody as well as through agents in order not to make themselves unaccountable and not transparent to the people they govern. In order to break the chain of tyranny and ensure the free flow of information from governments to the governed, there are declarations, treaties, agreements and covenants that have made freedom of expression a fundamental human right with legitimate limitations. States are required to enact laws on freedom of expression, place legitimate restrictions on them, and further provide for the procedure through which information that has not been restricted would be freely accessed.

The right to information deals with access to information not restricted by law within the public space. Private persons and private organizations may have information in their custody which may be adverse to the security of the state, public order and any other cause that states cannot obtain without enacting laws that are necessary in democratic societies to empower their security agencies to obtain same against the wishes of those persons.

This article shall take into account all the relevant international instruments and treaties on freedom of expression and the restrictions that are necessary to be placed on them, as well as the parameters of freedom of expression provided by the Right to Information Act 2019 (Act 989).

[B] HISTORICAL ANTECEDENTS OF FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

The history of right to information could be traced to two basic instruments which came about after the Second World War to ensure free flow of information among states to prevent another war based on absence or lack of information. The two instruments are United Nations (UN) Resolution 59(1) of 1946 by the UN General Assembly and the Universal Declaration of Human Rights of 1948. The first attempt by the UN to promote unlimited access to information came in the form of a resolution.

Resolution 59 of 1946—adopted as “Freedom of Information”—was meant to provide for a right to freedom of expression to individuals to gather, transmit and publish news anywhere and everywhere without fetters. The resolution seemingly provided for access to information without any restrictions or interference from both public and private entities.

The Universal Declaration of Human Rights was the first international human rights instrument made by the UN, and its Article 19 is on the right to freedom of expression and opinion. The Declaration purported, *prima facie*, to make the right to expression and opinion absolute, unlike recent treaties and conventions on the subject, which *ab initio* provide for exceptions on legitimate grounds. The UN General Assembly in 1946 passed Resolution 59(1), which provides:

Freedom to information is a fundamental right, and it is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of information implies the right to gather, transmit, and publish news anywhere without fetters. As such, it is an essential factor in any serious effort to promote the peace and progress of the world.

The UN made the right to information an absolute right. There were no restrictions in any form placed on a person’s rights to obtaining, gathering, transmitting and publishing of opinion and expression through any media. The Resolution envisaged that right to information is a right that could be exercised by a person as an inherent right to obtain any information in the custody of any person with the aim of promoting peace in the world.

The right to information was the only way to expose wrongdoers through information which may affect world peace and progress if such information were not gathered and exposed. The Resolution was passed immediately after the Second World War and considered as an essential

factor to promote peace and progress on the globe by exposing countries which had in mind to benefit from war or foment another war.

However, Resolution 59 existed with the common law right of defamation, which clothed a person whose reputation had been injured without justification to maintain an action for defamation and seek appropriate remedies, including reparation and injunction. The resolution did not also prevent states from punishing a person whose aim was to create another world war by publishing false news, the very thing the resolution was passed to protect.

I submit that, even though Resolution 59 stated in clear terms that it was an absolute right, it did not authorize persons to hide under it to create criminal offences, disturb world peace, or violate public order, national security, or damage the reputation of others without a just cause, and, in fact and in substance, it was not an absolute right; otherwise, it would have defeated the purpose for which it was passed to achieve.

The literal interpretation of the words of the resolution will result in absurdity unless the reasons behind its passage prevail over its letter to create exceptions which would preserve the purpose for which the resolution was passed to achieve.² Undoubtedly, the resolution did not take into account information whose disclosure would be prejudicial to the security of the state or affect public interest or disturb democratic principles or regimes, and it cannot be said to have given priority to a private right over public interest. The strict application of the resolution would defeat the principle of proportionality which requires public interest to override private interest whenever they come into conflict. The author is of the candid opinion that even though Resolution 59(1) seems to be absolute and confers the right on individuals to seek, gather and publish any information they have at their disposal, it inherently took into consideration the rights of the states *vis-à-vis* those of the individuals in a democratic regime not to confer an absolute right on an individual, which would impact negatively on the security of the state, public interest, maintenance of law and order, and the reputation of the individual; the very things that the world body sought to protect.

The right to gather, transmit and publish news anywhere without fetters shall be construed to include news which is relevant and would deepen democracy, transparency and accountability in the respective states. A resolution from a body such as the UN would not give an open licence to persons to defame others without just cause or violating the human rights of others, or do an act that would be prejudicial to the security

² *Holy Trinity Church v United States* 143 US 457, SCt 511 36 L Ed 226 29 February 1982.

of the state or injurious to the public interest, and should be construed purposively to give effect to the purpose for which it was enacted.

The second instrument, the Universal Declaration of Human Rights of 1948, is a soft law and the first human rights instrument made by the UN to be respected by its member states and their colonies. Article 19 of the Declaration made the right to freedom of opinion and expression an absolute right without any interference or restrictions. Article 19 of the Universal Declaration of Human Rights provides as follows:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

Article 19 of the Declaration makes the right to acquire information and share it through the media an absolute one. The essence was to empower persons to seek and obtain information in the custody of other persons and share same through the media without any limitations placed on it by law. The author is of the considered opinion that Article 30 of the Declaration is to ensure that no one exercises a right under it to destroy the rights and freedoms provided in it, and that alone places fetters on the rights created by it.

Furthermore, the Declaration provides that all persons are born free and equal in dignity and rights and would not confer unfettered rights on persons not to respect the rights or reputation of others.³ Even though Article 19 did not provide for any exceptions to freedom of opinion and expression, they are subject to the other fundamental human rights provisions, particularly those provided in the Declaration, and cannot be said to be absolute.

A careful reading of Article 19 suggests that, even though it protects both the right to freedom of expression and the right to hold an opinion, it is the latter right that is at large and cannot be lawfully curtailed. Article 19 should be given its proper interpretation to mean that there is a clear distinction between the right to hold an opinion, which is absolute and cannot be interfered with, and the right of expression, which by necessary implication is not an absolute right.

On the face of Article 19(1) of the Declaration, one may be tempted to conclude that there is no limitation on the right to freedom of expression, but a reading of the Declaration as a whole does not make it absolute but subject to the rights of other persons. The Declaration did not envisage a

³ Universal Declaration of Human Rights, Article 1.

situation where a person may intentionally defame another person and assert that they have an absolute right under it. Until recently, most jurisdictions criminalized some publications which were considered to be intentional or negligent acts to defame other persons. In Ghana, until the Criminal Code (Repeal of Criminal Libel and Seditious Laws) Amendment Act 2001 (Act 602) was passed, the Criminal Offences Act 1960 (Act 29) had criminalized negligent and intentional libel, and some people who violated it were tried and sanctioned, including journalists.⁴ Apart from the law of tort which addresses publications meant to dent the rights or reputation of persons, the same act had also been criminalized.

Section 373 of the Criminal Code of Nigeria deals with criminal defamation, where a publication is made against any person that is likely to injure his or her reputation by exposing them to hatred, contempt, or ridicule, or to damage their profession or trade. The Supreme Court of Appeal of South Africa held that criminal defamation forms part of the laws of South Africa and that the offence is committed where a person unlawfully and intentionally publishes a matter concerning another person with the aim of injuring that person's reputation. The court affirmed the conviction and sentence of three years' imprisonment, suspension for five years, and, in addition, three years' correctional supervision for 22 of the 23 counts of criminal defamation.⁵

On 28 October 2020, the Sierra Leone Parliament repealed criminal libel from its statute book, which had existed for over 55 years. The United Kingdom (UK) kept its common law crimes of criminal libel and seditious libel until they were abolished by the Coroners and Justice Act 2009. Blasphemous libel in the UK was also abolished by the Criminal Justice and Immigration Act 2008. The above paragraphs attest to the fact that states did not interpret the two international instruments in absolute terms and subjected them to restrictions, and it was only recently that criminal libel was undergoing repeals in most countries.

The extent of the right to information contemplated by the two international instruments, when construed literally, would be dangerous for states and their nationals and would be interpreted purposively to make them subject to other human rights provisions and statutes within the specific states.

⁴ Criminal Code 1960 (Act 29), sections 112-119.

⁵ *Hoho v S* (493/05) [2008] ZASCA 98; [2009] 1 All SA (SCA); 2009.

[C] SOME OF THE RECENT INSTRUMENTS ON THE RIGHT TO INFORMATION IN INTERNATIONAL LAW

The four international instruments on the right to information to be discussed under this sub-topic are the International Covenant on Civil and Political Rights 1965 (ICCPR), the European Convention on Human Rights 1950 (ECHR), the American Convention on Human Rights 1969 (ACHR) and the African Charter on Human and Peoples' Rights 1981 (ACHPR). The above instruments confer rights on individuals to express opinion and to seek, receive and publish information to deepen democracy with specific restrictions.

The ICCPR in its Preamble states that the state parties to it considered the principles proclaimed by the Charter of the UN, recognized the rights derived from the inherent dignity of humankind and the Universal Declaration of Human Rights, and rights inherently vested in the human person to enjoy civil and political freedom from fear.

The Covenant was principally made to protect civil and political rights within the confines of state laws made in consonance with it. The Covenant was opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) on 16 December 1966. It came into force on 23 March 1976, in consonance with Article 49, which provided that it should come into force three months after the 35th instrument or accession had been deposited with the Secretary-General of the UN. Article 19 of the Covenant is on the right to hold opinions without interference and the right to freedom of expression. It provides the following:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other medium of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The Covenant expressly makes the right to hold opinions an absolute fundamental human right. However, the right to freedom of expression is guaranteed subject to restrictions provided by law and necessary to respect the rights or reputation of others, protect national security or public order, or public health or morals. A person cannot hide under the right to freedom of expression to injure the reputation of other persons or do any act which may be inimical to public order, the security of the state, public health or morals. States are required to enact laws to cater for the restrictions mentioned in the Covenant.

