WRITE-UPS

THE DOCTRINE OF CONTINUOUS VIOLATION: CAN IT BE CAUGHT BY THE DOCTRINE OF ESTOPPEL AND THE STATUTE OF LIMITATION?

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"On principle of public policy nobody should be allowed to take advantage of his own wrong."[1]

INTRODUCTION

With this doctrine the decision in *Bodner v Banque Pariba*[2] comes to mind. The court held thus:

"'Federal courts have found the statute of limitations must accrue from the date of the last wrongful act where there is a continuous wrong. Leonhard v United States, 633 F. 2d 599, 613 (2d Cir. 1980). Thus, under the continuous violation doctrine, "the limitation period for a continuing offence does not began until the offence is completed." United States v Rivera-Ventura, 72 F. 3d 277, 281 (2d Cir. 1995).. The nature of Plaintiffs claim is such that the continued denial of their assets, as well as facts and information relating thereto, if proven, constitutes a continuing violation..."

In this case the plaintiff, Jews, brought an action in the year 2000 for the recovery of their assets and damages from the Defendant bank. The basis of their claims is that the defendants have connived with the Nazi and the Vichy regimes during their World War II occupation of France to expropriate their private properties. The defendant pleaded the statute of limitation. The Plaintiff in turn pleaded continuing violation, namely, that every single day that the defendant refused to return the properties or, in lieu of that, pay compensation to them, constitute a new and fresh violation.

The doctrine is to the effect that if one violates a statute for a long period of time he cannot invoke the doctrine of estoppel or the statute of limitation to seek refuge upon his wrongful conduct. In the words of Amegatcher JSC is instructive *"the police administration at the time should count themselves fortunate to have escaped the punishment for the unreasonable delay, …… failure to comply with the orders and direction of the Supreme Court given 28years ago and mustering the courage to plead that the enforcement of the orders and directions have been caught by the statute of limitation."*[3]

Meaning of the doctrine 'Continuous Violation'.

The continuing violation doctrine is one of such doctrines which statutes of limitation are incapable of overriding. Strictly speaking, the continuing doctrine is not exactly an exception to the statute of limitation. It is, in fact, consistent with statute of limitation. It indeed, acknowledges the limitations that a statute may place on the claim. It however, looks at the totality of the wrongful behavior complained of in determining whether the limitation that the statute places on the wrong is triggered. The basis of the doctrine is that the wrongful behavior complained of or another similar wrongful behavior which is consequent upon the initial wrongful behaviour complained of continues, even after the cause of action had fully accrued in respect of the initial wrongful behavior. In such a case, a new cause of action is deemed to accrue every single day that the wrongful behavior persists, thereby shifting the accrual date of the cause of action forward. It also means that until the wrongful behavior abates, each new day becomes the beginning of a new cause of action to which the putative defendant may be liable.[4]

1 Acquah v Oman Ghana Trust [1984-86] 1 GLR 157 at 158 holding 1.
2 114 F. Supp. 2d 117 (E.D.N.Y, 2000)
3 Inspector Shitu Wabi and 76 Ors v IGP & Attorney-General [2022]180 GMJ 586 SC; delivering the minority opinion
4 Inspector Shitu Wabi & 79 Ors v Inspector General of Police & Attorney-General; Amegatcher JSC

The doctrine is rooted on the consequences of a breach of constitution or any enactment. The question is can a person who has continuously breached an order of a court or the Constitution 1992 seek refuge under estoppel or the statutes of limitation? I do not think so.

This paper analyses the circumstances under which estoppel and the statutes of limitation cannot be invoked as shield or even as a sword to override an act or conduct of any person which contravenes the Constitution 1992.

