THE RIGHT TO INFORMATION TO PROMOTE TRANSPARENCY AND ACCOUNTABILITY, AND THE RIGHT OF PROTECTION PROVIDED BY INTERNATIONAL AND NATIONAL LAWS WITHIN THE GHANAIAN CONTEXT

LECTURE BY JUSTICE DENNIS DOMINIC ADJEI – INSTITUTE OF ADVANCED LEGAL STUDIES INNS OF COURT JUDICIAL FELLOW FOR 2022-2023 ACADEMIC YEAR ON MONDAY 13TH FEBRUARY, 2023 AT THE INSTITUTE OF ADVANCED LEGAL STUDIES – UNIVERSITY OF LONDON

Table of Contents

1.0 INTRODUCTION 3

2.0 HISTORICAL ANTECEDENTS OF FREEDOM OF EXPRESSION IN INTERNATIONAL LAW 4

a. UN RESOLUTION 59 OF 1946 4

b. UNITED NATIONS DECLARATION OF HUMAN RIGHTS 5

3.0 RECENT INSTRUMENTS ON THE RIGHT TO INFORMATION IN INTERNATIONAL LAW 6

4.0 OBLIGATION TO COMPLY WITH INTERNATIONAL LAW 10

5.0 THE RIGHT TO FREEDOM OF INFORMATION ON ENVIRONMENTAL PROTECTION 12

6.0 LEGITIMATE GROUNDS TO RESTRICT FREEDOM OF EXPRESSION 14

7.0 THE RIGHT TO INFORMATION IN GHANA: A HISTORICAL PERSPECTIVE 15

8.0 PROTECTION OF THE RIGHT TO INFORMATION IN GHANA'S FOURTH REPUBLIC 17

9.0 POSITIVE EFFECTS 19

11.0 THE AREAS EXEMPTED BY LAW AND JUSTIFICATION 20

12.0 ENACTMENTS THAT PROVIDE FOR EXEMPTIONS AND SANCTIONS FOR VIOLATIONS 21

13.0 THE STATE'S POWER TO ACCESS INFORMATION FROM THE PEOPLE 22

14.0 ACCESS TO COURT AND THE POWER OF CONTEMPT 24

15.0 FREEDOM OF EXPRESSION AND JOURNALISM 27

CONCLUSION 29

BIBLIOGRAPHY 31

ABSTRACT

Over the years, the right to information has become one of the most important human rights for the purposes of ensuring transparency and accountability to the people. This right arose on the international plane after the Second World War to guarantee the free flow of information between the States and avert the outbreak of another war. Since then, many countries have provided elaborate laws which seek to further define the scope of this right and the pertinent exceptions to it.

In this paper, the author discusses the right to information in Ghana within the context of international human rights and environmental law instruments and Ghana's domestic laws, including the Right to Information Act, 2019 (Act 989). The author will discuss a range of topics. These topics include the restrictions to the right to information, access to information on the environment, journalism and the right to information, the state's right to access information, and court access and the ability to punish for contempt.

The goal of the paper is to comprehensively discuss the potency of the right to information as a tool to ensure that public institutions are accountable and transparent.

1.0 INTRODUCTION

Public institutions hold information acquired while performing official obligations in trust for the citizenry. In the context of information access and this lecture, the phrase "public institutions" refers to institutions established by the Constitution and other laws as well as private organizations or institutions that carry out public duties or receive public funds.

As trustees and fiduciaries, public institutions have a duty to uphold the public's confidence by being accountable, transparent, and honest to the public. This is especially true given that they receive public funding. However, there is no denying that authoritarian regimes and their agents conceal information in their possession to avoid being held responsible by the people they rule.

In order to end the cycle of tyranny and guarantee the free flow of information from governments to citizens, declarations, treaties, agreements, and covenants have established freedom of expression as a fundamental human right. Further, many states have passed Right to Information Acts, which offer legal protection for anybody requesting information from public officials.

The right to information is inextricably linked to the freedom of expression. Freedom of expression can be exercised in numerous ways. It encompasses actions or inactions which have expressive content. Thus, the International Covenant on Civil and Political Rights (ICCPR) provides that it may be expressed by a person orally, in writing, in print, through art, or through any other forms of media of his choice.[1] The phrase "other forms of media of his choice" encompasses communication made via satellites, the internet, DVDs, CD-ROMs, cables, and media players.

Nonetheless, the free flow of information, whether scientific, real, demonstrative, electronic, documentary, or digital must be regulated. Information is a powerful tool because it has the capacity to affect other people's thoughts and behaviour. Thus, regulation may be necessary for various reasons, including national security or public order, territorial integrity or public safety, protection of health or morals, respect for the rights or reputation of others, prevention of crime or disorder, and confidentiality of received information, as well as maintaining the impartiality and authority of courts.[2]

Therefore, states must pass laws protecting the right to information, impose appropriate limitations, and establish procedures for accessing unrestricted information. Not all forms of expression are protected. The content and context of the expression are relevant. Thus, in the case of *Texas v. Johnson,*[3] the Federal Supreme Court of the United States of America, by a majority of 5-4, held that the burning of the American flag was protected speech under the First Amendment to the U.S. Constitution.

Determining the boundaries of the right to information is a difficult issue, but this should not be an excuse for failing to enact a law that effectively protects it. Rather, it should be seen as a

[1] Article 19(2) of ICCPR
[2] Articles 19 of the ICCPR, 10 of the ECHR, and 9 of the AFCHPR
[3] 109 S.Ct. 2533 (1989)

recognition of the growing complexity that dynamic cultures around the world face. We should not abandon the idea entirely; we should not throw the baby out with the bathwater.

In this lecture, we will explore the international legal framework surrounding the right to information taking into account the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the African Charter on Human and Peoples' Rights.

The focus will then shift to the Right to Information Act, 2019 in Ghana, assessing its impact on promoting accountability, transparency, and trust in the public sector, as well as its effect on democracy. The lecture will examine the reasons for certain exemptions in the law that are meant to safeguard the public interest in democratic societies. Further, the discussion will touch on the delicate balance between freedom of expression and the restrictions necessary for protecting the public interest, as outlined in the Right to Information Act, 2019. Also, the paper explores the freedom and accessibility of information relating to the environment, held by public institutions.

2.0 HISTORICAL ANTECEDENTS OF FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

The history of the right to information could be traced to two instruments that were established after the Second World War to guarantee the free flow of information between the States and avert the outbreak of another war motivated by a shortage of information. The two instruments are UN Resolution 59(1) of 1946 by the United Nations General Assembly and the Universal Declaration of Human Rights of 1948.

a. UN RESOLUTION 59 OF 1946

The purpose of Resolution 59 of 1946, adopted as "Freedom of Information (FOI)", was to grant individuals the freedom of expression to gather, communicate, and publish news without restriction. The Resolution was passed shortly after the Second World War and was seen as a crucial element in promoting world peace and advancement by exposing nations who intended to profit from the war or spark a new war. As a result, the right to information was seen as a means to expose wrongdoers who jeopardize global peace and advancement.

In 1946, the General Assembly of the United Nations adopted Resolution 59(1), which states:

> *"Freedom of 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 resolution seemingly provided for the right to information in absolute terms. By stating that the right ought to operate "without fetters", it appears that a person's freedom to obtain, gather, transmit, and publish opinions and other forms of expression through any media was unaffected by any limitations of any kind.