Most countries have enacted laws to provide limits on freedom of expression, which includes freedom to gather, receive and impart. In some jurisdictions, where the information gathered to be published is obtained contrary to law, it may be used for what it is worth but cannot be used in a court of law. The common law position which was established in the case of *R v Leatham*,⁶ that illegally obtained evidence is admissible, does not wholly hold in countries including Ghana, where the Supreme Court has construed Article 18(2) of the Constitution of Ghana 1992 that any evidence obtained contrary to it is inadmissible unless it falls within the exceptions provided by it.⁷ This is a case where the plaintiff in the District Court, Sunyani, secretly recorded a pastor in charge of the Presbyterian Church over the ownership to the land which was the subject matter of the suit. The pastor on cassette admitted that the land was owned by the plaintiff, but stated in court that it was owned by the Presbyterian Church. The conclusion to be drawn from the above decision is that not every expression by a person can be recorded and used against that person unless it comes within the exceptions provided by Article 18(2) of the Constitution, including the promotion of the economic wellbeing of the people, and the prevention of crime, morality and disorder.

It is not certain as to whether the common law position established in *R v Leatham* has been compromised. The case of *R v Sang*⁸ has held that where illegally obtained evidence would have a prejudicial effect against probation value, the court can exclude its admission under section 78 of the Police and Criminal Evidence Act 1984. The case of *Delaney*,⁹ taking a contrary decision to the position in *R v Leatham*, rejected relevant evidence as inadmissible by the fact that it was taken in breach of the rules which requires records of evidence to be kept. However, the House of Lords in

⁶ *R v Leatham* (1861) 8 Cox CC 498.

⁷ *Cubage v Asare and Others* [2017]-[2020] 1 SCGLR 305.

⁸ *R v Sang* [1980] AC 402 [1979] Crim LR 655.

⁹ *Delaney* (1989) 88 Cr App R 338.

the recent case of *Attorney-General's Reference (No 3 of 1999)*¹⁰ admitted the DNA of a rapist which was kept by the police without reference to him and was to be used in another case against him; it was held that even though the police should not have kept the DNA without the consent of the accused, it was relevant and ought to be admitted into evidence.

I now discuss Article 10 of the ECHR which confers the right to freedom of expression on individuals among the member states. It provides thus:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms carries with it certain duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary

Article 10 ECHR is to the effect that freedom of speech is not absolute and states are able to make laws that would impose limitations, restrictions and penalties as are necessary in a democratic society, and in the interest of national security and public safety with the aim of preventing crime and disclosure of information obtained in confidence, protecting health or morals, reputation of persons, and maintaining the impartiality or authority of the courts.

Article 10 of ECHR is more detailed than Article 19 ICCPR but, in substance, both of them are to the effect that freedom of expression goes with duties and responsibilities and states are required to clearly set out restrictions and conditions based on any of the above legitimate grounds to protect freedom of expression. The legitimate grounds for restricting freedom of expression are those provided by Article 10(2) of the ECHR. In the case of *Director of Public Prosecution v Cuciurean*,¹¹ Lord Burnett CJ discussed the nexus between freedom of expression and freedom of assembly and association under Articles 10 and 11 respectively of ECHR and held that both rights were qualified rights and are subject to the

¹⁰ *Attorney-General's Reference (No 3 of 1999)* [2001] 2 WLR 56, [2001] AC 91.

¹¹ *Director of Public Prosecution v Cuciurean* [2022] EWHC 736 (Admin).

limitations to be placed on them by law and necessary in a democratic society; *inter alia*, to protect the reputation of others, in the interests of national security, public order and to maintain the authority of the courts.

Where a particular mode of expressing freedom of rights is curtailed by a state within the meaning of Article 10 of the ECHR, it shall be deemed lawful by the fact that it is a qualified right to freedom of expression or a right to information is not an absolute right. The question is, who determines that a restriction placed on Article 10 is necessary in a democratic society? It is ambiguous, and a person who is of the opinion that the restrictions placed are not within the contemplation of Article 10(2) may challenge its validity (Feldman 2002).

The courts, in determining whether a law enacted to restrict freedom of expression is in conformity with Article 10(2) of the ECHR, must satisfy themselves that the restrictions were made in accordance with the limitations provided by the Convention to respond to the social needs of the state and that they are proportional to the interests of individuals.

The ACHR, also known as the Pact of San Jose, is one of the international human rights instruments made to regulate human rights protection among member states. The Convention, which came into force on 18 July 1978, set up the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to ensure compliance by the member states. Article 13 of the Convention, which is on freedom of thought and expression, provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputation of others;
 - b. the protection of national security, public order, public health, or public morals.
- ...
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar action against any person or group of persons on

any grounds, including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The ACHR provides limitations to freedom of thought and expression and further criminalizes publications intended to promote national, racial, or religious hatred. The member states are to enact laws that would restrict freedom of expression and thought and further criminalize any act likely to create sectional or national hatred. The Convention prescribes for both civil and criminal restrictions, unlike other international instruments that provide for only civil restrictions.

The ACHPR is a human rights instrument for the member states of the African Union. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have been set up to ensure strict compliance with the provisions of the Charter. The Charter, like the other ones discussed above, does not make freedom of expression an absolute right. The member states are to enact laws to regulate freedom of expression in their respective countries, but the parameters of the restrictions were not provided. The irony is that all the member states of the Charter are members of the ICCPR and would be bound by the restrictions provided by the latter. Article 9 of the Charter, which is on the right to information, provides as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

The right of every individual to receive information is guaranteed by the ACHPR, but the right conferred on an individual to express and disseminate his or her opinions shall be made within the law enacted by the member states. The Charter seemingly suggests that states may restrict freedom of expression but does not provide guidelines or parameters for the restrictions, and it is subject to abuse by states.

The position provided by the ACHPR on the right to express and disseminate information is quite terse as compared to the provisions in the ICCPR, ECHR and ACHR, which provide guidelines for the member states in their national laws. On the other hand, most of the countries in Africa are also members (states) of the ICCPR and cannot use the provision in the ACHPR to arbitrarily restrict freedom of expression in their respective states, which would amount to censorship or deprivation of freedom of expression.

[D] THE DIFFERENCE BETWEEN THE RIGHT TO FREEDOM OF EXPRESSION AND THE RIGHT TO HOLD AN OPINION

There is a clear distinction between the right to freedom of expression and the right to hold an opinion. The right to freedom of expression relates to the dissemination of information acquired through whatever means, provided the source is credible. There are duties and responsibilities imposed on a person's right to freedom of expression as it must be made within the limitations provided by the national laws of that person. Article 19 of the ICCPR unambiguously provides that states are to provide limitations on freedom of expression by individuals by enacting laws that are necessary to give effect to it.¹²

The right to hold opinions is an absolute right and shall not be subject to interference by states. Article 19, paragraph 1 of the ICCPR provides that everyone has the right to hold opinions without interference or restrictions. The ICCPR makes a clear distinction between the right to freedom of expression, which is not an absolute right, and the right to hold opinions, which is absolute and cannot be interfered with by the member states.

The ECHR considers the right to information and the right to hold opinions under freedom of expression and places limitations on both as are necessary in a democratic society and for the protection of the reputation of others. The ECHR does not draw a distinction between the right to information and the right to hold opinions, and both are subject to restrictions by the member states within the parameters provided in Article 10, paragraph 2. Therefore, the member states within the European Convention are authorized by the Charter not to make freedom to hold opinions an absolute right.

Article 9(1) of the ACHPR distinguishes between the right to receive information and the right to express and disseminate information. The provision does not place restrictions on the right to receive information on persons but places limitations on the right to express and disseminate opinions.¹³

The above discussion may be summed up as follows: an individual seeking a right under the ICCPR to exercise the right to hold an opinion shall not be restricted by the member states, but the right to exercise

¹² ACHPR, Article 19(2) & (3).

¹³ Ibid Article 9(1) & (2).

freedom of expression shall be restricted by the member states through the enactment of law and is necessary in democratic regimes to prevent abuses and excesses on matters affecting the reputation of others and for the protection of national security and the interests of the state. An individual who is of the opinion that restrictions placed on the right to exercise freedom of expression by law are not necessary may challenge its validity in the appropriate forum.¹⁴

[E] THE MODE OF EXPRESSING FREEDOM OF EXPRESSION

The ICCPR provides that freedom of expression may take the form of being expressed orally, in writing, in print, in the form of art, or through any other medium.¹⁵ Freedom of expression may be in writing with a pen, pencil, chalk, crayon, or anything else that is capable of being used as a writing material and may be found in a book, on a sheet of paper, a blackboard or a writing board, on television, on social media, or on a wall, vehicle, building or structure among other things. A person in expressing freedom of expression may use charcoal to write it on a kiosk or any other structure, which shall constitute an expression.

A person may express freedom of expression orally through speech, radio, television, social media, the beating of a gong-gong, a toy, or any other verbal communication that is capable of conveying the meanings of the spoken words. Oral language may include signing languages, parents babbling to their babies, gestures and other non-verbal communications, including body language. A person may express freedom of expression in the form of print, including in a newspaper, magazine, journal, book, article or newsletter.

Freedom of expression may also take the form of art, including drawing, painting, photography, sculpture, music, cinema, literature, architecture, printmaking, video art, performance art (dance, drama and theatre), land art, intervention art and installation art.

A person may express freedom of expression either orally, in writing, in print, in the form of art, or through any other medium of their choice.¹⁶ The phrase “other forms of media of his choice” excludes print media but takes into account transmissions, distributions, exhibitions on

¹⁴ Ibid Article 19.

¹⁵ ICCPR, Article 19(2).

¹⁶ Ibid Article 19, paragraph 2.

telecommunications, the internet, satellites, DVDs, CD-ROMs, cables and media players. The mode of expressing information is broad and encompasses any action or inaction that is intended to have expressive content. While some expressions are protected, others are not.

The ECHR held that sexual intercourse that is used to express an opinion is an unprotected form of expression.¹⁷ The question to pose is: is the context capable of expressing an opinion irrespective of the fact that it was held to be unprotected? It is the substance of the expression and the context within which it is used that is material, not merely its form, which is considered unprotected.