Analysis

In *Aboagye Mensah & 2 Ors v Yaw Boakye (Execution of Consent Judgment/Abuse of Process)*[5] the Supreme Court in rejecting the idea that estoppel can be used to prevent a person from ventilating his constitutional rights held per Amadu JSC:

"The law is that previous conduct would not constitute an estoppel preventing the exercise of constitutional rights or enjoyment of constitutional remedy". The Supreme Court per Tanko, JSC referred to a number of case in the Ghanaian jurisprudence and decided as follows:

In *New Patriotic Party v Attorney-General*[6], this Court stated as follows:

"Our first reaction is that such equitable defences-acquiescence and inaction or conduct –must not be allowed to operate as a shield to prevent citizen from ventilating and enforcing his constitutional rights. Otherwise, sooner or later, the good intentions of the framers of the Constitution, will be defeated."

The Supreme Court continued thus:

In *Re Kwabeng Stool: Karikari v Ababio II*[7], estoppel was said to be wholly inapplicable if it is meant to cure non-compliance with statutes. At page 531 of the report in the case under reference, this Court held as follows:

"Estoppel of all kinds, however, are subject to one general rule: they cannot override the laws of the land. Thus, where particular formality is required by statute, no estoppel will cure the defect and jurisdiction cannot be given to the court by estoppel, where statute denies it…."

Again, *Attorney-General v Sweater & Socks Factory Limited*[8] the Supreme Court opined that the abuse of the process principle does not apply if in the new action, the courts attention is being drawn to either a breach of the Constitution or a jurisdictional error. In the case under reference, this Court per Wood (CJ) stated as follows:

"More importantly, it is very clear from the abuse if process doctrine as discernible from all the decisions of this court, without a single exception that special circumstances, would justify its exclusion or applicability and allow the litigation of issues which could have or ought to have been brought up for adjudication in a previous action, but were not. Given that estoppels of all kinds cannot override the laws of the land, I would include, constitutional questions, jurisdictional questions arising from alleged constitutional or statutory violations, such as the one raised before us, as some of the exceptional grounds on which, in a fresh action involving the same parties or privies, defendant cannot subsequently rely on the plea of the abuse of process."

5 [2021] 173 GMJ 179 SC
6 [1993-94] 1 GLR 124
7 [2001-2002] SCGLR 515, the Supreme Court stated the principle that, for an earlier decision to constitute an estoppel, it must have been delivered on the merits by a court of competent jurisdiction.
8 [2013-2014] 2 SCGLR 946 at 969; [2014] 74 GMJ 1 SC

The above decisions indicates that when a person violates the constitution 1992, statutes, jurisdiction, he cannot invoke the doctrine of estoppel or the Statute of Limitation as shield to seek a remedy from the court. This is because every violation constitute a new and fresh violation.

It is trite learning that the Constitution 1992 is the Supreme Law of the land. Article 2 of the Constitution 1992 gives right to any person who alleges that any act or omission of any person is inconsistent with, or is in contravention of a provision of the constitution, to bring an action in the Supreme Court for a declaration to that effect. The effect of any orders made by the Supreme Court on the entire citizenry and the repercussions for disobedience are provided for in articles 2(3) and (4) as follows:

"(3) Any person or group of persons of whom an order or direction is addressed under clause (2) of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction.

(4) Failure to obey out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under the Constitution and shall, in the case of the President or the Vice-President constitute a ground for removal from office under this constitution."

The above constitutional provisions sanctions any person who refuses to obey an order made by the Supreme Court. The offence for such a sanction is high crime.. So persons cannot hide under the statute of limitation or estoppel as shield or sword to override an act or conduct of any person which contravenes the Constitution 1992. For the purpose of this article the case that comes to mind is *Inspector Shitu Wabi & 79 Ors v Inspector General of Police & Attorney-General*[9]. I disagree with the majority opinion of the Supreme Court. I however, I associate myself with the minority opinion delivered by Amegaticher JSC.