However, the author submits that the word "without fetters" should be construed in a way that is compatible with the purpose of Resolution 59. Resolution 59(1) must therefore be interpreted

to take into account the rights of states in relation to those of the individuals in a democratic regime. As a result, it would not grant an individual an absolute right that would have a negative impact on the security of the state, the public interest, the maintenance of law and order, and the reputation of another person —exactly the things that the UN sought to protect.

If the phrase "without fetters" is construed strictly, it might lead to the absurd inference that the Resolution would defend the spread of information intended to spark a war. In reality, Resolution 59 was not an absolute right; otherwise, it would have defeated the purpose for which it was passed.[4] It cannot be used as a pretext to commit criminal offences, disturb the peace of the world, violate public order, national security, or damage the reputation of others without justification. The Resolution did not prevent nations from penalizing those who spread false information in an effort to ignite a new world war. Additionally, Resolution 59 did not purport to repeal the common law defamation right, which allowed a person whose reputation had been harmed without cause to pursue defamation claims and appropriate remedies, such as reparation and injunction. It is unlikely that a resolution from an organization like the United Nations would give an open license to violate another person's human rights or to take any action that would endanger the state's security or the public interest.

b. UNITED NATIONS DECLARATION OF HUMAN RIGHTS

The second instrument, the Universal Declaration of Human Rights of 1948 is soft law and the first human rights instrument made by the United Nations. It aimed, among other things, to provide people the freedom to obtain and transmit information held by others through the media. Contrary to more recent treaties and agreements on the right to information, the Declaration did not explicitly impose any restrictions on the freedom of expression. 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."*

Although Article 19 of the Declaration makes the right seem absolute, a holistic review of the Declaration reveals that the right is not unqualified. Rather, it is subject to the other fundamental human rights provisions, particularly those provided in the Declaration. Article 30 of the Declaration is to the effect that no one exercises a right under it to destroy the rights and freedoms provided in it. That alone places fetters on the rights in the Declaration. Also, Article 1 of the Declaration provides that all persons are born free and equal in dignity and rights; thus, it would not confer unfettered rights on persons not to respect the rights or reputation of others.

Furthermore, 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 unrestricted and cannot be lawfully curtailed. There is a clear distinction between the right to hold an opinion, which is absolute and cannot be interfered with, from the right of expression, which by necessary implication is not an absolute right. The Declaration did not envisage a situation

[4] *Holy Trinity Church v U.S. 143 U.S. 457, S.Ct. 511 36 L.Ed. 226 Feb 29, 1982*

where a person may maliciously disparage another person and claim that he has an absolute right to do so under the Declaration.

Most jurisdictions, up until recently, considered certain publications to be intentional or careless acts of defamation against other people, and they were therefore illegal. In Ghana, the Criminal Offences Act, 1960 (Act 29) had criminalized negligent and intentional libel in Ghana prior to the passage of the Criminal Code (Repeal of Criminal Libel and Seditious Laws) Amendment Act, 2001 (Act 602). Those who violated it faced criminal sanctions,[5] distinct from the civil sanctions which flow from the tort of defamation.

In Nigeria, Section 373 of the Criminal Code deals with criminal defamation, where a publication is made against any person that is likely to injure his reputation by exposing him to hatred, contempt, or ridicule, or to damage his profession or trade. In South Africa, the Supreme Court of Appeal held in Hoho v S[6] that criminal defamation forms part of the laws of South Africa and that the offence is committed when a person unlawfully and intentionally publishes a matter concerning another person with the aim of injuring his reputation. In that case, the Court affirmed the conviction and sentence of three years' imprisonment, suspension for five years, and in addition, three years of correctional supervision for 22 of the 23 counts of criminal defamation.

On 28th October 2020, the Sierra Leone Parliament repealed criminal libel from its statute book, which had existed for over 55 years. The United Kingdom kept its common law crimes of criminal libel and seditious libel until they were abolished by the Coroners and Justice Act, 2009. The blasphemous libel in the UK was also abolished by the Criminal Justice and Immigration Act, 2008.

The above paragraphs confirm that states did not interpret the two international instruments in absolute terms. Criminal libel has recently been abolished in many nations. Therefore, the scope of the right to information contemplated by the two international instruments, if construed literally, would be dangerous for states and their citizens.

3.0 RECENT INSTRUMENTS ON THE RIGHT TO INFORMATION IN INTERNATIONAL LAW

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

According to its preamble, the ICCPR was created in keeping with the Universal Declaration of Human Rights, the United Nations Charter, and the rights derived from a person's inherent dignity. The ICCPR was designed to safeguard civil and political rights. On December 16, 1966, the ICCPR became available for signature, ratification, and admission in accordance with General Assembly Resolution 2200A (XXI). Article 49 of the ICCPR provided that it was to

[5] Sections 112 to 119 of the Criminal Code, 1960 (Act 29)
[6] (493/05) [2008] ZASCA 98; [2009] 1 All SA (SCA); 2009

come into force three months after the 35th instrument of accession was submitted to the UN Secretary-General. This happened on March 23, 1976.

The freedom of expression and the right to hold beliefs without interference are governed by Article 19 of the ICCPR which provides:

> *"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 explicitly declares that the right to information is a fundamental human right. However, freedom of expression is subject to limitations that are necessary to respect others' rights or reputations, preserve public safety or order, or uphold public morality or health. One cannot use their right to freedom of expression as a cover to harm someone else's reputation or to engage in behaviour that may be detrimental to morality, public health, or public safety. States are required to enact laws to cater for the restrictions mentioned in the Covenant.

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 right to freedom of expression relates to the dissemination of information. 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 required to establish regulations that restrict people's freedom of expression.[7] The right to hold opinions is an absolute right not subject to interference by States as expressed in paragraph 1 of Article 19 of the ICCPR.

At common law, based on the principle established in *R v Leathem*[8] illegally obtained evidence is admissible in court. However, this is not absolute. Indeed, many countries, even in common law jurisdictions, have laws which limit the right to acquire and use information in this manner. In Ghana, for example, this principle has been modified by the Supreme Court. The Supreme Court in *Cubagee v Asare and Others*[9] held that evidence obtained in breach of the privacy right guaranteed in Article 18(2) of the 1992 Constitution was inadmissible if it was not acquired in line with specified exceptions. These exceptions include the promotion of the

[7] Article 19(2) & (3) of the ACHPR
[8] (1861) 8 Cox CC 498
[9] [2017-2020] 1 SCGLR 305

economic well-being of the people, and the prevention of crime, morality and disorder. This case involved a dispute over the ownership of land between the Presbyterian Church and the plaintiff. The plaintiff clandestinely recorded an acknowledgement by the pastor that the land belonged to him and sought to use that piece of evidence in court. However, ultimately the Supreme Court held the evidence to be inadmissible because it was not taken on any of the grounds specified in Article 18 of the Constitution.

The common law position established in *R v. Leathem*[10] above may have been compromised. According to the ruling in *R v. Sang*, the court may refuse to admit illegally obtained evidence if its prejudicial effect outweighed its probative value under section 78 of the Police and Criminal Evidence Act of 1984. In contrast to the ruling in *R v. Leathem*, supra, the case of *Delaney*[11] rejected pertinent evidence as being inadmissible because it was obtained in violation of the rules requiring the keeping of records of evidence. The House of Lords, however, held in the more recent case of *AG's Ref (No 3 of 1999)*[12] that even though the police should not have kept the accused's DNA without his consent, it was relevant and should be admitted into evidence.