In the case of *Texas v Johnson*,¹⁸ the Federal Supreme Court of the United States of America (USA), by a majority of 5:4, held that the burning of the American flag was protected speech under the First Amendment to the US Constitution and amounted to symbolic speech. The burning of a national symbol, such as a flag, or burning the photograph of the president of a country, and other physical demonstrations to show disapproval of conduct or an event would amount to freedom of speech within the meaning of “in the form of art” as contained in the Covenant. A mode of expressing an opinion shall not be protected where the national laws have prescribed restrictions on it; otherwise, in all other cases, it is the substance and the context within which the expression is made that are materially abusive or offensive.

[F] DUTIES AND RESPONSIBILITIES OF MEMBER STATES TO COMPLY WITH INTERNATIONAL LAWS, TREATIES, CONVENTIONS AND AGREEMENTS

The countries in the world are regulated by their national laws regarding the effect of treaties, conventions and agreements executed by them. There are two categories of countries when it comes to the execution of treaties, conventions and agreements. These countries are either monists or dualists. The monist countries are automatically bound by international law or treaties, agreements and conventions duly executed on their behalf by the appropriate executive body. The known monist countries in the world include Belgium, France, Germany and the Netherlands. By the Constitution and constitutional history of the USA, it is a monist

¹⁷ *X v United Kingdom* App No 7215/75 (ECHR 5 November 1981) [1981] ECHR 6.

¹⁸ *Texas v Johnson* 109 S Ct 2533 (1989).

country, but it goes further to draw a distinction between a non-self-executing treaty and self-executing treaties. The self-executing treaties are treaties which become part of the national laws when they are duly executed. The non-self-executing treaties are those that are ratified with the understanding that they would not have effect of their own force.¹⁹ The above discussions demonstrate the fact that the USA practises a hybrid of dualist and monistic law, depending on the nature of the treaty at stake.

The dualist countries, such as all African countries and most of the countries in Europe, Asia and Latin America, maintain their sovereignty and individual self-determination in terms of the law-making process, and, even though bound by treaties, conventions and agreements duly executed by them, such documents do not form part of their domestic laws until they are domesticated.

Article 11 of the Constitution of Ghana 1992 provides the sources of law in Ghana as the Constitution, enactments made by or under the authority of Parliament under the Constitution, subsidiary or delegated legislation made under the Constitution, the existing law and the common law.

International law is conspicuously missing as one of the sources of law in Ghana. On the other hand, customary international law forms part of the common law in Ghana and is one of the sources of law.²⁰ Article 75 of the Constitution of Ghana, which comes under international relations, provides for how treaties, conventions and agreements duly executed in the name of Ghana shall be ratified by Parliament to give it a legal effect. It provides the thus:

75

- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (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.

¹⁹ *Medellin v Texas* 552 US 491 2008.

²⁰ *Republic v High Court (Commercial Division), Accra, ex parte Attorney-General (NML Capital Limited & Republic of Argentina interested parties)* [2013]-[2014] 2 SCGLR 990.

The ICCPR and the ACHPR do not form part of the sources of law for the dualist countries, including those that have ratified both. By their necessary implications, the ICCPR and ACHPR, which have been duly executed and ratified by Ghana, do not form part of the sources of law in Ghana and only bind Ghana in international law.

A Ghanaian whose rights under any of the two international instruments have been violated may seek redress for a violation at the Economic Community of West African States (ECOWAS) Community Court where exhausting local remedies is not a *sine qua non*—although the individual may have exhausted domestic remedies—and where those rights have not been addressed, that person may seek redress in the ECOWAS Community Court or the African Court on Human and Peoples' Rights against Ghana and the result shall be treated as binding international law in both courts.

There is a lean way in which human rights provisions executed by the President of Ghana without Parliamentary approval under Article 75 of the Constitution may be used in Ghana, even though they do not form part of the laws of Ghana. The Constitution of Ghana 1992 provides that rights, duties, declarations and guarantees on fundamental human rights not specifically mentioned in the Constitution under Chapter 5 (Articles 12-33) have not been excluded and shall be used provided they are considered to be inherent in democracy and intended to secure the dignity and freedom of humankind. Article 33(5) of the Constitution, which permits the Ghanaian courts to apply some human rights provisions from other national and international jurisdictions, provides as follows:

The rights, duties, declarations, and guarantees relating to fundamental human rights 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.

There is no doubt that all the human rights instruments discussed above are inherent in democracy and intended to secure the freedom and dignity of man. The Ghanaian courts are not constrained by the Constitution from invoking human rights instruments and enactments from elsewhere where there is no such provision in the Constitution to supplement the human rights provisions contained in Chapter 5 to ensure that the protection of fundamental human rights and freedoms, which is the cornerstone for unity and stability, does not become a lip service.²¹

²¹ Constitution of Ghana 1992, Preamble & Article 35(4) & (5).

The conclusions to be drawn from the above discussions are that the right to information and freedom of expression found in the ICCPR, ECHR and the ACHPR do not form part of the national laws of the dualist countries who have executed same but bind those states in international law. In some states, such as Ghana, Sierra Leone and Nigeria, some of the human rights provisions in treaties, conventions and agreements may be considered fundamental human rights provisions even though they do not form part of the national laws, provided they are inherent in democracy and intended to promote the dignity of humankind.

The Universal Declaration of Human Rights, the ICCPR, the ECHR, the ACHR and the ACHPR can be used in Ghana under Article 33(5) of the Constitution even though Ghana is not a signatory to the ECHR and the ACHR by the facts that human rights provisions contained in them are inherent in democracy and intended to promote the dignity of humankind. The Ghanaian courts can use all the provisions on human rights in the above international instruments, and the rights to freedom of expression and opinion contained in them shall be invoked to promote and develop human rights jurisprudence in Ghana.

The cases from the Inter-American Courts, the European Court of Human Rights, the African Court on Human and Peoples' Rights and the ECOWAS Community Courts could be used as persuasive authorities in Ghana and shall have binding effects after they have been applied by the Superior Courts in the form of *stare decisis*.

However, a violation of human rights treaties, conventions and agreements by a country may be determined by the regional or continental courts with jurisdiction upon an application brought by the affected person or other appropriate body subject to satisfying the admissibility principles of that court and may be used by the Ghanaian courts to persuade them, after which they may become binding decisions.²²

[G] THE RIGHT TO FREEDOM OF INFORMATION ON ENVIRONMENTAL PROTECTION

The international instruments on the right to information discussed above did not take into account freedom of information and the right to environmental protection. The environment has been polluted and depleted to the extent that it must be protected by all, and that cannot

²² Article 6 of the Protocol to the ACHPR makes admissibility a condition precedent to assumption of jurisdiction in any case brought before the African Court on Human and Peoples' Rights.

be done unless unfettered access is given to people to freely access information on the environment.

The state of human health is mainly determined by the nature of the environments people live in. A healthy environment provides for healthy human beings. The Rio Declaration on Environment and Development, which was adopted in Brazil in 1992 under the auspices of the UN Environmental Protection Agency, clothed individuals with the right to unfettered access to environmental information from public authorities at the national level, including information on hazardous activities and materials within their communities.

The UN Conference on Environment and Development, also known as the Rio Declaration on Environmental Development or the Earth Summit, which was attended by 117 heads of state and 178 representatives from states and international, continental and regional bodies, agreed to make the right to freedom of information on environmental matters a reality for all persons. Principle 10 of the Resolutions taken at the summit, which is on the right to access to information on environmental matters to safeguard and protect a clean and healthy environment for the living and unborn generations, provides as follows:

Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each Individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and reliefs, shall be provided.

A discussion of the UN Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters (Aarhus Convention) is important to guide countries such as Ghana, which does not have enough materials on freedom of information and the right to environmental protection. There is no specific mention of the right to access information concerning the environment under the Right to Information Act 2019 (Act 989), and the courts may take advantage of Article 33(5) of the Constitution, including the provisions of the Act, to set legitimate parameters for disclosure of environmental matters.

The Aarhus Convention, held on 25 June 1998 in Aarhus, Denmark, by the European countries, recalled principle 10 of the Rio Declaration

on Environment and Development, the UN General Assembly Resolutions 37/7 of 28 October 1982 and 45/94 of 19 December 1990 on the World Charter for Nature and the need to ensure a healthy environment for the wellbeing of individuals respectively; and European Charter on Environment and Health (adopted in Frankfurt-am-main, Germany, on 8 December 1989, the World Health Organization's first European conference on Environment and Health). Article 4 of the Aarhus Convention reiterated the need for the states to make information on environmental matters available to the public within the framework of their national legislations, including requests for and production of documents on environmental issues without stating their interest unless the information has been issued to the public or it is reasonable for the public authority to issue it in another form.

The grounds upon which requests for environmental issues may be refused include: where the public authority requesting to disclose same does not hold it; the request is manifestly unreasonable or formulated in too general a manner; where it has been exempted by national law from being disclosed on grounds that the material is in the form of completion or concerns internal communications of public authorities, or where the disclosure of the information would injuriously affect the security of the state; the confidentiality of proceedings of public authorities which have been exempted by national law, international relations, national defence or public security; the course of justice so as not to prejudice a fair trial or not affect the ability to conduct a criminal or disciplinary enquiry; confidentiality to protect commercial or industrial information, and intellectual property rights; confidential personal data or files concerning natural persons and information of a third party who has supplied the information; and the environment the information relates to, including sites where rare species are breeding.

All the above grounds could be used within the context of sections 5-17 of the Right to Information Act 2019 when a question of access to environmental issues comes before the appropriate institutions for disclosure. Section 78 of the Act provides that information classified as exempt information under sections 5-16 shall cease to be exempt information after 30 years from the end of the calendar year in which the information came into being. A person who seeks to access classified exempt information may request for same after 30 years from the date on which the information came into being, but the Act does not operate retrospectively to affect information classified as exempt over 30 years ago.

