



**THE RIGHT TO LIBERTY AND FREEDOM OF MOVEMENT IN THE
SHACKLES OF ADMINISTRATIVE ACTS IN COVID-19 GHANA;
THE LEGAL IMPLICATIONS IN GHANA'S CONSTITUTIONAL
JURISPRUDENCE**

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1.0. INTRODUCTION

The outbreak of the COVID-19 pandemic has triggered governments the world over to make certain impositions towards the curtailment of the spread, and the possible elimination of the virus altogether. Following the development of vaccines by pharmaceutical companies to help combat the virus, many organizations and some states have directed that their workers and citizens be compulsorily vaccinated.

The Republic of Ghana is part of the many that have issued this directive. The Ministry of Health issued a directive to the effect that, effective 12th December, 2021 all persons who are eighteen years of age and above arriving in Ghana are required to provide proof of full vaccination against COVID-19. The directive further indicated that unvaccinated residents and citizens of Ghana who were outside the country at the time and intended to return within fourteen days after the coming into force of these directives were exempted from the requirement of full vaccination, save that upon their arrival at the airport, they would be vaccinated. Again, it provided that all Ghanaians travelling out of the country from the effective date of 12th December, 2021 are to be fully vaccinated. One of the directives made pursuant to the compulsory vaccination is for persons to be quarantined or otherwise detained until they show proof of vaccination or are vaccinated before they are allowed entry into Ghana. The directive also sought to prohibit citizens and other persons from having access to some public places unless they show proof of vaccination.

The Ghana Airport Company Ltd also issued a directive with a similar effect. But in addition to what was contained in the directive issued by the Ministry of Health, the Ghana Airport Company's circular contained a clause to the effect that airlines that bring passengers who are not fully vaccinated to Ghana shall be surcharged 3500 dollars per unvaccinated passenger.

When examined to their full effect, these directives do no more than prevent persons, including citizens, from leaving or entering the country, or even moving within the country, as far as certain public places are concerned, if they are not fully vaccinated. This fetter on the free movement of persons, nay citizens, into, out of and within the country, in our considered

opinion, constitutes the infliction of a heavy assault on the right to freedom of movement guaranteed by the Constitution, 1992. In due recognition of the fundamentality of this right in every democratic dispensation, by no means excluding ours, the authors attempt herein to demonstrate how these directives fly in the face of the Constitution, in so far as they place unnecessary clogs on the freedom of movement of citizens – something that is so sacred within the normative paradigm of our democratic and constitutional governance. We seek, also, to demonstrate that the directive requiring that persons be detained until they show proof of vaccination or are vaccinated is out of accord with the liberty of persons, devoid of any constitutional justification.

2.0. THE STATUS OF RIGHTS UNDER THE 1992 CONSTITUTION

Inspired by our gloomy legal history which is characterized by manifest violations of human rights, the 1992 Constitution, under chapter five guarantees the fundamental rights and freedoms of every person, insulating same from executive control and manipulation, and provides the forum and mechanism for the enforcement of these rights.¹

Indeed, the centrality of these rights in our jurisdiction cannot be gainsaid. A recourse to Article 290 of the Constitution reveals that the entirety of Chapter five of the Constitution has been designated as part of the entrenched provisions of the Constitution. Accordingly, it presupposes that these rights cannot be easily amended without a referendum, where at least forty percent of the persons entitled to vote, voted in respect of the amended, and seventy-five percent of such voters, casted their votes in favour of the amendment.²

The fundamental human rights as guaranteed under chapter five is derived from an internationally acknowledged normative framework for the protection of human rights that harks back to the United Nations Universal Declaration of Human Rights, 1948. This instrument, for the first time, enunciated a body of rights and freedoms that reflect the ethos of multi-cultural origins common to the very basic concept of being human. Other instruments evolved thereafter which also upheld and reinforced the principle and fact that there are certain

1 See Chapter Five of the Constitution, specifically Article 33(1) on the mode of enforcement of fundamental human rights.