The European Convention on Human Rights (ECHR) also guarantees the right to information and freedom of expression. The Convention carefully limits the right to information under Article 10 in recognition of the dire consequences of unfettered rights. These limitations are both for the benefit of the wider public such as public safety and national security and for individuals, including the protection of confidential information and the reputation of others. Article 10 of the ECHR provides:

> *"(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."*

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. Both are subject to restrictions by the member states within the parameters provided in paragraph 2 of Article 10.

Article 10 of the ECHR is more detailed than Article 19 of the International Covenant on Civil and Political Rights, but both articles essentially state that exercising one's right to free speech

[10] Ibid, n.8
[11] (1989) 88 Cr App R 338
[12] [2001] 2 WLR 56, [2001] AC 91

entails certain duties and obligations. States are also required to clearly lay out any conditions or restrictions based on any of the aforementioned justifiable reasons in order to protect that right. In the case of *Director of Public Prosecution v. Cuciurean*,[13] Lord Burnett CJ discussed the relationship between freedom of expression and freedom of assembly and association under Articles 10 and 11 of the ECHR, respectively, and held that both rights were qualified rights subject to the restrictions that must be imposed by law and necessary in a democratic society; among other things, to protect others' reputations, in the interests of national security, public order, and to maintain the authority of the courts.

Effectively, the restriction of the right to information guaranteed under Article 10 of the ECHR by a country will not necessarily constitute a breach of that country's obligations under the ECHR. Admittedly, Article 10 of the ECHR employs vague language – how is one to determine if a restriction placed is necessary in a democratic society? The lack of clarity on the issue requires that anyone who believes the restrictions imposed do not fall within the scope of Article 10 (2) to challenge their legality.[14] The task ultimately falls on judicial authorities. The courts must be satisfied that the restrictions were in line with the specified grounds for imposing limits and that they were necessary in furtherance of the grounds for limitation.

The right to information is also provided under the American Convention on Human Rights (ACHR). This convention which came into force on 18th July 1978 is often referred to as the "Pact of San José". Under the convention, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were established to strengthen compliance by member states. The ACHR provides for freedom of thought and expression in its Article 13 as follows:

> *"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.*
>
> 1. *Any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitements to lawless violence or any other similar action against any person or group of persons on any grounds, including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law."*

[13] [2022] EWHC 736 (Admin)
[14] David Feldman, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press.

The American Convention on Human Rights places restrictions on the right to free speech and also makes it illegal to publish materials that incite racial, national, or religious hatred. The member states must pass legislation that further criminalizes any conduct that can incite racial or religious hatred. Unlike other international conventions that solely address civil restrictions, the Convention specifies both civil and criminal restrictions.

The African Charter on Human and Peoples' Rights (ACHPR) is a human rights instrument for the member states of the African Union. To enforce strict adherence to the Charter's provisions, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have been established. Like the other documents mentioned above, the Charter does not declare freedom of expression to be a fundamental right. The boundaries of the restrictions were not specified, but the member states are required to implement laws to control freedom of expression in their individual nations. Ironically, all of the Charter's signatory nations also belong to the ICCPR and are thus subject to its limitations. 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."*

It is, thus, clear from Article 9 that whilst the right to receive information has not been limited the right to express and disseminate opinions must be exercised in accordance with the appropriate laws. A drawback arising from the absence of express limitations is that a country may make laws which arbitrarily restrict the right to express and disseminate a person's opinions. Fortunately, most African nations are signatories to the ICCPR, thus, they are prohibited from arbitrarily limiting freedom of expression.

A review of the international human rights instruments reveals that whilst they each seek to guarantee the freedom of expression and right to information, the scope of those rights and the permissible limitations are not identical. Nonetheless, if a State is a party to multiple human rights instruments, those instruments will be binding on the State. For example, because Ghana is a signatory to the ICCPR and ACHPR, it may be more prudent to couch claims against Ghana for the breach of the right to information in terms of the ICCPR, instead of the ACHPR exclusively. It is noteworthy that international human rights courts and tribunals are not limited only to the instruments which establish them. They can consider relevant human rights instruments binding on the State involved.

4.0 OBLIGATION TO COMPLY WITH INTERNATIONAL LAW

The domestic law of each country determines the circumstances under which treaties, conventions, and agreements executed by them are binding on the domestic plane. There are two categories of countries when it comes to the execution of treaties, conventions, and agreements. These countries are either monists or dualists. A treaty, agreement, or convention that has been properly executed on behalf of the monist countries by the relevant executive body will automatically bind those nations. Belgium, France, Germany, and the Netherlands are some of the world's well-known monist nations. The United States of America applies a hybrid of dualism and monism. Some treaties automatically become part of the United States law upon execution. These treaties are known as self-executing treaties. On the other hand, other treaties need to be domesticated before they form part of the law. These are non-self-

executing treaties.[15] Thus, depending on the type of treaty, the United States of America may be monist or dualist.

The dualist countries include several 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, they 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.[16] The Article 75 of the Constitution of Ghana, requires treaties, conventions, and agreements duly executed in the name of Ghana to 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."*

The ICCPR and the ACHPR, which Ghana duly ratified at the international level, are only binding on Ghana in international law because they have not been ratified by Ghana's parliament. A Ghanaian who believes that one or both of the two international agreements have been violated may file a complaint with the ECOWAS Community Court, where there is no requirement that local remedies have been exhausted. He may, after exhausting all domestic remedies, seek redress against Ghana in the ECOWAS Community Court or the African Court on Human and Peoples' Rights, which will recognize the ICCPR and the ACHPR as binding on Ghana.

Though Ghana is dualist, human rights instruments may apply under Article 33(5) of the Constitution even if Ghana is not a signatory to them or Ghana's Parliament has not ratified it. It provides:

> *"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."*

Without a doubt, each of the aforementioned human rights instruments is a part of democracy and serves to protect human freedom and dignity. The Constitution of Ghana does not prevent the Ghanaian courts from supplementing the human rights provisions found in Chapter Five

[15] *Medellin v Texas 552 U.S. 491 2008*
[16]*Republic v High Court (Commercial Division), Accra, Ex parte Attorney-General (NML Capital Limited & Republic of Argentina interested parties [2013-2014] 2 SCGLR 990*

with human rights instruments and enactments from other jurisdictions where there is no such provision in the Constitution to ensure that the protection of fundamental human rights and freedoms, which is a core value, is not undermined.[17]

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, the human rights provisions contained in them are inherent in democracy and intended to promote the dignity of man. 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 on Human Rights, the African Court on Human and Peoples Rights, and the ECOWAS Community Courts could be used as persuasive authorities in Ghana and will have legal force after being applied by the Superior Courts through *stare decisis*.

In sum, human rights obligations under international law may be enforced before the appropriate international human rights bodies, or before local courts if they have been domesticated. On the other hand, if they have not been domesticated, they may be enforced on the grounds that the obligations are inherent in a democracy and intended to secure the freedom and dignity of man. Alternatively, the jurisprudence from human rights bodies may be used as persuasive authorities to assist domestic courts to interpret provisions in national laws.