The Right to Information Act 2019 has prospective effect even though it is applicable to information which was in existence before the coming into force of the Act and information that comes into existence after the Act has come into force, and time shall run in respect of information classified as exempt effective from 21 May 2019 when it was assented to come into force.²³

The common law exceptions to retrospective legislation—that is an enactment shall have retrospective effect unless expressly stated in cases of declaratory, procedural, evidence, and revised and consolidated laws—do not apply to the Right to Information Act 2019 as it does not belong to any one of those exceptions.²⁴

Theoretically, there is no classified information in Ghana that is absolutely exempt from disclosure, but the time to freely access it is postponed to 30 years unless the person in custody of the information establishes that the disclosure of that information will endanger the life or physical safety of an individual, public safety, national security, national economic interest or international relations with any other country. Section 78(2) of the Right to Information Act 2019 takes away the right to access exempt information after 30 years if it can be established that the purpose for which it was exempt is one of the grounds stated above.

In substance, the Right to Information Act 2019 purports to give a right under section 78(1) and takes away almost all the rights under section 78(2), as the reasons upon which the person in possession of that information may refuse to disclose may fall within the grounds under which the exemptions were made under sections 5-17 of the Act.

Article 4 of the Aarhus Convention provides that any refusal to grant access to information shall be in writing if the application was made in writing or, if it was requested orally and the applicant requests for the refusal in writing, it shall be granted. The reasons for the refusal shall be provided. States may allow public authorities to make a charge or payment of fees for the information, but it shall not exceed a reasonable amount.

Article 9 of the Aarhus Convention made provision for access to court or another independent and impartial body established by law to be provided in national legislations to respond to a person who is of the

²³ Right to Information Act 2019 (Act 989), sections 78(1) and 80; and Constitution of Ghana 1992, Article 107.

²⁴ *Feneku and Another v John Teye and Another* [2001]-[2002] SGLR 985.

opinion that his or her request has been ignored or wrongfully refused by the public authorities.

The right to information on environmental matters is not an absolute right but is subject to legitimate restrictions to be imposed within the context of the Aarhus Convention but those restrictions may be teased out from the exemptions provided by the Right to Information Act 2019. The environmental degradation and pollution of land and water bodies in the mining areas by the illegal miners known in Ghana as Galamsey has affected water bodies in the affected communities, including farmlands and the cash and food crops on them. Every person has the right to access information from the Minerals Commission about the concessions it has granted and other relevant information the applicant may deem necessary.

The right of information on environmental matters, like all other rights to information, requires applicants to be given access to information such as visual, electronic, written, aural, or any other materials in respect of the elements or state of the environment, including landscape, air, water, land and atmosphere, and factors such as radiation, noise, energy and substances, and the measures adopted to regulate and make them human-friendly to safeguard their existence unless legitimately restricted in accordance with the appropriate Conventions.²⁵

The Ghanaian courts can make use of the Aarhus Convention even though Ghana is not a member state because it is a human rights instrument which is inherent in democracy and intended to secure the dignity of humankind, and there is no comparable provision in the Constitution under the human rights chapter.

[H] LEGITIMATE GROUNDS TO RESTRICT FREEDOM OF EXPRESSION

States are to restrict the right to freedom of expression, which includes the freedom to seek, receive and impart ideas and information through any acceptable means of communication, subject to restrictions to be provided by national legislation. There is a universally agreed-upon principle that is used to restrict access to information, and it is known as the three-part test. In all cases, the three individual tests must be passed; otherwise, it would amount to unjustifiable restrictions to the right of information.

²⁵ Aarhus Convention 1998.

The first test is about the legitimacy of the restrictions. Every restriction on freedom of expression shall be legitimate; prescribed by a law that is relevant, clear, accessible and does not confer excessive discretionary powers on the authorities of the state to limit freedom of expression.²⁶

The second test is that the restriction must be made to pursue a legitimate aim. Legitimate aims are the restrictions provided as exceptions to the international instruments discussed above, including Articles 4 and 9 of the Aarhus Convention, Article 19 of the ICCPR, Article 10 of the ECHR, Article 13 of the ACHR and Article 9 of the ACHPR.

The third test is whether it is necessary to impose restrictions on the right to information. The state is required to establish that it has become necessary to use restrictions to address the social needs of the state and that this is not intended to violate the rights of individuals. The state is required to use the least available restriction, which is proportionate to the objective it seeks to achieve, which is to restrict access to information. Therefore, any restrictions made contrary to the three-part test shall not be considered to be lawful, as they would be intended to deprive the citizenry of their right of freedom of expression.

The combined effect of all the international instruments discussed above is that the legitimate grounds upon which states may restrict freedom of expression are: to respect the rights and reputation of others; to protect public order, national security, or public health and morals; to prevent crime and disorder; to prevent the disclosure of information received in confidence; and to maintain the impartiality and authority of the courts as is necessary in a democratic society.

After the exemptions on justifiable grounds, all other information is free to be accessed without any further impediments, and this is the thrust of the right to information. The right to information simply means that, where freedom of expression is curtailed by legitimate grounds, the information that is not exempted must be made available through a procedure provided by law enacted by a state to address same.

[I] THE RIGHT TO INFORMATION IN GHANA: A HISTORICAL PERSPECTIVE

Ghana, on attaining independence on 6 March 1957, went through different political stages, from democratic regimes through military interventions, and finally established constitutional democracy on

²⁶ *Sunday Times v United Kingdom* App No 6538/74 (ECHR 26 April 1979).

7 January 1993, after the promulgation of the Constitution of Ghana 1992. Ghana had its first constitution in 1957 (Order in Council), and, in 1957 and 1958, it enacted the Deportation Act of 1957 and the Preventive Detention Act of 1958, respectively.

The Deportation Act of 1957 was passed to deport aliens whose presence in Ghana was not conducive to the public good. The irony was that there was no definition for what amounted to a person whose presence in Ghana was not conducive to the public good and was left to the discretion of the authorities.²⁷ Several persons were deported under this Act, including those who claimed to be Ghanaians, and their deportations were orchestrated by their political activities and comments made about the then regime in their capacities as leading members of the opposition Muslim Association Party.²⁸

The most serious enactment ever made in Ghana to curtail freedom of expression was the Preventive Detention Act of 1958. The Act was passed to give power to the Governor-General, who then represented the Queen of England, to detain a person whose acts were prejudicial to the security of the state for a term of imprisonment of not more than five years without recourse to the courts, and it further forbade the courts from entertaining *habeas corpus* applications within the five years.

A person detained under the Act could seek judicial relief from the courts after the expiration of the five years specified in it. What made the Act a venomous viper was the fact that there was no definition for what amounted to an act prejudicial to the security of the state. The Act was seriously abused, and most political leaders, including those who did not go into self-exile, were arrested and detained for up to five years without recourse to the courts.²⁹

There was the need to instil fear in Members of Parliament who might criticize the government, and the Ghana (Constitution) Order in Council, which was the supreme law, was amended by the National Assembly by the Disqualification Act 1959 to disqualify a Member of Parliament who was detained under the Act and, further, to lose their parliamentary seat. The people of Ghana had their first reformed constitution in 1960. Article 13 of the Constitution provided for the solemn declaration to be taken by the President on assumption of office which required the President to preserve public order, morality or health and further ensured that no

²⁷ Preventive Detention Act 1958, section 3.

²⁸ *Lardan v Attorney-General & Others (No 1)* 3 WALR (1957) 55.

²⁹ *Re Akoto and Seven Others* [1961] GLR 523.

person was deprived of their freedom of speech and right of access to the courts.

In the case of *Re Akoto*,³⁰ the plaintiffs challenged the constitutionality of the Preventive Detention Act *vis-à-vis* Article 13 of the Constitution, and the Supreme Court held that Article 13 was not a bill of rights to have a legal effect to invalidate an Act arising from a conflict but was analogous to the Coronation Oath of the Queen of England, and the powers given to the Governor General or his representative to detain persons whose acts are prejudicial to the security of the state could not be impugned.

The 1964 Referendum, which brought into force the Habeas Corpus Act 1964 (Act 244), amended parts of the 1960 Constitution, including Article 45(3), to make the judiciary, which is supposed to protect the fundamental human rights of the people, an appendage to the Executive by conferring power on the President to remove judges of the Superior Court at any time for reasons which appeared to the President to be a sufficient cause. There was no definition for any reason appearing to the President to be a sufficient cause to remove a judge, and therefore it became susceptible to abuse.

The National Liberation Council overthrew the democratically elected Government elected to office in 1960 through a *coup d'état*. The National Liberation Council on assumption of office passed into law the Criminal Procedure Code 1960 (Act 30) to clothe the Attorney-General with the power to detain persons for an initial 28 days and for a further period as the Attorney-General may deem fit without having access to bail. The amendment further threatened freedom of expression.

The first time Ghana had in its constitution a chapter on fundamental human rights, particularly freedom of expression and the right to information, was in the Constitution of 1969. The Parliament of Ghana did not pass an Act to give effect to a right to information provided in simple terms in the 1969 Constitution. The three successive *coups d'état* that brought into power the National Redemption Council (which subsequently metamorphosed into the Supreme Military Council), the Supreme Military Council II, and the Armed Forces Revolutionary Council did not improve upon the right to information as people lived in fear and were not given the opportunity to seek relevant information from public institutions and governments.

The 1979 Constitution further had a chapter on fundamental rights, which included freedom of expression and the right to information, but the

³⁰ Ibid.

Constitution was suspended and abrogated by the Provisional National Defence Council on 31 December 1981 and could not be enacted to regulate the right to information provided therein. The Provisional National Defence Council governed the state for over a decade and subsequently gave birth to the 1992 Constitution of Ghana, which has been in force for 30 years.

[J] THE RIGHT TO INFORMATION IN GHANA

The right to information is provided by Article 21(1)(f) of the Constitution of Ghana 1992, which makes the right to information a fundamental human right in Ghana and provides thus:

- (1) A person shall have the right to ...
 - (f) information, subject to such qualifications and laws as are necessary in a democratic society.