2 Article 290(4) of the Consitution, 1992.

fundamental rights and freedoms inherent in the fact of being a human being. It is significant to note that fundamental human rights are not granted by any mere political or royal act.³ These are rights which adhere to every human being and are enjoyed by all persons no matter where he or she is or the status of that said person.⁴

In light of the above, the Constitution provides that the fundamental rights and freedoms enshrined in the said chapter shall be respected and upheld by the executive, the legislature and the judiciary, and all other organs of government and its agencies and all natural and legal persons and shall be enforceable by the Courts as provided in the Constitution.⁵ It is further provided that every person in Ghana, whatever his race, place of origin, political opinion, colour religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but *subject to the rights and freedoms of others and for the public interest*⁶.

The last part of this clause suggests that the fundamental human rights elaborately provided for under Chapter Five of the Constitution are not absolute but subject to certain clawback limitations. However, such limitation in itself must be within the limits or remits laid down by the Constitution.⁷ These limitations must be to protect the rights of others and in the public interest. In *Republic v. Eugene Baffoe Bonnie Adinnyira* JSC stated that this provision [Article 12(2)] is an explicit direction to the court to undertake a balancing exercise in the enforcement of the human rights provisions of the Constitution.⁸ Thus, the courts are enjoined to balance the rights of persons which are sought to be limited against the justifications given to limit them. If the scale tilts towards the reason(s) advanced for limiting rights, then the rights in question would be deemed to have been justifiably limited.⁹

We shall therefore proceed to examine the rights to liberty and freedom of movement in juxtaposition to the directives in issue herein to determine whether, and to what extent, the

3 [Martin Kpebu \(no.4\) v. Attorney General WRIT NO. J1/22/2016 decided on 18 December, 2019.](#)

4 [Ibid.](#)

5 [The Constitution, 1992, Article 12\(1\).](#)

6 [Ibid, Clause 2.](#)

7 [Ampofo Adjei v. the Attorney General and President of the National House of Chiefs \[2011\] GHASC 54 \[2018\] GHASC 40](#)

8 [Republic v. Tommy Thompson Books Co. Ltd \[1997-98\] 1 GLR 515.](#)

directives are violative of these rights.

3.0 MANDATORY DETENTION PENDING VACCINATION AND THE RIGHT TO LIBERTY

The liberty of the individual is recognized in international human rights treaties and national constitutions the world over as one of the most basic of rights. In that regard, a person's liberty must not be curtailed without just cause, and whoever curtails another's liberty is under an obligation to defend the curtailment in accordance with law. It is therefore not surprising that Lord Atkin's powerful and bold remark in his dissenting opinion expressed in *Liversidge v Anderson*¹⁰ that "in English law every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act"¹¹ was subsequently accepted as the true statement of the law in England.¹² This reinforces the view that personal liberty is so sacrosanct that it cannot be derogated from except in a limited class of cases where a person's liberty may be curtailed, either for his own welfare or the safety of the community in which he lives.

Thus, the 1992 Constitution provides in clear terms that the liberty of every person is guaranteed and no person shall be denied his liberty except in a limited class of cases.¹³ The circumstances under which a person's liberty can be curtailed include where it is necessary for the execution of a sentence imposed by a court on a person found guilty of a criminal offence¹⁴ or where it is necessary to fulfil an order of a court punishing that person for contempt of court.¹⁵ Again, the curtailment of liberty may be lawful if it is for the purpose of bringing a person before court in accordance with an order of the court.¹⁶ Apart altogether from the aforementioned, a person suffering from a communicable disease, someone of unsound mind, a drug or alcohol addict or a vagrant may have his liberty lawfully restricted for purposes of his treatment or for the purpose of protecting the community.¹⁷ The welfare or education of a person below eighteen years of age may also be a sufficient cause to restrict his liberty¹⁸. Furthermore, a person's

10 [1942] AC 206.

11 *Ibid*, 245.

12 *R v Home Secretary, Ex Parte Khawaja* [1984] AC 952, 1011 per Lord Scarman.