5.0 THE RIGHT TO FREEDOM OF INFORMATION ON ENVIRONMENTAL PROTECTION

Access to environmental information is important because it exposes environmental challenges and serves as a necessary step to effective environmental activism. However, international human rights conventions discussed earlier did not expressly take into account the relationship between the right to information and access to environmental information. It is, therefore, important to discuss the extent to which the right to information can aid in providing access to information on the environment.

The right to information on environmental matters, like all other rights to information, requires applicants to access 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.[18]

The United Nations Conference on Environment and Development (UNCED), also known as the Rio Declaration on Environmental Development or the Earth Summit, in Brazil in 1992 under the auspices of the United Nations Environmental Protection Agency (UNEP) 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. It was attended by 117 heads of state and 178 representatives from states and international, continental, and regional bodies. At this summit, it was agreed to make the right to freedom of information on environmental matters a reality for all persons. Principle

[17] Preamble to the Constitution & article 35 (4) & (5) of the Constitution
[18] Aarhus Convention (UNECE) 1998

10 of the Resolutions taken at the summit which is on right to access to information on environmental matters to safeguard and protect a clean and healthy environment for the living and unborn generations provide 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."*

The importance of a healthy environment to the well-being of the individual has been widely recognized. These include the European Charter on Environment and Health was adopted in Germany, in December 1989 and the Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters was held by European nations on June 25, 1998, in Aarhus, Denmark.

The Arhaus Convention recalled Principle 10 of the Rio Declaration on Environment and Development and the General Assembly Resolutions 37/7 of October 28, 1982, and 45/94 of December 19, 1990, on the World Charter for Nature. Article 4 of the Aarhus Convention requires States to make information on environmental matters available to the public within the framework of their domestic laws unless the information is already public or it is reasonable for the public authority to release it in another form.

The grounds for refusing requests for information on environmental matters may include: the public authority does not possess the information, the request is manifestly unreasonable or too broadly formulated, the information has been exempt from disclosure under national law due to being in draft form or concerning internal communications of public authorities, or the disclosure would harm the security of the state or confidentiality of public authorities. Additionally, national law may exempt information related to international relations, national defence or public security, the course of justice, commercial or industrial information, intellectual property rights, confidential personal data, information belonging to third parties, and the environment related to rare species habitats.

The exemptions discussed above may be applied within the context of sections 5-17 of the RTI Act to determine whether access to information ought to be granted. It is, however, important to note that exempt information under sections 5-17 ceases to be except 30 years after the end of the calendar year in which the information was created. The common law exceptions to retrospective legislation, according to which an enactment has retrospective effect if it is declaratory, procedural, evidentiary, a revised law, or a consolidated law, do not apply to the Act because it does not fall under any of those exceptions.[19] The Act, therefore, has prospective effect even though it applies to information that existed before its enactment as well as

[19] *Fenuku and Another v John Teye and Another [2001-2002] SGLR 985*

information that is created after its enactment. Time runs for information classified as exempt from May 21st, 2019, the date it came into force.[20]

Theoretically, there is no classified information in Ghana that is absolutely exempt from disclosure, but the time to freely access it is postponed to thirty (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, and international relations with any other country. Section 78(2) of the Act takes away the right to access exempt information after thirty (30) years if it can be established that the purpose for which it was exempt is one of the already stated grounds.

According to Article 4 of the Aarhus Convention, a refusal to allow access to information must be conveyed in writing. Also, if the request was made verbally and the applicant requests that the rejection be put in writing, this must be done. Further, the grounds for the refusal must be given. It is also permissible to charge fees for the information, but the fees must not be excessive.

According to Article 9 of the Aarhus Convention, a person who believes that his request has been disregarded or improperly denied by the public authorities may have recourse to a court or another independent and impartial authority established by law.

The right to information on the environment in Ghana will be subject to the exemptions in the RTI Act. However, these exemptions ought to be exercised in a manner consistent with the Aarhus Convention. The right to information is a very critical tool in tackling environmental degradation. Illegal mining in Ghana, often called "Galamsey", has polluted waterbodies and damaged several lands in Ghana. Bodies such as the Environmental Protection Agency and the Minerals Commission must apply the RTI Act in a manner that equips the citizenry to tackle the destruction of the environment.

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

6.0 LEGITIMATE GROUNDS TO RESTRICT FREEDOM OF EXPRESSION

In exercising the power to restrict the freedom of expression, which includes the right to information, states must satisfy the three-part test to ensure that the restriction is lawful. Each part of the test must be satisfied, it will not be sufficient if only one or two of the tests has been complied with.

The first part of the test requires that the restrictions are legitimate. This means that the restrictions must be prescribed in an enactment, relevant, clear, accessible, and free from excessive official discretionary powers vested in the state.[21]

---

[20] Sections 78 (1) and 80 of the Right to Information Act, 2019 (Act 989); and Article 107 of the Constitution of Ghana, 1992

[21] *The Sunday Times. v United Kingdom, 26th April, 1979. Application No 6538/74, ECHR*

The second test is that the restriction must pursue a legitimate aim. The legitimate aims are those restrictions listed as exceptions in international instruments such as 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 final test deals with whether the restriction is necessary to meet the social needs of the state. States must use means which are proportional to the objective for which the rights are restricted. Restrictions which do not meet the three-part test are considered unlawful as they wrongly deny individuals their freedom of expression.

The combined effect of all the international instruments discussed is that the legitimate grounds for states to restrict freedom of expression are: respecting the rights and reputation of others, protecting public order, national security, public health and morals, preventing crime and disorder, preventing the disclosure of confidential information, and maintaining the impartiality and authority of the courts as necessary in a democratic society.

After these justified grounds for exemptions, all other information is free to be accessed without any further obstacles. This is the essence of the right to information. The right to information means that when freedom of expression is limited by legitimate grounds, the information that is not exempt must be made available through a legal procedure established by the state.

7.0 THE RIGHT TO INFORMATION IN GHANA: A HISTORICAL PERSPECTIVE

On attaining independence on 6th March 1957 Ghana went through different political stages. There were different democratic and military regimes before constitutional democracy was established on 7th January 1993 upon the promulgation of the Constitution of Ghana, 1992

Ghana enacted the Deportation Act of 1957 and the Preventive Detention Act of 1958 under its Ghana (Constitution) Order in Council, 1957. The two pieces of legislation significantly restricted the right to freedom of expression. The Deportation Act of 1957 was passed to deport aliens whose presence in Ghana was not conducive to the public good. 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.[22] Several persons were deported under this Act, including those who claimed to be Ghanaians, and their deportations were orchestrated because of their political activities and comments about the then regime in their capacities as leading members of the opposition Muslim Association Party.[23]

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 (5) years without recourse to the courts, and it further forbade the courts from entertaining *habeas corpus* applications within the five (5) year period.

A person detained under the Act could seek judicial relief from the courts after the expiration of the five (5) year period. What made the act a venomous viper was the fact that there was no

[22] Section 3 of the Preventive Detention Act
[23] *Lardan v Attorney- General & Others (No 1) 3 WALR 55*

definition for what amounted to an act prejudicial to the security of the state. The Act was seriously abused, and most political leaders were arrested and detained for up to five (5) years without recourse to the courts.[24]

To instil fear in Members of Parliament who oppose the government, the Ghana (Constitution) Order in Council, which was the supreme law, was amended by the National Assembly. The Disqualification Act, of 1959 was passed to disqualify a Member of Parliament who was detained under the Preventive Detention Act of 1958 from contesting elections and to prevent existing Members of Parliament from maintaining their parliamentary seats.