The Constitution does not define the parameters of the qualifications to information and laws which are necessary in a democratic society, and the Right to Information Act 2019 (Act 989) was enacted to provide the rights to individuals to access information in public institutions and private institutions or organizations that provide public functions or receive public resources and further exempted areas considered to be necessary and consistent with the protection of public interest.

The Right to Information Act 2019 (Act 989) which was enacted and came into force on 21 May 2019, is the first Act of Parliament in Ghana to provide for the right to information and exemptions made on legitimate grounds. The Right to Information Act 2019 (Act 989) does not apply to information held by the national archives, libraries and museums, to which the public has access to seek information.³¹

The right to information was provided as a fundamental human right to give the people of Ghana an inherent right to hold the President of the Republic, who was elected in accordance with the principle of universal adult suffrage, accountable. The Government becomes a trustee for the people of Ghana, including those who voted for the President and those who did not, and, as beneficiaries, the people must know everything within the public sector as a right unless matters are lawfully exempted from disclosure on legitimate grounds. The right to information is an effective tool to hold persons in accountable positions to be transparent and accountable. The exemption must be legitimate to conform with the restrictions provided by the international instruments discussed above.

³¹ Right to Information Act 2019 (Act 989), section 79.

The Right to Information Act 2019 (Act 989) has made public institutions accountable and, to avoid any ambiguity, provided a definition for it to include private institutions or private organizations that receive public resources or provide a public function. The private bodies contemplated by the Act include hospitals and schools established by religious bodies whose staff are paid by the state. A mission hospital whose compensation is paid by the state to perform public health services would be deemed to be a public body regulated by the Act to give free access to information held by it.³²

The word “information” has also been defined broadly to include recorded matter or material of whatever form or medium that is under the control, possession, or custody of a public institution, irrespective of how it was made or produced by a public institution, and in the case of a private body it must relate to the performance of a public function.³³

The long title to the Right to Information Act 2019 (Act 989) forms part of the Act in addition to providing objectives of the Act. Section 13 of the Interpretation Act 2009 (Act 792) provides that the preamble and long title form part of an Act. The long title to the Right to Information Act 2019 (Act 989) provides as follows:

AN ACT to provide for the implementation of the constitutional right to information held by a public institution, subject to the exemptions that are necessary and consistent with the protection of the public interest. In a democratic society, to foster a culture of transparency and accountability in public affairs and to provide for related matters.

The long title to the Act seems to be quite misleading on the legal effect of the right to information by describing it as a constitutional right even though it is first and foremost a fundamental human right which is an inalienable right before the Constitution further made it a constitutional right.

The Act mandates public institutions to come out with manuals containing up-to-date, accurate and authentic information held by them, including departments or agencies under them, and shall be reviewed every 12 months. The information in the manual shall be accessed or inspected free of charge or may be subject to the payment of a fee in accordance with section 75 of the Act.³⁴

³² Ibid section 84.

³³ Ibid.

³⁴ Ibid section 3.

An applicant who is seeking access to information from an appropriate body shall pay appropriate fees under the Fees and Charges (Miscellaneous Provisions) Act 2009 (Act 793) unless otherwise exempted under section 75(2) of the Right to Information Act 2019 (Act 989). The circumstances under which fees and charges shall not be paid by an applicant include: where it is about a personal reproduction of the applicant or on whose behalf the application was made; information of public interest; information that should have been provided by the public body within the time stipulated under the Act; where the information is to an applicant who is indigent or a person with a disability; the time spent by the information officer or the information reviewing officer to review the information requested or the time spent by the information officer or an information reviewing officer to examine if the information requested for has been exempted; and preparing the information for which access is to be provided.³⁵

The charges payable by the applicant shall be retained by the public institution concerned to defray the expenses incurred by it in the performance of its functions.³⁶ An item of information required from a public institution or an appropriate private institution shall be obtained through an application upon payment of a prescribed fee to that body through its information officer, unless exempted by the Act. An information officer who is served with such an application is required to respond within 14 days.

Where the information required is in the custody of another institution, it shall be directed to that body to provide same to the applicant. Where the information officer refuses to grant the request, the applicant may apply for an internal review to be determined by the head of the institution, who shall deliver a decision within 15 days from the date of receipt of the request. Where the head of the institution fails to grant the application, the applicant may apply to the High Court for judicial review within 21 days or to the Right to Information Commission.

The Right to information Commission was set up by the Act to promote, monitor, protect and enforce the right to information provided under Article 21(1)(f) of the Constitution and shall be independent in the discharge of its functions subject to the Constitution. The Right to Information Commission may entertain and review a decision rendered by an information review officer of an institution upon an application made orally or in writing to it.³⁷

³⁵ Ibid section 75(2).

³⁶ Ibid section 76.

³⁷ Ibid section 41.

The jurisdiction of the Right to Information Commission shall only be dealt with after the applicant has exhausted the internal review process; if the information officer had decided on the matter and was dissatisfied with its decision, he or she applies to the review information officer, who is the head of the body concerned, to review the decision.

A person dissatisfied with the review decision by the information review officer may either apply to the High Court for judicial review or invoke the jurisdiction of the Right to Information Commission, subject to section 67 of the Act, which permits direct access to the Commission on stated grounds.³⁸

The instances where direct access is permitted include: where the information has previously been in the public domain; the request for the information is time-bound; the head of the body is the information officer there; and the information requested is the personal information of the applicant and the initial request made to that body has been refused.³⁹

An applicant who makes an application under the Act must satisfy themselves that the information being sought has not been exempted by the Act and that the information officer is competent to respond to same.

Furthermore, the state should act legitimately by imposing restrictions which conform with international law and satisfy the three-part test. An application to request information that has been exempted by the Act shall be dismissed by reason of the exemption.

[K] THE AREAS EXEMPTED BY LAW AND JUSTIFICATION

Information prepared for submission to the President or Vice President for consideration or containing information concerning any advice, deliberation, minutes, opinion, consultation, or recommendation that is likely to prejudice national security or undermine the deliberative process has been exempted.⁴⁰

This includes information relating to Cabinet, a subcommittee of Cabinet, or a committee of Cabinet regarding matters submitted before it for consideration; information before Cabinet that has not been published or released to the public, which, if disclosed, may disclose information relating to advice, deliberation, opinion, recommendation, minutes, or

³⁸ Ibid sections 65 & 66.

³⁹ Ibid section 67.

⁴⁰ Ibid section 5.

consultations likely to prejudice national security, frustrate the success of the policy, if it is disclosed prematurely, undermine the deliberative process in Cabinet, including its committees and sub-committees; or prejudice the formulation or development of government policy. The Cabinet is given the authority to grant access to information exempted by section 6 of the Right to Information Act 2019 (Act 989). The exemptions under section 6 of the Act do not cover information which contains statistical or factual data.⁴¹

Information concerning law enforcement and public safety has been exempted on several grounds, *inter alia*, to prevent the commission of crime, disorder and threats to public safety. The exemptions are not absolute and do not cover access to information consisting of the outcome of a programme adopted by a public institution to deal with possible contravention or contravention of an enactment, contains a general outline of a programme adopted by a public institution to deal with possible contravention or contravention of an enactment, or consists of a report emanating from an investigation that has been disclosed to the person who was investigated are not exempted from disclosure.⁴²

Also exempt is information affecting international relations whose disclosure will damage or prejudice the relations between the Government of Ghana and government of any other country; information communicated in confidence to a public institution by another government or on its behalf; or by an international organization or a body of that organization; or to another public institution in another country or another government; or an international organization or a body of that organization. Despite the exemptions, the President of Ghana may give prior approval for its disclosure.⁴³

The other exempted areas include: information that affects the security of the state, economic and other interests; economic information of third parties unless it has been already disclosed or made available to the public; information concerning tax unless the person to whom the information concerns agrees to its disclosure; information concerning the internal working of public institutions which is on opinion, advice given or recommendation or deliberative process in that institution but may be disclosed where it contains statistical or factual data, contains information used as the basis of public policy or to formulate public policy; parliamentary privilege, fair trial, and contempt of court or of

⁴¹ Ibid section 6.

⁴² Ibid section 7.

⁴³ Ibid section 8.

a quasi-judicial body; and privileged information under the Evidence Act 1975 (NRCD 323), the lawyer and client professional relationship, communication between a doctor and patient or any other medical expert in respect of a medical diagnosis or treatment of the patient, or a communication between spouses married under any law, unless that privilege is waived by the person who is entitled to it.⁴⁴

The other areas exempted by the Act are where the disclosure of personal affairs on the living or dead person is unreasonable, and where information is exempt from disclosure but its disclosure would fail to protect the public interest.⁴⁵

Article 135 of the 1992 Constitution is on the production of official documents in court where disclosure of its contents will be prejudicial to the security of the state or will be injurious to public interest. The Supreme Court has exclusive jurisdiction to determine whether or not an official document shall not be produced in court and if its disclosure or production of its content will be prejudicial to the security of the state or will be injurious to the public interest.⁴⁶

All the legitimate grounds provided by the Act are in accordance with the legitimate grounds provided by the recognized international instruments discussed above and satisfy the three-part test which is used to determine the justification for restrictions placed on freedom of expression and the right to hold opinions.

[L] SOME OF THE ENACTMENTS THAT PROVIDE FOR EXEMPTIONS AND SANCTIONS FOR VIOLATIONS

The State Secrets Act 1962 (Act 101) provides that a person who obtains information, records or publishes any state secrets intended to be useful to a foreign power either directly or indirectly or makes any sketch or model intended to be used by a foreign power commits an offence.⁴⁷

The Right to Information Act 2019 (Act 989) which has criminalized a wilful disclosure of exempt information provided by it and a person convicted of any such disclosure shall be liable to a fine of not less than 250 penalty units and not more than 500 penalty units or to a term of

⁴⁴ Ibid sections 9-15.

⁴⁵ Ibid sections 16 & 17.

⁴⁶ Constitution of Ghana 1992, Article 135.