Facts of the case

Prior to the coming into force of the Constitution 1992, the conditions of service of members of the Ghana Police Service, then a Police Force, were governed by the Police Service Act, 1970 (Act 350), the Police Service (Amendment) Decree, 1974 (NRCD 303) and the Police Service (Administration) Regulations, 1974 (LI 880). Under Regulation 24(1) of LI 880, police officers compulsorily upon reaching the age of 50 years for females and 55 years for males. When the 1992 Constitution was promulgated, Article 199 placed the Ghana Police Service within the Public Services of Ghana. Article 199(1) stated that the retirement age of public officers serving in the public services shall be 60 years for all irrespective of gender. Within the first two years after the Constitution 1992 came into force on 7th January 1993, the Ghana Police Service retired approximately one thousand men and women of the service who attained the ages of 50 for females and 55 for males. Three of the retired officers challenged the constitutionality of their retirement in the Supreme Court under articles 2(1) and 130 of the Constitution 1992. The case of *Yovuyibor & Anor v Attorney-General*[10] is the lead judgment from which all the affected officers draw inspiration. In that case, the plaintiff, Yovuyibor, was a superintendent

9 [2022] 180 GMJ 586 SC
10 [1993-94] 2 GLR 343

of police, as was the plaintiff Bonuedi. They and others were compulsorily retired from the Police Service at the age of 55 years sometime after the coming into force of the Constitution 1992. They filed a suit in the Supreme Court for declaration that as the compulsory retiring age for public officers under article 99(1) of the Constitution 1992 was 60 years, the compulsory retiring age for members of the Police service who were part of the Police Service was 60 years and not 55 years as was the case before the Constitution 1992 came into force; and as such, their premature retirement at the age of 55 years was wrongful and a breach of the provisions of Article 199(1) of the Constitution 1992. In opposing the action by the plaintiffs, the Attorney-General contended that the Police Force continued Service (Amendment) Decree, 1974 (LI 880), which required all police officers to retire at the age of 50 and 55 years and therefore, their retirement was constitutional. The Supreme Court unanimously granted the reliefs of the plaintiff and held per Amua-Sekyi JSC that:

"From the above, I am of the opinion that as public officers holding pensionable appointments, the compulsory retiring age of the plaintiffs is 60 years and that their purported retirement from the Police Service at the age of 50 and 55 years is a breach of Article 199(1) and a nullity. I would grant them declarations to that effect and order that they are reinstated forthwith."

It was then expected that after the judgment of the apex court declaring the Police authority's premature retirement of its officers unconstitutional, the management would comply with the court's judgment and reinstate the affected officers, or failing to engage them pay their salaries and benefits for the remaining duration of their tenure, they being deemed under the judgment to be still serving officers of the Ghana Police Service. The Police Administration however failed to comply fully with the orders of the Court. A few officers were recalled for training and reinstated but the majority were completely ignored. The explanation given was that in some cases, the Police Administration did not have accurate records of all the Police personnel who were unlawfully retired, while in others, their positions in the service had already been filled and therefore there was no vacancy.

Not satisfied with this explanation, the retired officers grouped them and instituted class actions at the High Court based on the judgment and the orders of the Supreme Court on 26th July 1994. It was following these class actions and subsequent directives and orders by the High Court that the Police Administration was compelled to pay some of these officers their salaries and benefits with interest. But the plaintiffs in this suit and others were still ignored mainly because the Police Administration had failed to verify their names as officers affected by the retirement. It was until 2005-2006 that the Police Administration finally wrote letters to the plaintiffs verifying their names. It was not surprising that the delay in finalizing the administrative processes for payment to be made, resulted in exasperation and the frustration. Armed with these letters, the plaintiffs (initially numbering 131 but later reduced to 77 by an amendment), under the inspiration of their leader Insp/Rsm Shitu Wabi instituted the current suit now on appeal to this Court for the following reliefs: *Entitlement for the five (5) or ten (10) years deprived; interest from 1993 or 1994 till date at the current bank rate; Costs.*

The Attorney-General, representing the Ghana Police Service, admitted that the plaintiffs were retired at ages 50 and 55, but stated in paragraphs 8, 9 and 10 of the Amended Statement of

Defence that there was no dispute between the parties to warrant recourse to the High Court, and that it was not necessary for the plaintiffs to come to the High Court to claim their entitlements, since the issue could be administratively handled. In paragraph 4 of the amended defence, the Defendants pleaded that it was the inordinate delay of the plaintiffs which made it impossible to reinstate them and therefore their action was statute-barred.