13 See Article 14 of the Constitution, 1992.

14 Article 14(1)(a) of the Constitution, 1992.

15 Article 14(1)(b) of the Constitution, 1992.

16 Article 14(1)(c) of the Constitution, 1992.

17 Article 14(1)(d) of the Constitution, 1992.

18 Article 14(1)(e) of the Constitution, 1992.

liberty may also be limited if the purpose of the limitation is to prevent a non-citizen from entering Ghana unlawfully, or to secure the successful lawful removal from Ghana or some other country through Ghana, of that person.¹⁹ A person who is also reasonably suspected of having committed or being about to commit a criminal offence may also have his liberty curtailed.²⁰

Following from the above, the nagging question that arises is whether placing fetters on a person's liberty for the purpose of ensuring that he is vaccinated against COVID-19 satisfies any of the constitutional grounds upon which a person's liberty may lawfully be limited. It is our considered opinion that none of the grounds justifying the limitation of liberty is satisfied by any directive requiring the detention of persons entering Ghana, until they have attained the threshold of full vaccination.

Clearly, the closest of the criteria of justification for the restriction of liberty as provided for under Article 14(1) is that which relates to a person suffering from a contagious disease, for the purpose of whose care or treatment or the protection of the community his liberty may be curtailed. The directive requiring detention may be sought to be justified on the ground that it is for the purpose of protecting the community from the corona virus disease. Pausing for a moment, one must recall that the basic rules of constitutional interpretation frown upon the reading of some words and phrases in a constitutional provision and placing meaning on same, without due regard to the entire provision in question, and indeed the Constitution as a whole. It is required that the Constitution be interpreted in such fashion as would ensure internal consistency, in order that the Constitution may retain its pride of place as a single coherent framework.²¹ In construing the true effect of a constitutional provision, effect must be given to every word and every provision of it.²²

Emboldened and guided by the above rules, it is our view that whereas we agree that express mention is made of "the protection of the community" as a justification for putting clogs on

19 Article 14(1)(f) of the Constitution, 1992.

20 Article 14(1)(g) of the Constitution, 1992.

21 *National Media Commission v Attorney General [1999-2000] 2 GLR 577, 585-586 per Acquah JSC.*

22 *Bortier Quaye v Electoral Commission & Attorney-General [2012] SCGLR 433, 438-439; Martin Kpebu v Attorney General [2015-2016] 1 SCGLR 171, 216.*

liberty, that phrase must be interpreted as deriving its meaning from the preceding words. This means that, to use the protection of the community as a basis for limiting liberty, the one whose liberty is in issue must fall within the category of persons listed in the words preceding the expression “for the protection of the community”. To wit, the person must either be a drug or alcohol addict, or a vagrant or a person of unsound mind, or more importantly, for the present purposes, a person suffering from a communicable disease.

The question worth considering, then, is whether or not the directive in issue meets this requirement. Are the persons who are to be detained until they are vaccinated necessarily people who tested positive to the virus, such that it may be said that in the interest of the protection of the community, their liberty must be curtailed? An examination of the directive impels a negative answer to this question. The only basis upon which a person may be detained is if he merely enters the country within the stipulated timeframe and is unable to show proof of full vaccination. This does not satisfy the relevant tests which may necessitate the restriction of liberty.

It must be remembered that human liberty is too precious to be sacrificed on the altar of administrative directives merely on grounds of public policy. We do recognize the fact that the right to liberty is not absolute. However, any attempt to place any limitation therein must satisfy the requirements provided therein. Consequently, having concluded that the said directive though an attempt to serve a legitimate purpose does not meet constitutional constrictions, and accordingly we are of the considered opinion that the said directive is unconstitutional.

4.0. THE RIGHT TO FREEDOM OF MOVEMENT AND ITS LIMITATIONS: DOES COMPULSORY VACCINATION SATISFY THE TEST OF LIMITATIONS

We undertake, under this part, to consider the right to freedom of movement and the extent to which same can be limited, the scope of derogation allowed and the procedures that must be complied with.

Having said that, it is noteworthy that under Article 21(1)(g), it is provided in very unambiguous and clear terms, that everyone shall have the right to freedom of movement. This right is manifested in three respects. Thus, the right to move freely in Ghana; the right to leave and

enter Ghana at any time, and lastly immunity from expulsion from Ghana.

In the case of *New Patriotic Party v. Inspector General of Police*,²³ **Amua Sakyi JSC** percipiently observed, in respect of this right that the right to freedom of movement connotes the right of every individual freely to enter and to leave this country, and to reside in or carry on business or other economic or social activity in any part thereof.