⁴⁷ State Secrets Act 1962 (Act 101), section 1.

imprisonment of not less than six months and not more than three years or to both.⁴⁸

The Cybersecurity Act 2020 (Act 1038) has criminalized publication of photographic images of a child or any other person. A person who takes or permits to be taken an indecent image of a child for the purposes of publication or storing it on a computer shall upon conviction be liable to a fine of not less than 2500 penalty units and not more than 5000 penalty units or term of imprisonment of less than five years or both.⁴⁹

Furthermore, a person who uses a computer online service, an internet service, a local bulletin board service, or any other device capable of storing electronic data or transmission to publish or store information relating to a child for sex abuse shall upon conviction be liable to a term of imprisonment of not less than five years and not more than 15 years without an option of a fine.⁵⁰

A person who is convicted of the offence of aiding and abetting a child for the purposes of child abuse or sexual extortion shall, upon conviction, be liable to a term of imprisonment of not less than five years and not more than 15 years without the option of a fine.⁵¹ A person who is convicted of the offence of cyberstalking a child shall be liable to a term of imprisonment of not less than five years and not more than 15 years.⁵²

A person who commits sexual extortion; a person who threatens to distribute by post, email, text, or transmission by any electronic means or otherwise to harass, intimidate, or coerce a person with intent to extort money or engage in unwanted sexual activity; or actually extorts money or forces the victim to engage in unwanted sexual activity shall, upon conviction, be liable to a term of imprisonment of not less than five years and not more than 25 years without the option of a fine.⁵³ There are other offences relating to the distribution or dissemination of information relating to online sexual offences.

There are civil remedies to regulate the use of information without disclosing their source and claiming it as their own, which amounts to plagiarism and is also considered as academic dishonesty which attracts

⁴⁸ Right to Information Act 2019 (Act 989), section 81.

⁴⁹ Cybersecurity Act 2020 (Act 1038), section 62.

⁵⁰ *Ibid* section 63.

⁵¹ *Ibid* section 64.

⁵² *Ibid* section 65.

⁵³ *Ibid* section 66.

serious sanctions. Furthermore, there are laws on copyright to protect the intellectual property of its owners.

[M] THE STATE'S POWER TO ACCESS INFORMATION FROM THE PEOPLE

The Government also requires information from individuals to promote the welfare of its citizens, in whom the sovereignty of power resides, and therefore enact laws to clothe it with authority to either legally or illegally obtain information which will help in fighting crime, prevent disorder, protect public safety and the economic wellbeing of the people or for the protection of rights and freedoms of other persons.

As a result of the above, the Government has enacted several laws including the Constitution of Ghana 1992; the Criminal Offences and Other (Procedure) Act 1960 (Act 30); the Electronic Communication Act 2008 (Act 775); the Economic and Organised Crime Office Act 2010 (Act 804); the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930); the Office of the Special Prosecutor Act 2017 (Act 959); the Right to Information Act 2019 (Act 989); the Narcotics Control Commission Act 2020 (Act 1019); and the Cybersecurity Act 2020 (Act 1038) to empower the Government to obtain information from individuals and other entities to promote the welfare of Ghana through any means permitted by law.

The Cybersecurity Act 2020 (Act 1038) gives authority to an investigative officer investigating an offence under the Act to make an application *ex parte* to the High Court in camera for the production order to obtain the subscriber information, which is the subject matter of the investigation, from the suspect.⁵⁴ An application *ex parte* to intercept the content data may be made, and the court, if satisfied, may grant and issue a warrant for that purpose.⁵⁵

Despite the fact that communication by persons provided by the service providers including Vodafone, Scancom and Airtel-Tigo is supposed to be confidential, the Government of Ghana operating under the exceptions provided under Article 18(2) of the 1992 Constitution has permitted the National Communication Authority to request the service providers to install interception capabilities to record all communications that pass through them, including the decrypting of telecommunications message used through their facilities, to enable

⁵⁴ Ibid sections 69 & 70.

⁵⁵ Ibid sections 73 & 74.

them to comply with interception warrants issued by the High Court under the Cybersecurity Act 2020 (Act 1038).⁵⁶

The service providers are further mandated to store and retain subscriber information for at least six years, traffic data for a period of 12 months, and relevant content data for a period of 12 months, and the High Court, upon an application made *ex parte*, can order the service provider concerned to provide the required information.⁵⁷ Everyone is at risk and must know the type of information they pass on to others or discussions they have through telecommunications.

The Government also requires information from the people to ensure the maximum welfare of the people in accordance with the 1992 Constitution.⁵⁸ The Constitution provides for the protection of privacy of home and other property, but there are exceptions which permit the state to use its coercive power in accordance with law and as may be necessary in a free democratic society for public safety, economic wellbeing of the people, the prevention of crime or disorder and the protection of rights and freedoms of others.

The state may therefore empower a body by an Act of Parliament to record and intercept communications between persons and search a person, or his or her property, to seize any information that comes under the justification provided by the Constitution. The Government may require information from the people through whatever means to prevent disorder or crime, or the rights and freedom of others, or provide safety or economic wellbeing of the country, and may secretly record a person or intercept his or her communications.

Section 71 of the Narcotic Control Commission Act 2020 (Act 1019) empowers the Director-General of the Commission, subject to Article 18 of the 1992 Constitution, to intercept communications and parcels likely to contain information or substances that may assist in a narcotics offence.

Sections 10, 11 and 12 of the Criminal Offences and Other (Procedure) Act 1960 empower the police to arrest and search for information by search warrant executed in accordance with the law. Other bodies, including the Office of the Special Prosecutor and the Economic and Organized Crime Unit, have been clothed with the powers of the police to arrest, search and obtain information in accordance with the law to perform similar functions given to the police by law, and each of them

⁵⁶ Ibid section 76.

⁵⁷ Ibid section 77.

⁵⁸ Constitution of Ghana 1992, Articles 1 & 18.

may tap communications between persons to obtain evidence against them to be used in the courts.

Section 96 of the Banks and Specialised Deposit-Taking Act 2016 (Act 930) empowers a person authorized by the Bank of Ghana to examine the books, records, minute books, files and personnel of any financial institution under the Act as part of the supervisory powers of the Bank of Ghana over all other banks in the country.

[N] ACCESS TO COURT AND THE POWER OF CONTEMPT

The courts are public institutions set up by law to resolve disputes and legalities, and it is in the public's interest that people have confidence in them. The parties to actions before the courts are restricted by court rules and laws of evidence as to the information that could be pleaded and the evidence that could be adduced as relevant and admissible.

The power of the courts to commit for contempt for themselves in Ghana is exclusively given to the superior courts of judicature, consisting of the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals.⁵⁹ The contempt committed in respect of the lower courts is punished by the High Court on their behalf, as they do not have jurisdiction to commit contempt against themselves. The importance of contempt is to maintain the authority and impartiality of the judiciary.

The parameters of contempt of court are quite dicey, as what amounts to contempt is quite ambiguous. In Ghana, the courts are classified into superior courts and lower courts. The lower courts consist of the Circuit Courts, District Courts, Juvenile Courts and the Chieftaincy Tribunals, which are made up of the judicial committees of the National House of Chiefs, the Regional Houses of Chiefs and the Traditional Councils.⁶⁰

At times, it is not certain whether to include bodies that exercise quasi-judicial authority, including commissions of inquiry established under the 1992 Constitution and other Acts of Parliament. The bodies established by law to exercise administrative and investigative functions include the Commission on Human Rights and Administrative Justice and the Labour Commission.

⁵⁹ Ibid Article 126.

⁶⁰ Courts Act 1993 (Act 459), section 39.

Admittedly, those bodies cannot commit contempt against themselves, as the 1992 Constitution has given that jurisdiction exclusively to the superior courts, and they cannot claim to have jurisdiction. The question is about when they are scandalized in the discharge of their functions: can one file contempt proceedings in the High Court to safeguard the administration of justice?

The main issue is whether the High Court has jurisdiction to entertain contempt applications emanating from the proceedings of bodies that exercise investigative and administrative functions of the state. There are several cases before the English courts for resolution on the issue of the High Court to entertain contempt applications from bodies which are not part of the inferior courts but exercise judicial responsibilities. In the case of *Attorney-General v British Broadcasting Corporation* (1981),⁶¹ the Attorney-General sought an interlocutory injunction to restrain the British Broadcasting Corporation from broadcasting proceedings before the local valuation court as it was likely to prejudice the matter pending before it for determination.

The House of Lords held that the local valuation court is not one of the inferior courts created by law and does not attract the protection of the law of contempt. By parity of reason, only the courts have the protection of the law of contempt, and the other bodies are not protected.

Another group of bodies that may require the protection of the law of contempt are those that exercise quasi-judicial powers. Traditionally, the quasi-judicial bodies were not given the protection of the law of contempt, but section 14(c) of the Right to Information Act 2019 (Act 989) states that information is exempt where its disclosure would “constitute contempt of court or of a quasi-judicial body”. These are bodies that are essentially judicial in character but not created to exercise judicial power within the contemplation of the law. There is no legislation in Ghana that has created a quasi-judicial body, and the Act cannot create such jurisdiction and exempt its information from disclosure.

There are tribunals established by some Acts of Parliament to resolve legal matters, and a person dissatisfied with them may appeal to the courts. They include the tribunal known as the Adjudicative Panel, established by the Chief Justice under section 28 of the Payment Systems and Services Act 2019 (Act 987) to review a decision of the Bank of Ghana arising from the refusal of a licence or authorization of an electronic

⁶¹ *Attorney-General v British Broadcasting Corporation* [1981] AC 303.

money issuer, and the Court Martial established under the Armed Forces Act 1962 (Act 105).

These quasi-judicial bodies are composed of a High Court judge and other persons, but they are not considered as part of the lower courts and ordinarily do not have the protection of the law of contempt. However, the Right to Information Act 2019 (Act 989) seeks to exempt some of their information from disclosure, which, when disclosed, would constitute contempt of a quasi-judicial body, which is unknown to the jurisprudence on contempt in Ghana.