The Supreme Court dismissed the appeal by a ratio 3:2, Pwamang JSC delivered the majority opinion (with Anin Yeboah JSC and E. Yonny Kulendi JSC agreeing while Amegatcher JSC, delivered the dissenting opinion (with I.O Tanko Amadu JSC agreeing with the dissenting opinion).

His Lordship Pwamang, JSC held:

"The policy of the law in setting limitation periods within which persons may take action to enforce their legal rights or forever hold their peace is a fundamental postulate of law that permeates all legal rights. Of course, as with all laws, exceptions are made in limitation statutes and by binding judicial decisions. This policy ensures that persons do not have liabilities hanging over them and creating uncertainties for extended periods. The Constitution takes the lead in this by setting limitation period for presidential election petitions which has a time limitation of twenty-one days as provided under article 64. Limitation periods within which constitutional rights may be vindicated under the Constitution 1992 are stated in a number of statutes. For example, section 13(2) (a) of CHRAJ Act, 1993 (Act 456) provides as follows:

"(2) The Commission may refuse to investigate or cease to investigate a complaint

(a)If the complaint relates to a decision, recommendation, an act or omission of which the complainant has had knowledge for more than twelve months before the complaint is received by the Commission."

Furthermore, Order 67 r 3 of CI 47 on Enforcement of Fundamental Human Rights by the High Court has set six months from the occurrence of an alleged contravention, or three months from the applicant becoming aware of a contravention which an aggrieved person may sue to enforce her Fundamental Human Rights. Limitation periods for civil actions in general are provided for under the limitations Act, 1972 (NRCD 54). As has been discussed, this action of the plaintiff in an action for damages for breach of the terms of their employment provided in an enactments and it would defy basic legal principles to contend that on the facts of this case, the plaintiff could go to sleep after becoming aware that their retirement was premature and wake up at any time and sue in court to claim monetary compensation with no limitation period binding them"

The Supreme Court further held:

"Plaintiff's herein were not parties to the 1994 judgment and the court did not grant a relief in favour of all police personnel who were in the class of the plaintiffs in the 1994 case. Therefore, the plaintiffs herein cannot be heard to say that they were praying for the enforcement of that judgment for their benefit. In any event, it is lawful to seek to enforce a judgment of a court by commencing a fresh suit relying on the case of Tularly v Ababio[11]*"*

My submission is that where there is breach of a constitutional provision or failure to comply with an order the statute of limitation does not arise. The plaintiffs avers that by the decision in the *Yovuyibor* case the Police administration did not comply fully with the decision and therefore breached article 199 (1) of the Constitution 1992. In such a situation the statute of limitation cannot be used as a shield to fly against breaches of the Constitution 1992. The words of Amegatcher JSC

11 [1962] 1 GLR 411

is instructive in that regard: *"Estoppel is one of the defences which will not fly against breaches of the Constitution."* The learned judge in delivered the minority opinion and relied on the celebrated case of *Tufuor v Attorney-General*[12]

Facts

Article 127(8) of the 1979 Constitution provided that on the coming into force of that Constitution, all Justices of the Superior Court of Judicature holding office as such shall be deemed to have been appointed from the date of the coming into force to hold office as such under the Constitution. Prior to the coming into force of the Constitution, Justice Fred Kwasi Apaloo held the office as the incumbent Chief Justice of the Republic. After the Constitution came into force, the President purported to nominate Justice Fred Kwasi Apaloo as Chief Justice. This implies him going through Parliamentary approval i.e to present himself to Parliament to be vetted him and rejected him as Chief Justice.