In 1960, Ghana had a new Constitution. Article 13 of this Constitution provided for the solemn declaration to be taken by the President on the assumption of office. This declaration required the President to preserve public order, morality or health. Further, it provided that no person was to be deprived of his freedom of speech and right of access to the courts. Thus, in the case of *Re Akoto & 7 Others, supra*, the plaintiffs challenged the constitutionality of the Preventive Detention Act as contrary to Article 13 of the Constitution. However, the Supreme Court held that Article 13 was not a bill of rights which could invalidate a statute. Rather, the Court held it was analogous to the Coronation Oath of the Queen of England. Thus, 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 Act 244 into effect, amended parts of the 1960 Constitution, including Article 45(3), making the judiciary, which is responsible for protecting the fundamental human rights of the people, an appendage of the Executive. This was achieved by giving the President the power to remove Judges of the Superior Court at any time for reasons that appeared to the President to be sufficient cause. There was no definition for the phrase "reasons appearing to the President to be sufficient cause," leaving it open to abuse.

Through a coup d'état, the National Liberation Council overthrew the government which was elected to office in 1960. The National Liberation Council on the assumption of office passed into law the Criminal Procedure Code (Act 30) to give the Attorney-General the power to detain persons for an initial period of twenty-eight (28) days and for a further period as he may deem fit without having access to bail. The amendment further threatened freedom of expression.

In 1969, Ghana promulgated a new constitution which provided for fundamental human rights, including the right to information. However, Parliament under the 1969 Constitution did not enact a law to give effect to the right to information provided in the 1969 Constitution. The three (3) 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 also did not improve upon the right to information. People lived in fear and were not given the opportunity to seek relevant information from public institutions and governments.

The 1979 Constitution of Ghana also had a chapter on fundamental human rights, which included freedom of expression and the right to information. However, the Constitution was suspended and abrogated by the Provisional National Defence Council on 31st December 1981 which did not subsequently enact any law to regulate the right to information provided by the

[24] *Re Akoto and 7 Others [1961] GLR 523*

Constitution. 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 power for thirty (30) years.

8.0 PROTECTION OF THE RIGHT TO INFORMATION IN GHANA'S FOURTH REPUBLIC

The right to information is provided by Article 21 (1)(f) of the Constitution of Ghana, 1992. This constitutional provision 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 or laws which are necessary in a democratic society. Thus, the Right to Information Act, 2019 (Act 989) was enacted to provide the rights to individuals to access information in public institutions, but exempted areas considered to be necessary and consistent with the protection of public interest.

The Right to Information Act, 2019 (Act 989) came into force on 21st May 2019 and is the first Act of Parliament in Ghana to provide for the right to information and exemptions made on legitimate grounds. It, however, does not apply to information held by the national archives, libraries, and museums, to which the public has access to seek information.[25]

The right to information was established as a fundamental human right to give the people of Ghana the inherent power to hold their elected President accountable. The government acts as a trustee for the people of Ghana and they, as beneficiaries, have the right to know everything within the public sector, unless matters are lawfully exempt from disclosure on legitimate grounds. The right to information serves as an effective tool to ensure transparency and accountability among those in positions of power. The exemptions must be legitimate and in accordance with international instruments.

The Right to Information Act of 2019 (Act 989) has made public institutions accountable and has provided a definition to include private institutions or organizations that receive public resources or provide a public function. This includes hospitals and schools established by religious bodies and mission hospitals that are compensated by the state for providing public health services. These private entities are regulated by the Act and must provide free access to information held by them.[26]

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

[25] Section 79 of the Right to Information Act, 2019 (Act 989)
[26] Section 84 of the Right to Information Act, 2019 (Act 989)

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.[27]

The long title to the Right to Information Act, 2019 (Act 989) forms part and also provides the 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 requires public institutions, including departments or agencies under them, to publish manuals containing current, accurate, and authentic information held by them. These manuals must be reviewed every twelve (12) months. The information in the manual may be accessed or inspected without charge, but it may also be subject to the payment of a fee in accordance with Section 75 of the Act.[28]

An applicant who seeks access to information from a public body must pay the appropriate fees as specified under the Fees and Charges (Miscellaneous Provisions) Act, 2009 (Act 793), unless they are exempt under section 75(2) of the Act. The following circumstances are exempt from fees and charges: when the request is for the personal information of the applicant or on behalf of the applicant; when the information is in the public interest; when the information should have been provided by the public body within the time specified by the Act; when the applicant is indigent or has a disability; the time spent by the information officer or the information review officer to review the request or to determine if the requested information is exempt; and the time spent preparing the information for access.[29]

The charges payable by the applicant should be retained by the public institution to defray its expenses incurred in performing its functions.[30] An applicant seeking information from a public or appropriate private institution must make an application and pay a prescribed fee to that body's information officer, unless exempt by the Act. The information officer must respond within 14 days of being served with the application.

If the information is in the custody of another institution, the information officer must direct the applicant to that body. If the information officer refuses to grant the request, the applicant may request an internal review, which will be determined by the head of the institution within 15 days of receipt of the request. If the head of the institution fails to grant the request, the

[27] Section 84 of the Right to Information Act, 2019 (Act 989)
[28] Section 3 of the Right to Information Act, 2019 (Act 989)
[29] Id., section 75(2) of the Act
[30] Id., section 76 of the Act

applicant may seek judicial review from the High Court or apply to the Right to Information Commission within 21 days.

The Right to Information Commission was established by the Act to promote, monitor, protect, and enforce the right to information provided in Article 21(1)(f) of the Constitution. The Commission is independent in carrying out its functions and may review decisions made by information review officers of institutions upon an application made orally or in writing to it.[31]

The jurisdiction of the Right to Information Commission can only be invoked after the applicant has exhausted the internal review process. If the information officer has made a decision and the applicant is dissatisfied, they can apply to the review information officer (the head of the body) for review. If the applicant is still dissatisfied with the review decision, they may seek judicial review from the High Court or directly access the Commission on stated grounds, subject to Section 67 of the Act.[32]

The instances in which direct access is allowed include: when the information has already been made public; when the request for information is time-sensitive; when the head of the organization is the information officer; and when the requested information is personal to the applicant and the initial request made to the organization was denied. [33]

An applicant who submits a request under the Act should ensure that the information they are seeking has not been exempt from disclosure under the Act and that the information officer is capable of responding to the request. Additionally, the state should act in a legitimate manner by imposing restrictions that are in compliance with international law and meet the three-part test. Requests for information that has been exempt from disclosure under the Act will be rejected due to the exemption.

9.0 POSITIVE EFFECTS

Public institutions are to publish all relevant information which may be accessed in a brochure and shall be revised every twelve 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 willfully discloses 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 Act has criminalised an act of public officers which constitutes gross misconduct.[34] The state, through its agencies, may interfere with or intercept any information or communication that may assist the state in preventing crime, disorder, the violation of rights or freedoms of others, public safety, or the economic well-being of the people. International instruments help member states restrict freedom of expression in accordance with the law as necessary in a democratic society.

10.0 NEGATIVE EFFECTS

[31] Id., section 41 of the of the Act
[32] Id., sections 65 & 66 of the Act
[33] Id., section 67 of the Act
[34] Sections 81 & 82 of the Right to Information Act, 2019 (Act 989)

The governmental power to intercept communication is subject to abuse, particularly against political opponents. The interception of communication by 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 it. Private organisations are exempted unless it is funded by the State or perform 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.