This provision notwithstanding, it is provided in Article 21(4) that nothing in or done under authority of a law shall be held to be inconsistent with a provision of this Constitution to the extent that the law in question makes provision for...

- (a) The imposition of restrictions by an order of a Court that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person.
- (b) (...)
- (c) For the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally or any class of persons.
- (d) For the imposition of restrictions on the freedom of entry into Ghana, or of movement in Ghana of a person who is not a citizen of Ghana.

This provision on a hindsight may be interpreted with a thoughtless haste as placing unfettered restrictions on the rights and freedoms of the individual person. However, a careful perusal of the wording of the Article denotes that it is more revealing than on a mere surface reading of same. Thus, before this provision can be invoked to place limitations on the rights and freedoms of persons, certain indices, express within the penumbra of Article 21(4) must be present. On this account, we would endeavor to delineate the scope, import and application of the clawback clauses provided under Article 21(4).

23 [1993-94] 2 GLR 459

4.1. The Scope of the Limitations under Article 21(4)

For the purposes of the present Article, paragraph 'a' and 'c' of clause 4 of Article 21 will be relevant in the ensuing discussion.

In relation to paragraph 'a' of the said clause 4 of Article 21, the imposition of the restrictions must be made pursuant to a law in force which makes provision for the restriction to be imposed by a Court order to prevent or otherwise restrain the movement of a person in or within Ghana. The purpose of the restrictions must be in the interest of defence, public safety or public order.

With regard to paragraph 'c', the limitations would be said to be justifiable where they are made pursuant to a law which makes provisions for the imposition of restrictions as is reasonably necessary in the interest of defence, public order, public health or the running of essential services.

Thus, whereas, paragraph 'a' requires that the restrictions must be made by a Court order, and the power of the Court to make that order must be derived from a law and same must be in the interest of defence, public order or safety, paragraph 'c' requires that the restrictions be made by a person conferred with the power by a law enacted for the purpose and the person or authority conferred with the power must be satisfied that the restrictions were necessary in the interest of defense, public health, public safety etc.

In *New Patriotic Party v. Inspector General of Police* (supra), Hayfron-Charles Benjamin JSC sought to distinguish in very elaborate terms the distinction between paragraphs 'a' and 'c' of clause 4 of Article 21 thus:

“First, in article 21 (4)(a) the imposition of the restrictions ...is by the court, while in article 21(4)(c) whoever is imposing the restrictions is required to exercise his

discretion – that is to say, the “restrictions are reasonably required.” Secondly, article 21(4)(a) provides for the imposition of prior restraint by the court on the exercise of the fundamental freedom while article 21(4)(c) is akin to the emergency powers which, short of a presidential declaration of a state of emergency, may be exercised under the authority of any law made to cover the situations and the persons mentioned in that subsection – see article 31(9) of the Constitution, 1992.”

In *Ampofo Adjei v. Attorney General and President of the National House of Chiefs*²⁴, Date-Bah JSC, through whom the Supreme Court spoke underscored that, the limitations under Article 21(1) would only be justified where it is for the purposes of public safety, public morality, public health, etc, and that where the object sought to be achieved is not in tandem with these indices, the limitation would be unconstitutional.

With this background, we would proceed to consider the constitutionality or otherwise of the directive imposing restrictions on movement or entry into certain public places unless one shows proof of vaccination.

4.2. The Constitutionality or Otherwise of the Mandatory Vaccination Directive

As demonstrated above, for the limitations made pursuant to Article 21(4) to pass the test of constitutionality, must meet the parameters set by the same Constitution.

Article 21(4) postulates that the limitations must be made pursuant to a law for that purpose. In effect, there must be a law which is passed purposely for placing limitations necessary, in the circumstances thereunder. In effect, the law must specifically provide for the limitations of the rights of persons envisaged under Article 21 of the Constitution.

The next question which necessarily arises for determination is what constitutes a law, within the purview of Article 21(4). It is submitted in this Article that the law envisaged within the context of the said Article is a law passed by the appropriate body of law making²⁵ under

²⁴ [2011] GHASC 54

²⁵ Pursuant to Article 93(2) and Article 106, the Parliament of Ghana is the appropriate body of law making.

the Constitution, and the purpose of the law must be to impose restrictions on the rights of persons in the interest of public safety, public morality, public health and defence of the state.