For the purposes of this topic, emphasis shall be placed on criminal contempt, which is often used to maintain public confidence in the court. Civil contempt primarily consists of wilful disobedience to a speaking order or judgment of a court which directs a person to do an act or to refrain from doing an act otherwise than payment of money to a person.

Criminal contempt consists of contempt *in facie curiae* (on the face of the court) and *ex facie curiae* (outside the face of the court), and it must relate to one or more of the following acts: any act that scandalizes the court or tends to scandalize it; an act that prejudices or impedes pending proceedings; insulting the court or a judge in respect of a pending proceeding; an act that tends to lower the authority of the court; an act that prejudices or tends to prejudice or interferes or tends to interfere with pending proceedings; or an act that interferes or tends to interfere with or obstructs the administration of justice in whatever manner.

In the case of *Republic v Mensa-Bonsu and Others*,⁶² where the respondent published a scurrilous publication about one of the Supreme Court cases after judgment, the Supreme Court held that there are instances where the exercise of freedom of speech in the courts would constitute contempt of court, and that includes all the grounds mentioned in the above paragraph. In the case in point, one of the Supreme Court judges was alleged to have attributed a comment to the former Prime Minister of Ghana, Dr Kofi Abrefa Busiah, which was not true and, in the article, captioned: “Justice Abban is a liar”.

Another article was headed “Justice Abban scandal takes dramatic turn”, and a final article was headed “Abban puts integrity of the Bench on the line”. The journalist was convicted of contempt of court for publishing scandalous, abusive and contumacious material calculated to bring the administration of justice into disrepute.

⁶² *Republic v Mensa-Bonsu and Others* [1994]-[1995] GBR 130.

Freedom of expression is restricted when it comes to contempt matters, as the law has settled that the truth or otherwise of the publication is not a defence, and the court would not take it into account when it is established that the publication concerns any of the restrictions imposed by law whose violation amounts to contempt of court. Any act that scandalizes the courts has the propensity to erode public confidence in the courts which would undermine the authority of the courts whether it was made in respect of a pending proceedings or after judgment.

The restrictions imposed on freedom of expression in court derive their roots from common law and are further fortified by Article 10, paragraph 2, of the ECHR, which restricts freedom of expression as prescribed by law and is necessary in a democratic society to “maintain the authority and impartiality of the judiciary”. Section 14 of the Right to Information Act 2019 (Act 989) exempts any information whose disclosure would constitute contempt of court or of a quasi-judicial body. It provides the following:

- 14 Information is exempt from disclosure if the disclosure can reasonably be expected to ...
- (c) constitute contempt of court or of a quasi-judicial body.

Any information whose disclosure would constitute contempt of court or a quasi-judicial body is exempt by law. The restrictions imposed on freedom of expression whose disclosure would constitute contempt do not suggest that the courts are above criticism, but any criticism of the court shall be *bona fide*, temperate and fair; otherwise, it may delve into the area restricted by law.⁶³

The European Court on Human Rights (ECtHR) held that freedom of expression is not an absolute right and a person who uses abusive words in the court or to its judge shall overstep his or her bounds and may be guilty of contempt. The ECtHR drew a distinction between criticism and insults when an appellant who was dissatisfied with the decision of the Municipal Court in Zagreb, Croatia, filed a notice of appeal against it to the Zagreb County Court in which he insulted the court and the judge. He was convicted of contempt in the nature of abuse of rights in the proceedings by the Municipal Court and argued that it was within his freedom of expression under Article 10 of the ECHR.

The court held that the appellant was guilty of contempt by the fact that he used abusive words in the court in Croatia and towards its judge, that such conduct falls within the restricted part of Covenant and that

⁶³ *Saday v Turkey* App No 32458/96 (30 March 2006).

the restraint on freedom of expression was necessary and proportionate to maintain the authority and impartiality of the judiciary. By a majority of 4:3, the ECtHR held that the restrictions imposed by law did not violate the appellant's right to freedom of expression on the ground that they were imposed by law to pursue a legitimate aim that was necessary in a democratic society.⁶⁴

The aim of restricting freedom of expression is to maintain the sanctity of the courts and their judges and promote public order. Contempt of court under Article 19 of the 1992 Constitution is an entrenched provision whose amendments or repeals would have to go through a national referendum.

[O] FREEDOM OF EXPRESSION AND JOURNALISM

Journalists are persons who seek, obtain, publish or disseminate information for public use through text, pictures, or video. The person may belong to a professional body or not but may be considered a journalist provided the person provides the public with the information he or she seeks, gathers and disseminates. Journalists expose public wrongs to promote transparency and accountability, while others also expose wrongs by naming and shaming those involved and require protection from the courts.

The restrictions imposed by the ICCPR, ECHR, ACHR and ACHPR do not exempt journalists from the restrictions imposed on freedom of expression, and the restrictions apply to all, and a journalist who violates any of them ought to be dealt with in accordance with the law. The Right to Information Act 2019 (Act 989) also does not exempt journalists from the restrictions imposed on freedom of expression. The UN Educational, Scientific and Cultural Organization (UNESCO) promotes the safety of journalists as some of them are killed for the information they release to the public, while others are imprisoned by the courts for contempt of court.

The killings of journalists have been condemned by all, and a UNESCO report disclosed that 55 journalists were killed in 2021, and the number of killings in 2022 rose to 86.⁶⁵ The laws on contempt do not spare journalists, and occasionally some of them are convicted and punished for contempt of court by the courts, which has become a worry to journalists.

⁶⁴ *Zugic v Croatia* App No 3699/08; 3408/2011 (ECHR, 31 May 2011).

⁶⁵ See UNESCO, 'Journalist killings decline in 2021 but alarming threats remain' (6 January 2022).

In Ghana, the first open court system was allowed during the 2012 presidential election dispute, when the public had the opportunity to observe the Supreme Court proceedings. The second open court was during the 2022 presidential election dispute.

In Ghana, the hearing of cases is supposed to be made in public, subject to restrictions to be placed by the adjudicating authority in the interest of public morality, public safety, or public order to hear them in public.⁶⁶ There are laws that have placed restrictions on public hearings in the interest of public morality, public safety, or public order, and they include proceedings before family tribunals and juvenile courts.

The ICCPR, to which Ghana is a signatory and which requires court hearings to be in public, forbids the press and the public from attending cases on stated grounds. It provides the following:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society or when the interest in the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice but any judgment rendered in a criminal case or in a suit at law shall be made public, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁶⁷

The above provision introduces the topic of open or closed courts. Where a public hearing of a case is not forbidden by law, journalists shall be afforded the opportunity to attend and broadcast same live to the public under freedom of access to information. In most instances, there are allegations made by some of the courts in Ghana that court reportage by some journalists is not accurate and fair, and the only solution is to advocate for open justice in proceedings not restricted by law. In most cases, judges and magistrates permit journalists to take notes and make stories out of them instead of promoting audiovisual recordings.

Audiovisual journalists and television journalists are also journalists who capture the entire proceedings live in both visual and audio form for the consumption of the public. The audiovisual represents the accurate

⁶⁶ Constitution of Ghana 1992, Article 19(14).

⁶⁷ ICCPR, Article 14(1), which is almost the same as ECHR, Article 6(1).

and fair representation of the court proceedings, and it is preferable to print journalism, which feeds the public with the information journalists perceive to have heard from the court.

In some cases, including presidential election disputes, a sizable number of the public would be willing to attend, but the court space may not allow more than 500 people to be present. This is where television journalists come in, as they would be able to broadcast everything live to the millions of people who would have liked to attend if not for the inadequate space.

The Supreme Court of Appeal in South Africa affirmed the decision of the High Court granting access to court proceedings to the public and stated that audiovisual broadcasting of judicial proceedings forms part of freedom of expression.

The court further held that the use of pencils and pads by print journalists to take notes from the courts for public consumption has become outmoded and fails to give accurate reportage, and makes the judges accountable to the public. The court also stated that to avoid interference with the work of the courts, the journalists shall be in court at least 15 minutes before the court sitting to use stationary, erected video-cameras to be operated without human movement with the consent of the officials of the court.⁶⁸

The South African Supreme Court of Appeal had, as far back as 2009, issued a practice direction allowing full audiovisual broadcasting of its proceedings, and the restrictions were on the means of gathering the information and the place where it should be gathered, not on filming outside the court. The UK has also endorsed open court, including the use of audiovisual broadcasting of court proceedings, as a right to freedom of information.⁶⁹

Lord Diplock defined open justice as a fundamental right inherent in common law; it is subject to narrow exceptions, and in criminal cases all evidence communicated to the court is made public.⁷⁰ The ECtHR has held that Article 6 ECHR, which requires public hearings, is subject to certain restrictions. Judges, magistrates and jurors who preside over cases in areas where there are no restrictions become accountable to the public as their temperaments are witnessed live by all.

⁶⁸ *NDPP v Media 24 Limited and Others and HC Van Breda and Media 24 Limited and Others* (425/2017) [2017] ZASCA 97 (21 June 2017).

⁶⁹ *Attorney-General v Leveller Magazine* [1979] AC 440.

⁷⁰ ECHR, see Article 6(1) and *B v United Kingdom; Pev United Kingdom* [2001] 2FLR 261.

There are instances where judges deny the comments attributed to them during court proceedings by journalists, and open court is the solution to it.⁷¹ There are restrictions imposed on the reporting of cases involving a child before a family tribunal, and a person who acts contrary to them commits an offence. Section 39 of the Children's Act 1993 (Act 560) provides as follows:

- (1) A person shall not publish information that may lead to the identification of a child in a matter before a family tribunal except with the permission of the family tribunal.
- (2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding two hundred and fifty penalty units or to a term of imprisonment not exceeding one year or to both the fine and the imprisonment.

The above provision does not exempt journalists from criminal prosecution on the publication of matters affecting children before the family tribunal, which may lead to the identification of the child involved.