The Right to Information Act, 2019 (Act 989) satisfies the legitimate restrictions provided by the international human rights treaties, to which Ghana is a signatory, 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 exempt bodies which are not courts from disclosing information under the guise of contempt when contempt of 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 district assembly, and not any other type of contempt in Ghana.[35]

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 organisations that perform public functions or receive public resources, and there is no ambiguity about their identification to give such discretion to the Minister.

11.0 THE AREAS EXEMPTED BY LAW AND JUSTIFICATION

The instances where information has been exempted include information prepared for submission to the President or Vice President for consideration or containing information regarding advice, deliberation, minutes, opinions, consultations, or recommendations that are likely to prejudice national security or undermine the deliberative process.[36]

Information relating to Cabinet, its subcommittees, or committees, concerning matters submitted for consideration and that has not been published or released to the public may disclose information that may prejudice national security, frustrate the success of the policy if disclosed prematurely, undermine the deliberative process in Cabinet and its sub-committees or prejudice the formulation or development of government policy. The Cabinet has the authority to grant access to information that is exempt under Section 6 of Act 989, however, this exemption does not cover information containing statistical or factual data. [37]

Information concerning law enforcement and public safety has been exempted on several grounds, including preventing the commission of crimes, disorders, and threats to public safety. These exemptions are not absolute and do not cover access to information about the outcome

---

[35] Articles 19, 122, 123 & 126 of the Constitution, and section 223 of the Local Governance Act, 2016 (Act 936)

[36] Id., section 5 of the Act

[37] Id., section 6 of the Act

of a public institution's program to deal with possible contraventions of an enactment, a general outline of such a program, or reports emanating from investigations that have been disclosed to the subject of the investigation. [38]

The law also exempts information that affects international relations, and whose disclosure may damage or prejudice the relations between the Government of Ghana and the government of any other country, or reveal 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 these exemptions, the President of Ghana may give prior approval for its disclosure.[39]

The other areas exempt from disclosure under the law include: information that affects the security of the state, economic and other interests; economic information of third parties, unless it has already been disclosed or made publicly available; information regarding tax, unless the person it concerns agrees to its disclosure; information regarding the internal workings of public institutions, including opinions, advice given, recommendations, or the deliberative process, but may be disclosed if it contains statistical or factual data, or if it was used to formulate or inform public policy; parliamentary privilege, fair trial, and contempt of court or a quasi-judicial body; and privileged information under the Evidence Act (N.R.C.D. 323), such as communications between lawyers and clients, doctors and patients, or spouses, unless the privilege is waived by the entitled party. [40] Additionally, the disclosure of personal information about living or deceased individuals is unreasonable, and disclosure of information that is exempt but fails to protect the public interest is also exempted. [41]

Article 135 of the Constitution pertains to the production of official documents in court. If the disclosure of the contents of these documents would be prejudicial to the security of the state or injurious to the public interest, they may not be produced in court. [42] The Supreme Court has the exclusive authority to determine whether or not a document should be produced, taking into account its potential impact on the security of the state or public interest.

The legitimate grounds for restriction on freedom of expression and the right to hold opinions, as provided by the Act, are consistent with those recognized by international instruments and meet the criteria of the three-part test.

12.0 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. [43]

The Right to Information Act has criminalised the willful disclosure of exempt information. A person convicted of any such disclosure shall be liable to a fine of not less than two hundred

[38] Id., section 7 of the Act
[39] Id., section 8 of the Act
[40] Id., sections 9–15 of the Act
[41] Id., sections 16 and 17 of the Act
[42] Article 135 of the Constitution, 1992
[43] Section 1 of the State Secrets Act, 1962 (Act 101)

and fifty penalty units and not more than five hundred penalty units or to a term of imprisonment of not less than six months and not more than three years or to both. [44]

The Cyber Security Act, 2020 (Act 1038) has criminalised the publication of pornographic images of a child. Any person who takes or permits to be taken an indecent image of a child for the purposes of publication or storage shall upon conviction be liable to a fine of not less than two thousand five hundred penalty units and not more than five thousand penalty units or a term of imprisonment to less than five years or to both. [45]

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 fifteen years without an option of a fine. [46]

A person who is convicted of the offence of aiding and abetting 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 fifteen years without the option of a fine. [47] 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 fifteen years. [48]

A person who commits sexual extortion, threatens to distribute by post, e-mail, text, or transmission by any electronic means, or otherwise harasses, intimidates, or coerces the person with the 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 twenty-five years, without the option of a fine.[49] There are other offences related to the distribution or dissemination of information concerning online sexual offences.

There are also civil remedies to regulate the use of information without disclosing its source and claiming it as one's own, which amounts to plagiarism and is considered academic dishonesty, attracting serious sanctions. Furthermore, there are laws on copyright to protect the intellectual property of their owners.

13.0 THE STATE'S POWER TO ACCESS INFORMATION FROM THE PEOPLE

The Government also requires information from individuals in the public interest. As a result, the government has enacted several laws which empower the government to obtain information from individuals 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

[44] Section 81 of the Right to Information Act, 2019 (Act 989)
[45] Section 62 of the Cybersecurity Act, 2020 (Act 1038)
[46] Section 63 of the Cybersecurity Act, 2020 (Act 1038)
[47] Section 64 of the Cybersecurity Act of 2020 (Act 1038)
[48] Id., section 65 of the Act
[49] Id., section 66 of the Act

(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).

The Cybersecurity Act, 2020 (Act 1038) gives authority to investigative officers investigating an offence under the act to make an *ex parte* application to the High Court in camera for a production order to obtain the subscriber information related to the investigation from the suspect. The court, if satisfied, may grant a warrant to intercept the content data.[50]

Despite the fact that communication between individuals using services provided by companies such as Vodafone, Scancom, and Airtel-Tigo is supposed to be confidential, the Government of Ghana, operating under exceptions provided in Article 18 (2) of the Constitution, has authorized the National Communication Authority to request that these service providers install interception capabilities to record all communications passing through them. This includes the ability to decrypt telecommunications messages used through their facilities in order to comply with interception warrants issued by the High Court under the relevant Act.[51]

The service providers are also required to store and retain subscriber information for at least six years, traffic data for twelve months, and relevant content data for twelve months. The High Court may, upon an application made *ex parte*, order the concerned service provider to provide the required information. [52] Everyone should be aware of the types of information they pass on to others or the discussions they have through telecommunications.

The service providers are required to store and retain subscriber information for at least six years, traffic data for twelve months, and relevant content data for twelve months. The High Court may, upon an application made *ex parte*, order the relevant service provider to provide the required information. It is important for everyone to be aware of the type of information they share or discussions they have through telecommunications, as they are at risk.

The government also requires information from the people to advance the welfare of the people in accordance with the Constitution. [53] 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, the economic well-being of people, prevention of crime or disorder, and 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 property to seize any information that comes under the justification provided by the Constitution. The government may require information from the people to prevent disorder or crime, protect the rights and freedom of others, or to guarantee the safety or economic well-being of the country.

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

[50] Id., sections 73 and 74 of the Act
[51] Id., section 76 of the Act
[52] Id., section 77 of the Act
[53] Articles 1 & 18 of the Constitution, 1992

Sections 10, 11 and 12 of the Criminal Offences and Other (Procedure) Act 1960 empowers 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 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 authorised 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.