This thus implies that the law must comply with the procedure of law making as designated by the Constitution, 1992 under Article 106.²⁶ It also appears from a contextual reading of Article 21(4) coupled with the Supreme Court's decision in *New Patriotic Party v. Inspector General of Police* supra, that the object of the said law must be to place limitations on the enjoyment of some rights. Accordingly, a law whose object was not solely for the imposition of such limitations cannot be used as such a law contemplated under Article 21(4) to constrict the rights and freedoms of individuals guaranteed under the said Article. This argument is further buttressed by the Supreme Court's decision in *Yeboah v. J.H Mensah*²⁷ wherein the Supreme Court acutely noted that where the Constitution makes provision for the doing of a thing it is only that mode that must be complied with, as any other mode would be deemed as unconstitutional.

Now the question is whether a mere administrative directive satisfies the test of 'a law' within the context of Article 21(4) of the Constitution. If this is answered in the affirmative, the inescapable conclusion to be driven would be that the ministerial directive on compulsory vaccination, and which by extension placed limitations on entry into Ghana, as well as freedom of movement to certain areas would be held to be constitutional.

4.3. Does a mere Administrative Directive Satisfy the Test of a Law?

An administrative directive is akin to an executive order or instrument. The general view is that these directives do not have the force of law, because they are neither made by parliament, nor does parliament have the power to exercise oversight powers over the same.²⁸ Pursuant to section 1 of the Interpretation Act, 2009²⁹, an executive instrument is any instrument which is of an administrative or executive character, and which is not of judicial or legislative character.

26 See Article 106 on the procedure of law making.

27 [1997-1998] 2 GLR 245.

28 See Article 11(7) on the kind of delegated legislation that may be laid before parliament.

29 Act 792.

An executive or administrative directive is usually issued by a person or authority with powers to do so, which said power is derived from the constitution or an Act of parliament.

Accordingly, an administrative directive does not meet the constitutional parameters of what constitutes a law, because they do not have legislative character, but are merely issued for administrative purposes.³⁰ Consequently, these directives are not required to be laid before parliament for 21 parliamentary sitting days for them to mature into law primarily because they do not constitute orders, rules and regulations within the scope or reach of Article 11(7) of the Constitution.³¹

In *Baffour Osei Akoto v. Attorney General*, the Court speaking through the distinguished Date-Bah JSC opined in relation to executive orders as follows:³²

“The purpose for laying subsidiary legislation before Parliament is for it to mature into a binding enactment. This purpose is alien to an executive order. An executive order does not have legislative effect and should not, therefore, in principle be laid before Parliament. The arguments of the plaintiff to the contrary have not persuaded us that this position of principle has been altered by any of the legal materials that he relies on. Accordingly, our interpretation of Article 11(7) of the 1992 Constitution is that it does not apply to executive instruments. Accordingly, the executive instruments impugned by the plaintiff are valid...Executive instruments, according to their definition in the Interpretation Act, 2009, are not of a legislative character. Therefore, for us, they do not have to comply with article 11(7) of the 1992 Constitution. It is thus not permissible for this Court to accept the invitation from the plaintiff to accord a differential treatment to particular kinds of executive instruments. All kinds of executive instruments are the means for implementing executive authority. There is no credible justification for requiring such instruments to be laid before Parliament,

30 [Republic v. Minister of Interior, Ex parte Bombelli \[1984-86\] 1 GLR 204](#)

31 [Association of Fiance Houses v. Bank of Ghana and Attorney General \[2021\] DLSC 10](#)

32 [\[2013-2014\] 2 SGLR 1295.](#)

when they do not have a legislative character. A contextual and purposive interpretation of article 11(7) of the 1992 Constitution leads inevitably to the conclusion that it is intended to apply to instruments of a legislative nature.”

The exposition herein clearly reveals that administrative directives or fiat or executive orders do not constitute law under the Constitution and accordingly, same could not have been anticipated when law was referred to in Article 21(4) of the Constitution. Having therefore answered the above question in the negative, it is submitted that the directive on compulsory vaccination is unconstitutional for failure to meet the requirements of the constitution. Indeed, in *Professor Asare v. Attorney General*, the Court observed that where the constitution specifically dictates that a thing be done in a particular way, then any other route contrary to that provided by the Constitution cannot be legitimate.³³

4.4. Granting without conceding that the ministerial directive is constitutional, does it meet the test of reasonable necessity for the limitation of rights? Was the directive necessary in the interest of public health?

It is now a hallowed principle that any law or statute seeking to impose limitations on the exercise or enjoyment of fundamental rights and freedoms must be such that the limitation was reasonably necessary in the public interest and that it must be proportional to the object that is sought to be achieved by the limitation.

In *Centre for Juvenile Delinquency v. Ghana Revenue Authority and Attorney General*³⁴, the Court speaking through Adinyira JSC observed thus:

in determining the validity of any statutory or other limitation placed on a constitutional right, the question that need to be determined are:

- a. *Is the limitation necessary? In other words, is the limitation necessary for the*

33 [2012] GHASC 31

34 [2019] GHASC 29

enhancement of democracy and freedoms of all, is it for the public good?

b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the Constitution?

The test of necessity requires that there must be some urgency or need to place that limitation, and that in the absence of that limitation, there is no other alternative less restrictive of rights which could be used to achieve the object sought to be achieved by the law.³⁵ The test of proportionality on the other hand demands a balancing act of the cost and benefits or the advantages and disadvantages of the limitation placed on the exercise of the right. If the limitation is unreasonable, to the extent that the disadvantages far outweigh the advantages, then it would be disproportionate and thus would not meet the test for that purpose.

On this premise, the question is whether the directives imposing mandatory vaccinations were necessary and were such as would advance democracy and freedoms of all? It is submitted that the directives on compulsory vaccination and their cumulative effect of denial of persons from entering the country or requiring them to mandatorily take the vaccine is not necessary. Indeed, though the vaccine if taken, would to some extent protect the individual taking it, there is no empirical evidence to suggest that a person who has taken the vaccine cannot still transmit the virus to another person. Nor is there any empirical evidence that the vaccine once taken by a person, that person cannot contract the virus anymore. In effect, there was no urgency which was so compelling as to demonstrate that unless there is compulsory vaccination, all those unvaccinated would transmit the virus to those who were already vaccinated. In fact, the news outlets are replete with reports about people who tested positive to the virus, despite having fully vaccinated. Therefore, the transmission of the virus lies not in one's vaccination, because, a person can be vaccinated and still contract or otherwise transmit the virus.

The foregoing analysis suggests that there were other alternative means of achieving the object sought by the directive, rather than to mandatorily impose limitations on the rights of persons. To this extent, it is submitted, that the directive was not necessary for the advancement of

³⁵ Juan Cianciado, 'The Principle of Proportionality: The Challenges of Human Rights' (2010) vol 3 JCLS 178.

democratic rights and freedoms.

Is the directive proportional to the benefit to be derived from compulsory vaccination and the incidental restrictions on movement to certain places? We submit that the directive to the extent that it attempts to effectively crush one's freedom of thought, conscience, as well as once freedom to move freely within Ghana or freely enter Ghana is completely disproportionate with the benefit of vaccination, which benefit in itself is not automatic. We say the benefit is not automatic because, the mere fact that one is vaccinated does not mean he cannot contract the virus anymore albeit it merely reduces the risk. Secondly, the mere fact that one is vaccinated does not necessarily mean he cannot also transmit the virus. Considering these possibilities in the light of the constitutional violations of rights arising from this compulsory vaccination, we submit that the directive is disproportionate to the enjoyment of fundamental human rights. Consequently, we are of the considered opinion that the ministerial directive is unconstitutional, in so far as it places unjustifiable limitations on the right to freedom of movement.

5.0. CONCLUSION

We have endeavored to demonstrate that the right to personal liberty and freedom of movement, like other fundamental rights, are inalienable, salutary and sacrosanct. Placing any limit whatsoever on any of these requires that there be reasonable constitutional grounds to do so. But, examining the directive of the Ministry of Finance and the Ghana Airport Company Ltd, against the background of the relevant constitutional provisions and the applicable case law, we are disposed to conclude that the grounds which may justify any clogs on these rights cannot be found for the reasons embodied in this paper.