It is not every matter before an adjudicating authority that may be heard in public, and in some cases only the parties to the proceedings and their lawyers may be permitted to attend due to several reasons. The justifiable grounds for a closed hearing in Ghana include where the adjudicating body considers it necessary or expedient that an open hearing of the proceedings may prejudice the interests of justice or where a law provides for an in-camera hearing in the interest of defence, public safety, public morality, public order, or the welfare of children (persons under 18 years), or the protection of private lives of the parties to the proceedings.⁷²

An open hearing or publicity should be forbidden to journalists in cases where their admission to the proceedings would violate the 1992 Constitution or ICCPR provisions on in-camera proceedings. There is a controversial issue as to whether cases heard in camera may be published in the law reports for public consumption. Some of the matrimonial proceedings which are heard in camera are published in some of the law reports for public consumption, which therefore defeats the objective of in-camera hearings. At best, only the legal issues emanating from the case may be published, excluding the facts and evidence that would expose the private lives of the couple or parties. When matters heard in camera under law go on appeal, the appellate courts should ensure that they comply with the requirements imposed on them by the 1992 Constitution

⁷¹ *Republic v Mensa- Bonsu* (n 62 above).

⁷² Constitution of Ghana 1992, Article 19(14)(a) & (b).

and ICCPR to prevent publicity unless it is a legal issue, which would not defeat the purpose of an in-camera hearing.

It is recommended strongly that proceedings from cases heard in camera for some obvious reasons under the 1992 Constitution and ICCPR should not be made public in law reports to publish the facts and evidence for public consumption.

[P] POSITIVE EFFECT

Public institutions are to publish all relevant information which may be accessed in a brochure and shall be revised every 12 months to give up-to-date, accurate and authentic information on the institutions. The right to information requires public officers to be transparent and accountable to the people they serve. A person who wilfully discloses any information exempt from disclosure commits an offence, and this is meant to ensure that legitimate restrictions placed on freedom of expression to promote democratic principles are not abused.

Furthermore, to ensure transparency and accountability on the part of public officers, the Right to Information Act 2019 (Act 989) has criminalized an act of public officers which constitutes gross misconduct.⁷³ The state, through its agencies, may interfere with or intercept any information or communication that may help the state to prevent the commission of crime, the prevention of disorder, the protection of the rights or freedoms of others, the protection of public safety, or the economic wellbeing of the people. The international instruments help the member states restrict freedom of expression in accordance with the law, as is necessary in a democratic society.

[Q] NEGATIVE EFFECT

The governmental power to intercept communication is subject to abuse, particularly against political opponents. The interception of communication by the telecommunication companies is not safe and may pose problems for subscribers, including suits for defamation and arrests for matters that they did not attach any seriousness to. Private organizations are exempted unless funded by the state or performing public functions. The fees payable for the information sought may be disincentives to applicants, in particular where the applicant decides to use judicial review to address a decision by a review information officer, which is filed upon payment of appropriate filing fees.

⁷³ Right to Information Act 2019 (Act 989), sections 81 & 82.

The Right to Information Act 2019 (Act 989) satisfies the legitimate restrictions provided by the international human rights treaties, some of which Ghana is a signatory to, including the ICCPR and the ACHPR. Section 14(c) of the Act, which partly deals with information that is exempt from disclosure and is likely to constitute contempt of a quasi-judicial body, is likely to create confusion and deter exempt bodies which are not courts from disclosing information under the guise of contempt when contempt of a quasi-judicial body is unknown to the jurisprudence on contempt in Ghana. The laws provide for contempt of court, contempt of Parliament, and contempt of a district assembly, and not any other type of contempt in Ghana.⁷⁴

Where a private body performs a public function and has not been included in the legislative instrument made by the minister responsible for information, it may refuse to disclose information under the Act. The Act has defined “relevant private body” as “a private body that the Minister may, by legislative instrument, add to the list of private bodies performing a public function”. The power given to the minister is subject to abuse as public institutions have been defined to include private bodies or organizations that perform public functions or receive public resources, and there is no ambiguity about their identification to give such discretion to the minister.

[R] CONCLUSION

Freedom of expression is a vital tool used to deepen democracy, but it is not absolute, and the restrictions imposed on it by laws should be observed to avoid prosecution and further imprisonment, whether the person involved is a journalist or not. There is an undeniable fact that the roles of the judiciary and journalists complement each other to develop democracy and further expose wrongdoing. Journalists must appreciate the fact that they are forbidden from disclosing exempt information, otherwise the laws would deal with them as they would with any other person. Where there is a right to freedom of information, journalists may through whatever means seek, obtain and disseminate for public use.

Where there is a right to information, the law on illegally obtained information is immaterial, as the role of journalists is to get information for the public. The issue as to whether illegally obtained evidence would be admissible in court or not does not form part of the role of journalists; but a question of admissibility is to be determined by the courts. Everybody is

⁷⁴ Constitution of Ghana 1992, Articles 19, 122, 123 & 126 and Local Governance Act 2016 (Act 936), section 223.

at risk about the discourse they have on telecommunications and should be circumspect in their discussions. There is a clear distinction between freedom of expression and the right to information, as the former has exempt information which cannot be disclosed, while the latter is free, and the procedure used to obtain it is immaterial.

Section 85 of the Right to Information Act 2019 (Act 989) makes the Act applicable to all the enactments in force before the coming into force of the Act that deal with disclosure, and, where the existing law provided otherwise, it shall be modified to conform with it.

About the author

Sir Dennis Dominic Adjei is a Justice of the Court of Appeal, Ghana. He was elected as Judge of the African Court in July 2022 for a term of six years. He is one of the Nine-Member Advisory Committee of the International Criminal Court. Justice Dennis Dominic Adjei was elected as the Inns of Court and Institute of Advanced Legal Studies, University of London, Senior Judges Fellow for Common Law jurisdictions for the 2022-2023 academic year. He is a Fellow of the Ghana Academy of Arts and Sciences.

References

Feldman, David. *Civil Liberties and Human Rights in England and Wales* 2nd edn. Oxford: Oxford University Press, 2002.

Legislation, Regulations and Rules

Armed Forces Act 1962 (Act 105)

Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930)

Children's Act 1993 (Act 560)

Constitution of Ghana 1957 (Order in Council)

Constitution of Ghana 1969

Constitution of Ghana 1979

Constitution of Ghana 1992

Courts Act 1993 (Act 459)

Coroners and Justice Act, 2009

Criminal Code of Nigeria

Criminal Code (Repeal of Criminal Libel and Seditious Laws) Amendment Act 2001 (Act 602)

Criminal Justice and Immigration Act 2008

Criminal Offences Act 1960 (Act 29)

Criminal Offences and Other (Procedure) Act 1960 (Act 30)

Criminal Procedure Code 1960 (Act 30)

Cybersecurity Act 2020 (Act 1038)

Deportation Act 1957

Disqualification Act 1959

Economic and Organised Crime Office Act 2010 (Act 804)

Electronic Communication Act 2008 (Act 775)

Evidence Act 1975 (NRCD 323)

Fees and Charges (Miscellaneous Provisions) Act 2009 (Act 793)

Habeas Corpus Act 1964 (Act 244)

Interpretation Act 2009 (Act 792)

Local Governance Act 2016 (Act 936)

Narcotics Control Commission Act 2020 (Act 1019)

National Assembly (Disqualification) Act 1959

Office of the Special Prosecutor Act 2017 (Act 959)

Payment Systems and Services Act 2019 (Act 987)

Preventive Detention Act 1958

Right to Information Act 2019 (Act 989)

State Secrets Act 1962 (Act 101)

International instruments

American Convention on Human Rights 1969 (ACHR)

African Charter on Human and Peoples' Rights 1981 (ACHPR)

European Charter on Environment and Health 1989

European Convention on Human Rights 1950 (ECHR).

International Covenant on Civil and Political Rights 1965 (ICCPR)

Rio Declaration on Environment and Development 1992

Universal Declaration of Human Rights of 1948

United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 1998

United Nations General Assembly, UN Resolution 37/7 of 28 October 1982

United Nations General Assembly, UN Resolution 45/94 of 19 December 1990

United Nations General Assembly, UN Resolution 59 of 14 December 1946 (adopted as “Freedom of Information”)

United Nations General Assembly, UN Resolution 2200A (XXI) of 16 December 1966

Cases

Attorney-General v British Broadcasting Corporation [1981] AC 303

Attorney-General v Leveller Magazine [1979] AC 440

Attorney-General’s Reference (No 3 of 1999) [2001] 2 WLR 56, [2001] AC 91

B v United Kingdom; Pev United Kingdom [2001] 2FLR 261

Cubage v Asare and Others [2017]-[2020] 1 SCGLR 305

Delaney (1989) 88 Cr App R 338

Director of Public Prosecution v Cuciurean [2022] EWHC 736 (Admin)

Feneku and Another v John Teye and Another [2001]-[2002] SGLR 985

Holy Trinity Church v United States 143 US 457, S Ct 511 36 L Ed 226 29 February 1982.

Hoho v S (493/05) [2008] ZASCA 98; [2009] 1 All SA (SCA); 2009

Lardan v Attorney-General & Others (No 1) 3 WALR (1957) 55.

Medellin v Texas 552 US 491 2008

NDPP v Media 24 Limited and Others and HC Van Breda and Media 24 Limited and Others (425/2017) [2017] ZASCA 97 (21 June 2017)

R v Leatham (1861) 8 Cox CC 498

R v Sang [1980] AC 402 [1979] Crim LR 655

Re Akoto and Seven Others [1961] GLR 523

Republic v High Court (Commercial Division), Accra, ex parte Attorney-General (NML Capital Limited & Republic of Argentina interested parties) [2013]-[2014] 2 SCGLR 990

Republic v Mensa-Bonsu and Others [1994]-[1995] GBR 130

Saday v Turkey App No 32458/96 (ECHR, 30 March 2006)

Sunday Times v United Kingdom App No 6538/74 (ECHR, 26 April 1979)

Texas v Johnson 109 S Ct 2533 (1989)

X v United Kingdom App No 7215/75 (ECHR 5 November 1981)

Zugic v Croatia App No 3699/08; 3408/2011 (ECHR, 31 May 2011)