14.0 ACCESS TO COURT AND THE POWER OF CONTEMPT

The courts are public institutions established by law to resolve disputes and legal matters, and it is in the public interest for people to have confidence in them. Parties in court actions are limited by court rules and laws on evidence as to what information can be pleaded and what evidence can be presented as relevant and admissible.

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 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.[54]The power to commit for contempt of court in Ghana is exclusively given to the superior courts of judicature, which consist of the Supreme Court, the Court of Appeal, the High Court, and Regional Tribunals.[55] 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 power to punish for contempt exists to maintain the authority and impartiality of the judiciary.

The parameters of contempt of court are quite ambiguous, as it is often unclear what constitutes contempt. This becomes even more uncertain when considering bodies with quasi-judicial authority, such as commissions of inquiry established under the Constitution and other acts of Parliament. Bodies that exercise administrative and investigative functions, such as the Commission on Human Rights and Administrative Justice (CHRAJ) and the Labour Commission, are also established by law. However, these bodies cannot commit contempt against themselves, as the jurisdiction to do so has been exclusively given to the superior courts by the Constitution.

The main issue is whether the High Court has the jurisdiction to hear contempt applications arising from the proceedings of bodies with investigative and administrative functions. There are several cases pending in the English courts that will determine whether the High Court can entertain contempt applications from bodies that exercise judicial responsibilities but are not part of the inferior courts. In the case of *Attorney-General v. British Broadcasting*

[54] Section 39 of the Courts Act, 1993 (Act 459)
[55] Article 126 of the Constitution of Ghana, 1992

Corporation,[56] the Attorney-General sought an interlocutory injunction to prevent the British Broadcasting Corporation from broadcasting proceedings before the local valuation court, as it was likely to prejudice the matter pending before it. The House of Lords ruled that the local valuation court was not one of the inferior courts created by law and therefore did not have the protection of the law of contempt. By extension, only the courts are protected by the law of contempt, and other bodies are not.

Another group of bodies that may require the protection of the law of contempt are those that exercise quasi-judicial powers. Traditionally, these bodies were not granted the protection of the law of contempt, but Section 14(c) of the Right to Information Act states that information is exempt if its disclosure would "constitute contempt of court or of a quasi-judicial body." These bodies are essentially judicial in nature, but they are not established to exercise judicial power within the scope of the law. Currently, there is no legislation in Ghana that has established a quasi-judicial body, and the Right to Information Act does not create such jurisdiction or exempt its information from disclosure.

There are tribunals established by some Acts of Parliament to resolve legal matters, and a person dissatisfied with their decisions may appeal to the courts. These tribunals include the Adjudicative Panel established by the Chief Justice under Section 28 of the Payment Systems and Services Act, 2019 (Act 987), to review decisions of the Bank of Ghana regarding the refusal of a license or authorization for an electronic 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 individuals, but they are not considered part of the lower courts and generally do not have the protection of the law of contempt. However, the Right to Information Act seeks to exempt some of their information from disclosure, which, if disclosed, would constitute contempt of a quasi-judicial body, a concept that is not recognized in 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 willful 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*[57], 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 court constitutes contempt of court, including all the grounds mentioned above. In this case, a Supreme Court judge was allegedly attributed with making a false comment about the former Prime Minister of Ghana, Dr. Kofi Abrefa Busiah. The respondent published articles titled "Justice Abban is a

[56] [1981] AC 303
[57] [1994-95] GBR 130

liar," "Justice Abban scandal takes a dramatic turn," and "Abban puts the integrity of the bench on the line." The journalist was convicted of contempt of court for publishing material that was scandalous, abusive, and calculated to bring the administration of justice into disrepute.

Freedom of expression is restricted when it comes to contempt matters, as the law has established that the truth or falsehood of the publication is not a defence, and the court will not take it into account if it is established that the publication violates any of the restrictions imposed by law, which amount to contempt of court. Any act that scandalizes the court has the potential to erode public confidence in the court and undermine its authority, whether it was made in respect of a pending proceeding or after judgment.

The restrictions on freedom of expression in court have their roots in common law and are further strengthened 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 and 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 of a quasi-judicial body is exempt by law. The restrictions imposed on freedom of expression in cases where disclosure would constitute contempt do not suggest that courts are immune to criticism, but any criticism of the court must be *bona fide*, temperate, and fair. Otherwise, it may fall within the restrictions imposed by law. [58]

The European Court of Human Rights (ECtHR) held that freedom of expression is not an absolute right and a person who uses abusive language about the court or its judges may exceed their bounds and be guilty of contempt. The ECtHR made 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 with the Zagreb County Court in which he insulted the court and the judge. He was convicted of contempt of court for abuse of rights in the proceedings by the Municipal Court and argued that it was within his freedom of expression

The court held that the appellant was guilty of contempt due to the use of abusive language in the court and towards the judge in Croatia. The conduct falls within the restricted part of the Covenant and the restriction on freedom of expression was deemed necessary and proportionate to maintain the authority and impartiality of the judiciary. The ECHR, by a majority of 4 to 3, held that the restrictions imposed by law did not violate the appellant's right to freedom of expression, as they were imposed by law to pursue a legitimate aim that was necessary in a democratic society. [59]

---

[58] *Saday v Turkey (Application No. 32458/96, (2006)*

[59] *Zugic v Croatia (Application No. 3699/08; 3408/2011, May 31, 2011*

The goal of restricting freedom of expression is to maintain the sanctity of the courts and promote public order. Contempt of court under Article 19 of the Constitution is an entrenched provision that can only be amended or repealed through a national referendum.

15.0 FREEDOM OF EXPRESSION AND JOURNALISM

Journalists are persons who seek, obtain, publish, or disseminate information for public use. 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 seeks, gathers, and disseminates. Journalists expose public wrongs to promote transparency and accountability.

The ICCPR, ECHR, ACHR, and ACHPR do not exempt journalists from the restrictions on freedom of expression. The Right to Information Act also does not exempt journalists from these restrictions on freedom of expression. If a journalist violates any of these restrictions, they should be dealt with in accordance with the law.

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) has been promoting the safety of journalists, as some are killed for the information they release to the public, while others are imprisoned for contempt of court. The killing of journalists has been widely condemned, and a UNESCO report shows that in 2021, 55 journalists were killed and the number rose to 86 in 2022. [60] The laws on contempt do not exempt journalists, and some have been convicted and punished for contempt of court, which is a growing concern for the journalism community.

In Ghana, the first open court system was allowed during the 2012 Presidential Election dispute, giving the public the opportunity to observe proceedings at the Supreme Court. The second instance of an open court was during the 2022 Presidential Election dispute.

In Ghana, court hearings are typically held in public, but may be subject to restrictions imposed by the adjudicatory authority for reasons such as public morality, public safety, or public order.[61] There are laws that place restrictions on public hearings for the same reasons, including proceedings before Family Tribunals and Juvenile Courts. As a signatory of the ICCPR, Ghana is bound to hold court hearings in public. However, the ICCPR also forbids the press and the public from attending cases on specified grounds. It states:

> *"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*

[60] UNESCO.org

[61] Article 19 (14) of the Constitution of Ghana, 1992

proceedings concern matrimonial disputes or the guardianship of children."[62]

The above provision discusses open and closed court systems. If a court hearing is not restricted by law, journalists should be granted the opportunity to attend and live broadcast the proceedings to the public as a part of their right to access information. Some courts in Ghana have raised concerns about inaccurate and unfair court reporting by some journalists, which highlights the need for open justice in non-restricted proceedings.