The Plaintiff brought an action under article 2 of the 1979 Constitution, which is equivalent to the provisions of the current Constitution, to declare the nomination by the President, Justice Apaloo's presentation of him to Parliament for vetting, and Parliament vetting and rejecting him as Chief Justice, as all acts inconsistent with the Constitution and therefore void. The Attorney-General contended that by the conduct of Justice Apaloo in accepting the nomination and presenting himself to Parliament for vetting, he should be deemed to have waived any immunity provided by the Constitution and, therefore, *estopped* from challenging the consequences of that conduct.

The Supreme Court per Amegatcher JSC held from the dictum of Sowah JSC as follows:

"The decision of Mr Justice Apaloo to appear before Parliament cannot make any difference to the interpretation of the relevant article under consideration unless that decision is in accordance with the postulates of the Constitution. It is indeed the propriety of the decision which is under challenge. This court does not think that any act or conduct which is contrary to the express or implied provisions of the Constitution can be validated by equitable doctrines of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must confirm to due process of law in the fundamental law of the land or it is unlawful and invalid."[13]

The decision in the *Tufuor* case supra vindicates the minority decision delivered by Amegatcher JSC that estoppel cannot be invoked where there is a breach of a constitutional provision. This is because in the *Tufuor* case there was breach of a constitutional provision and the Supreme Court failed to agree with defendant's invocation of estoppel as a shield. Meaning that the Plaintiffs action in the *Inspector Shitu Wabi & 76 Ors* case was maintainable and therefore the majority decision that they have been caught by the statute of limitation is far-fetched. The words of Wood CJ in the *Attorney-General v Swaeter & Socks* case supra comes to mind: *"Given that estoppels of all kinds cannot override the laws of this land, I would include, constitutional questions, jurisdictional questions, arising from alleged constitutional or statutory violations…"*

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12 [1980] GLR 637

13 See also Republic v High Court, Accra Ex parte CHRAJ [2007-2008] SCGLR 213 WOOD CJ; Attorney-General v Faroe Atlantic [2005-2006] SCGLR 271

The minority opinion delivered by Amegatcher JSC further applied the doctrine of continuous violation and relied on the case of *Sumailia Bieibiel v Adamu Dramani*[14]. The defendant in this case objected to the jurisdiction of this Court on grounds, among others, as held by the Court of Appeal that the Plaintiff did not avail himself before the expiration of the limitation of period of twenty-one days after the Gazette publication within which to file a petition under the provisions of section 18 of the Representation of the People Act, 1992 (PNDCL 284). In effect, the period for challenging the election of the Defendant Member of Parliament had expired and the forum for appeals in the Court of Appeal was also exhausted.

Gbadegbe JSC, speaking for and on behalf of the majority at pages 144-145 of the report (in assuming jurisdiction over the case) applied the continuous violation doctrine to a breach of a constitutional provision in the following dictum:

"The plaintiff, in any event, is contending that the Defendant continues to breach the provisions of the Constitution even after the decision of the Court of Appeal. In my view, the facts urged by the plaintiff are of a continuing nature like a nuisance, therefore, every moment that the Defendant continues to take his seat in Parliament, or exercises the functions of that office, he is in breach of the constitutional provisions and, as such, there is a new cause of action consequent upon any such breach. This being the case, I do not see any force in the contentions on this ground."

Amegatcher JSC in applying the doctrine of continuous violation did justice to the case thus:

"Applying the doctrine of continuous violation, the opinion by the Supreme Court in the Yevuyibor case that the retirement of Police Officers at pages 50 and 55 when the Constitution has prescribed the age at 60 years rendered the decision of the police authorities outright unlawful and thus, void abi initio. It is as if the police administration had never laid the plaintiffs off and their cohorts off at all. It also made the refusal of the police administration to re-instate the plaintiffs or, in lieu of such reinstatement, pay to them their entitlement unlawful. But, even most importantly, the police administration's refusal to comply with the decision of this Court was unlawful. Accordingly, each day that the police authorities withheld the plaintiffs' lawful entitlements constituted a new and fresh wrong- not only a violation of the Constitution but also a violation of the rights of the plaintiffs and their cohorts. In other words, the wrong which the police administration committed against the plaintiffs and their cohorts only began from the day they were each laid off. It however, continued unabated and continued to affect each of them from that day until the day that the police administration would remedy it in respect of each of the."