Judges and magistrates often allow journalists to take notes for their stories, but audio-visual journalists provide a more accurate and fair representation of the proceedings by capturing both audio and visual elements. In some cases, such as presidential election disputes, many people may want to attend the proceedings, but court space limitations may not allow more than 500 people to be present. In these instances, television journalists play an important role by broadcasting everything live to the millions of people who would have liked to attend if not for the space restrictions.

The Supreme Court of Appeal in South Africa has affirmed the decision of the High Court granting access to court proceedings to the public and stated that audio-visual broadcasting of judicial proceedings is part of freedom of expression. The court further stated that traditional print journalism using pencils and pads to take notes is outmoded and fails to provide accurate reporting, and makes judges accountable to the public. To avoid disrupting court proceedings, journalists should arrive at the court at least 15 minutes before the session to set up stationary video cameras with the consent of court officials.[63]

The South African Supreme Court of Appeal issued a practice direction in 2009 allowing full audio-visual broadcasting of its proceedings, with restrictions on the means of gathering the information and where it should be gathered, not on filming outside the court. The United Kingdom also endorses open court, including audio-visual broadcasting of court proceedings, as a right to freedom of information.

Lord Diplock defined open justice as a fundamental right inherent in common law with narrow exceptions. In criminal cases, all evidence communicated to the court is made public.[64] The European Court on Human Rights has held that Article 6 of the ECHR, which requires public hearings, is subject to certain restrictions. Judges, magistrates, and jurors who preside over cases where there are no restrictions become accountable to the public as their actions are witnessed live.

An open court is a solution to instances where judges deny comments attributed to them during court proceedings by journalists. [65] There are restrictions on reporting cases involving a child before a family tribunal, and anyone acting contrary to them commits an offence. Section 39 of the Children's Act, 1993 (Act 560) provides as follows:

---

[62] Article 14 (1) of the ICCPR, which is almost the same as Article 6(1) of the ECHR

[63] *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)*

[64] *See; Article 6(1) of ECHR and B v United Kingdom; Pev United Kingdom [2001] 2FLR 261*

[65] *Republic v Mensa- Bonsu, supra*

> *"(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 matters affecting the publication of 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 can be heard in public, and in some cases, only the parties and their lawyers may be allowed to attend for several reasons. Justifiable grounds for a closed hearing in Ghana include when the adjudicating authority deems it necessary or expedient, as an open hearing may prejudice the interests of justice, or when a law mandates an in-camera hearing in the interest of defence, public safety, public morality, public order, the welfare of children under 18 years old, or the protection of private lives.[66]

Journalists should be prohibited from attending open hearings in cases where their admission would violate the Constitution or ICCPR provisions on in-camera proceedings. There is a controversy over whether cases heard in camera can be published in law reports for public consumption. Some matrimonial proceedings heard in camera are published in law reports, defeating the purpose of in-camera hearings. The best that can be done is to publish only the legal issues, excluding the facts and evidence that would expose the private lives of the parties. When matters heard in camera go on appeal, appellate courts should ensure that they comply with the Constitution and ICCPR requirements to prevent publicity, unless it is a legal issue that wouldn't defeat the purpose of an in-camera hearing.

It is strongly recommended that proceedings from cases heard in camera for reasons under the Constitution and ICCPR should not be made public in law reports.

CONCLUSION

Freedom of expression is a vital tool used to deepen democracy. It finds expression in several international human rights instruments and domestic laws around the world. It inspires hope of a world with fewer wars, corruption, and environmental degradation through transparency and accountability.

Whilst enforcement mechanisms exist on the international level, a greater level of commitment is required from states, especially in Africa, to make outcomes of those decisions enforceable before national courts. Furthermore, sensitization is necessary to improve the attitude of public institutions to requests made in line with the right to information.

The right to information is, however, not absolute. Information is a powerful tool that can have dire consequences on individual rights and reputation and to the public interest. It is, therefore,

[66]Article 19 (14) (a) & (b) of the Constitution of Ghana, 1992

important that legitimate limitations are applied to the right to information. This must, however, be done in the spirit of human rights and in accordance with the principles in international human rights instruments.

The 1992 Constitution of Ghana and the RTI Act, provide sufficient legal support for the enjoyment and enforcement of the right to information. Nonetheless, the full enjoyment of this right depends on the attitudes of public institutions and the courts to ensure that an effective response is given to steps taken in the exercise of the right to information.

BIBLIOGRAPHY

INTERNATIONAL INSTRUMENTS

American Convention on Human Rights (ACHR).

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

African Charter on Human and Peoples' Rights; and further discuss the Right to Information Act, 2019 (Act 989).

Coroners and Justice Act, 2009

Criminal Code of Nigeria.

European Convention on Human Rights (ECHR).

General Assembly Resolution 2200A (XXI).

International Covenant on Civil and Political Rights (ICCPR).

Resolution 59 of 1946 adopted as 'Freedom of Information (FOI)'.

Rio Declaration on Environment and Development.

Universal Declaration of Human Rights of 1948.

UN Resolution 59(1) of 1946 by the United Nations General Assembly.

United Nations General Assembly in 1946 passed Resolution 59(1).

ENACTMENTS & LEGISLATION

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

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

Criminal Offences Act, 1960 (Act 29).

Constitution of Ghana, 1992.

Criminal Justice and Immigration Act, 2008.

Constitution in 1957 (Order in Council), and in 1957 and 1958.

Criminal Procedure Code (Act 30).

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

Children's Act, 1993 (Act 560).

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

Cybersecurity Act, 2020 (Act 1038).

Deportation Act of 1957.

Evidence Act, N.R.C.D. 323.

Electronic Communication Act, 2008 (Act 775).

Economic and Organised Crime Office Act, 2010 (Act 804).

Ghana (Constitution) Order in Council.

Narcotics Control Commission Act, 2020 (Act 1019).

National Assembly (the Disqualification Act, 1959).

Office of the Special Prosecutor Act, 2017 (Act 959).

Preventive Detention Act of 1958.

Payment Systems and Services Act, 2019 (Act 987).

Right to Information Act, 2019 (Act 989).

State Secrets Act, 1962 (Act 101).

1964 Referendum.

CASES

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

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

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

Capital Limited & Republic of Argentina interested parties [2013-2014] 2 SCGLR 990.

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

Holy Trinity Church v U.S. 143 U.S. 457, S.Ct. 511 36 L.Ed. 226 Feb 29, 1982.

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

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

Medellin v Texas 552 U.S. 491 2008.

NDPP v Media 24 Limited and Others and HC Van Breda and Media 24 Limited and Others

Republic v High Court (Commercial Division), Accra, Ex parte Attorney-General (NML).

Re Akoto and 7 Others [1961] GLR 523.

Republic v Mensa-Bonsu, supra.

Saday v Turkey (Application No. 32458/96, (2006).

The Sunday Times v United Kingdom, 26th April, 1979. Application No 6538/74, ECHR.

Zugic v Croatia (Application No. 3699/08; 3408/2011, May 31, 2011.

(425/2017) [2017] ZASCA 97 (21 June 2017).