Also the decision by the majority opinion delivered by Pwamang JSC that: *"it is unlawful to enforce a judgment of a court by commencing a fresh writ"*[15] is in my respectful opinion is far-fetched. This is because in the Inpector *Shitu Wabi* case *supra* the plaintiff filed a fresh suit because the police performed an illegal act of not complying fully with the judgment in the *Yevuyibor* case. It is trite that when an action is tainted with illegality or fraud it is incumbent on the party to issue a writ to have it set aside or enforced[16]. Amegatcher JSC opined: *"retirement of Police Officers at pages 50 and 55 when the Constitution has prescribed the age at 60 years rendered the decision of the police authorities outright unlawful and thus, void abi initio.*

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14 [2011] 1 SCGLR 132; [2011] 40 GMJ 39 SC
15 Tularly v Ababio supra
16 Ahyia v Amoah [1987-88] 2 GLR 289 CA; Cole v Langford [1883] 2 QB 36

Even though the current plaintiffs in the current suit were not parties to the *Yevuyibor* case they were part of those police officers who were made to retire illegally at the ages of 50 and 55 instead of 60 years so they were adversely affected by the judgment. From the analysis so far advanced, I am of the view that the majority decision was delivered *per incuriam* because it is evident from decided case cited *supra* that the doctrine of estoppel cannot be invoked to validate a breach of a constitutional provision. In other words, the Limitation Act cannot be invoked as a shield or even used a sword to override an act or conduct of any person which contravenes the Constitution. If an act is unconstitutional, the indolence or delay in challenging it will not be a bar on a person's right to mount a challenge in future. However, according to Amegatcher JSC who delivered the minority opinion held that, the plaintiffs' action was not even statute barred because the judgment of the Supreme Court in the *Yevuyibor* case was delivered on 26th July 1994. The suit by the plaintiffs in the *Inspector Shitu Wabi* case to enforce the judgment was filed on 27th April 2006. According to the learned judge if one were to argue that the Limitation Act applies to this appeal, the relevant provision should be on section 5(2) of the Limitations Act which provides: *"(2) An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable."* According to the learned judge, the dates the plaintiffs' filed their action and the date delivered in the *Yevuyibor* case their action was not caught by the statute limitation as opined by Pwamang JSC thus: *"hence if we count their limitation period from 1994 when the Supreme Court handed down their decision, then their action was barred after 2000."*

CONCLUSION

The law is that previous conduct would not constitute an estoppel preventing the exercise of a constitutional right or enjoyment of a constitutional remedy. In other words, the equity maxims *"delay defeat equity"* and *"equity assist the diligent not the tardy"* cannot be applied under the doctrine of continuous violation. When there is a violation of the Constitution 1992 the person upon whom such an action is brought cannot invoke the doctrine of estoppel or the statute of limitation as a shield or sword to override an act or conduct which contravenes the Constitution. This point was well made by the following passage from the judgment of the Supreme Court in *Tuffuor v Attorney-General supra* as:

"Neither the Chief Justice nor any other person in authority can clothe himself with conduct which the Constitution has not mandated. To illustrate this point if the Judicial Council should write a letter of dismissal to a judge of the Superior Court of Judicature and that judge either through misinterpretation of the Constitution or indifference signifies acceptance of dismissal, can it be said that he cannot subsequently resile from his own acceptance or that having accepted his dismissal, he is estopped by conduct or election from challenging the validity of the dismissal. The court certainly thinks not. This court does not think that any act or conduct which is contrary to the express or implied provisions of the Constitution can be validated by equitable doctrines of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid."