WRITE-UPS

FUNDAMENTAL HUMAN AND ECONOMIC RIGHTS AT CROSS ROADS WITH THE COMPANIES ACT, 2019 (ACT 992). *********

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Fundamental human and economic rights at cross roads with the Companies Act, 2019 (Act 992). *********

1.Introduction

The fifty-six (56) year regime of the Companies Act, 1963 (Act 179)[1] ended in 2019 upon the coming into force of the Companies Act, 2019 (Act 992)[2]. Arguably, Act 992 represents a transformative shift in Ghana's business landscape, representing a monumental development from Act 179. Some of these include the departure from the regulations of a company to the constitution. Act 992[3] provides that it is not compulsory to incorporate a company with a constitution. It is however, instructive to note that where a company is not incorporated with a constitution, it will be bound by the default constitution as spelt out in the second, third and fourth schedules to Act 992. Another introduction is that a company shall not enter into a major transaction unless the transaction is approved by a special resolution or contingent on approval by special resolution.[4]

A major highlight of this development, particularly in respect of corporate governance, is the enhanced qualification of directors[5], the replacement of external auditors of companies after engaging for a period of 6(six) years, and the cooling-off period of auditors[6], amongst others.

This paper will focus on two major things. The first is the constitutionality of prohibiting persons from becoming directors of a company upon incorporation and/or rendering them disqualified or unfit to continue in their role as directors of a company merely because they have been charged with an offence relating to fraud or dishonesty. The second is the mandatory cooling-off period ascribed to auditors in the Companies Act, 2019 (Act 992). However, these discussions will be situate within the context of the supremacy of the Constitution and the Supreme Court's power to review legislation. It is in this vein that I will review the Supreme Court's recent decision in *Derrick Adu Gyamfi v The Attorney-General.*

2. *Facts of Derrick Adu Gyamfi v. The Attorney-General*

Plaintiff caused a writ to be issued pursuant to Articles 2(1) and 130(1) of the 1992 Constitution (hereinafter referred to as "the Constitution"), seeking an interpretation and enforcement of Articles 19(1), Articles 19(2)(c), and Article 15(3) of the Constitution as against Section 13 (2)(h)(i) and (ii), Section 172(2)(a)(i) and (ii) and Section 177(1)(e) of Act 992. The crux of the Plaintiff's case was that the continuous enforcement of Sections 13 (2)(h)(i) and (ii), 172(2)(a)(i) and (ii) and 177(1)(e) was violative of Articles 19(1) and (2)(c) and 15(3) of the Constitution. Essentially, these sections of Act 992 are reproduced hereunder as follows:

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1 The Companies Act 1963 (Act 179) came into effect on the 28th day of May 1963.
2 The Companies Act 2019 (Act 992) came into effect on the 2nd day of August, 2019.
3 Section 23(1) of Act 992 provides that a company has the option to have a registered constitution.
4 Section 145(1)(a) and (b) of Act 992
5 Section 173 of Act 992
6 Section 139(11) of Act 992

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Section 13(2) provides that "the application shall include;

> *(h) a statutory declaration by each proposed director of the proposed company indicating that within the preceding five years, that proposed director has not been*
>
> *(i) charged with or convicted of a criminal offence involving fraud or dishonesty;*
>
> *(ii) charged with or convicted of a criminal offence relating to the promotion, incorporation or management of a company;*

Section 172(2) provides that "a person shall not be appointed as a director of a company unless the person has, before the appointment

> *(a) made a statutory declaration submitted to the company and subsequently filed with the Registrar to the effect that the person has not, within the preceding five years of the application for incorporation,*
>
> *(i) been charged with or convicted of a criminal offence involving fraud or dishonesty;*
>
> *(ii) been charged with or convicted of a criminal offence relating to the promotion, incorporation or management of a company;*

Section 177(1)(e) provides that where there is an ongoing investigation by a criminal investigation body or by the Registrar or the equivalent in a foreign jurisdiction regarding the matter in paragraphs (a) to (d) against a director for a fraudulent activity he ought to be restrained from being a director of a company.

The import of the aforementioned provisions in Act 992 is to deprive a person from becoming a director upon incorporation of a company or prohibit, disqualify, and/or restrain such a person from continuing to act as a director of a company because he has been charged with an offence and/or under investigation for committing a crime relating to fraud and/or dishonesty in regards to the promotion, incorporation and/or management of a company.

Plaintiff's action was founded on the supremacy of the Constitution and the rules of fair trial espoused under Chapter 5 of the Constitution. The two will be discussed in turn.

a. <u>Supremacy of the Constitution over all bodies.</u>

Plaintiff's action was founded on Article 1(2) of the Constitution, which provides that the Constitution is the Supreme Law of Ghana[7]. In the recently decided case of *Justice Abdulai v Attorney General*, Kulendi JSC, in delivering the judgment of the Court, opined that "*no arm of government or agency of the State, including Parliament, is a law unto itself because, without exception, everyone and everything in Ghana is subject to the Constitution. As a result, an allegation that Parliament has acted and or is acting in a manner that is inconsistent with the Constitution will render Parliament, the actions, orders, rules or procedures in issue amenable to the jurisdiction of this Court.*

Parliament, like every organ of the State, including the Judiciary, is subject to the Constitution"[8]. The Constitution is a sacred document that streamlines the affairs of the State. It is from it

7 Article 1 (2) provides that this Constitution shall be the supreme law of Ghana and any other law found to be in consistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

8 (J1 7 of 2022) [2022] GHASC 1 (9 March 2022)

that all laws and actions in the body politique derive their power and authority. Sowah JSC, presiding over the full bench of the Court of Appeal in the seminal case of *Tuffour v Attorney-General*[9] stated that the Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority that each arm of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution.

b. Fundamental human rights of an individual

Plaintiff stated that the Constitution under Chapter 5 guarantees the right to a fair hearing[10] and the presumption of innocence[11] to an accused person. Ackah-Yensu JSC, in her expositions on the presumption of innocence, opined that a person who is charged with an offence or a subject of a criminal investigation cannot, even before his conviction, be punished for that offence[12]. The salutary principle of presumption of innocence was well espoused in Martin Kpebu (No. 2) v Attorney General, where the Supreme court held that it is a requirement that the prosecution prove the charge beyond reasonable doubt[13].

Hence, a fair hearing that is guaranteed an accused person under Article 19(1) moves pari passu with the presumption of innocence as enshrined in Article 19(2)(c) of the 1992 Constitution.

Ackah Yensu JSC[14] opined that, in simple terms, the constitutional presumption of innocence mandates that a person accused of the commission of a crime, or even a suspect, cannot be condemned before he has had his day in court. To punish an innocent person not convicted for the commission of an offence, either directly or indirectly, sins against the constitutional presumption of innocence.

Pwamang JSC, in delivering the concurring opinion in the same case, opined that where a person is barred because of a conviction, the inference is that a court of law has accorded a fair hearing and pronounced a person guilty of the offence. But the barring of a person just because he has been charged with those criminal offences means that he's being punished and denied his right to participate in a company as a director or on account of being charged with the criminal offence even though the Constitution stipulates that a presumption of innocence unless proven guilty of a criminal offence.

3. Power to strike down legislation

The power to strike down legislation can be traced to the seminal case of *Marbury v. Madison*[15].

9 [1980] G.L.R. 637
10 Article 19(1) provides that a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a Court.
11 Article 19(2)(c) provides that "a person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.
12 Suit No. J1/18/2022 Delivered on the 8th day of November, 2023
13 [2015-2016] 1 SCGLR 171
14 Derrick Adu Gyamfi v The Attorney-General, Suit No. J1/18/2022 Delivered on the 8th day of November, 2023
15 1 Cranch 137; 2 LED 60 [1803] Herein, the American Supreme Court, speaking through Chief Justice John Marshall, held that the Judiciary Act of 1789, which sought to expand judicial powers, was an act of Congress, which was in contravention of the mandate of the Judiciary in upholding the Constitution.

The Supreme Court, in their erudite submissions in *Ghana Bar Association v The Attorney-General*[16], stated that "the Constitution has vested the power of judicial review of all legislation in the Supreme Court. It has dealt away with either executive or parliamentary sovereignty and subordinated all arms or organs of the State to the Constitution".

In *Adofo v Attorney-General & Cocobod*[17], Date-Bah JSC stated that

> *"the power of judicial review of the constitutionality of legislation, which is explicitly conferred on this court by articles 2(1) and 130(1) of the Constitution, is one that should be vigilantly enforced by this court in the discharge of its obligation to uphold the Constitution of this country".*

In *Daasebre Asare-Baah III v Attorney-General & Electoral Commission*, Wood CJ was of the considered opinion that

the Supreme Court will only strike down legislation which is found to be in violation of a constitutional provision, namely that the legislation is either inconsistent with, in breach, or violation or contravention of the provisions of the Constitution[18].

This is the threshold that must be met before the Supreme Court will exercise that duty under Article 2(1)(a) of the Constitution.

The conclusions arrived by the apex court have been received with excitement within the legal community in that the supremacy of the Constitution has sounded a death knell to the ongoing breach of Articles 19 (1), (2) (c) and 15 (3) of the Constitution.

4. Qualification of directors

It is a truism that companies, even though artificial bodies, operate through natural persons such as officers, directors, agents, etc. Act 992 provides that a company shall act through the members of the company in general meeting or the board of directors or through officers or agents appointed by or under authority derived from the members in general meeting or the board of directors[19].

In *Okudjeto v Irani Brothers*, it was held that the administration and management of a company are vested in the directors[20]. Act 992 defines, "directors" as persons, by whatever name called, who are appointed to direct and administer the business of the company[21]. Act 992 provides that, except otherwise provided in the constitution of a company, the business of the company is managed by the board of directors, who may exercise the powers of the company[22]. This goes to show how instrumental directors are in the corporate governance structure of a company. When acting in their normal cause of duty they are not subject to the dictates of any person including the members of the company unless otherwise provided by the constitution of the Company[23].

16 [2003-2004] 1 SCGLR 250 @ 259
17 [2005–2006] SCGLR 42
18 [2010] SCGLR 463
19 Section 144(1) of Act 992
20 [1974] 1 GLR 374
21 Section 170(1) of Act 992
22 Section 144 (3) of Act 992
23 Section 144 (4) of Act 992 provides that unless the constitution of the company otherwise provides, the board of directors when acting within the powers conferred on them by this Act or the constitution of the company, are not bound by to comply with the directions or instructions of the members in general meeting.

The effect of sections 13 and 172 of Act 992 in the appointment process of directors was undoubtedly viewed as not merely argumentative but violative of their fundamental human rights. Thankfully, the Supreme Court in the recent case of *Derrick Adu Gyamfi v The Attorney General* has brought some finality to the issues by declaring as unconstitutional Sections 13(2)(h)(i) and (ii) and 172(2)(a)(i) and (ii) of Act 992. (lets discuss)

5. Legal reforms

Prior to the decision of the Supreme Court on this subject matter, the writer had expressed his concerns about the constitutionality of the said provisions to some individual members of the committee involved in the law-making process of Act 992.

The opposition stemmed from the fact that sections 13(2)(h)(i) and (ii) and 172(2)(a)(i) and (ii) were contrary to the Constitution because they sin against the presumption of innocence, which form part of the fundamental human rights of a person. All these overtures fell on deaf ears. One would have thought the Law Reform Commission or Parliament itself would have taken steps to correct such glaring unconstitutional defect by bringing it in conformity with the Constitution. Nothing was done until the Supreme Court came to the rescue.

6. Auditor rotation / cooling-off period

A novel addition to Act 992 in respect of corporate governance is the introduction of the cooling-off period as espoused in Section 139(11) of Act 992. This provision is entirely new, particularly in the operations of companies. Act 992 provides that an auditor shall hold office for a term of not more than 6 (six) years and is eligible for an appointment after a cooling-off period of not less than (6) six years[24].

The import of this is that an auditor can only occupy such a position for a period not exceeding 6 years at a particular time, after which he will have to step aside from the said position for a period of 6(six) years. This provision is a novel one because a thorough search of the old Companies Act, 1963 (Act 179) reveals no such arrangement mandatorily capping the duration of auditors of a company at 6 (six) years and further restraining them for another 6 (six) years before they can be considered again for reappointment as auditors. Some legitimate questions dabble around this intervention by Act 992. Some of these questions are as follows:

How did parliament arrive at the said 6 (six) years cooling-off period? What is the guarantee that an auditor's integrity will be compromised if he remains at the post beyond 6(six) years? What is the guarantee that he will become a stooge of the directors if he remains at the post for 6 years? Can't the auditors remain at post and have their work scrutinized and/or assessed by a higher authority within the company structure?

Imagine a situation where an audit firm[25] is appointed an external auditor and proceeds to invest in capacity-building with the aim of enhancing good auditing standards for the six years while at post, what is the guarantee that they will be re-appointed after they have stepped aside for six years?

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24 Section 139 (11) of Act 992

25 Section 139(2) of Act 992 provides that "a partnership firm may be appointed, in the name of the firm, as an auditor of a company, but, whether or not that firm is a body corporate, the appointment shall be deemed to be an appointment of the partners of the firm who, at the time of the appointment, are duly qualified."

Would they be compensated whiles they are away for the six years since their livelihood is going to be affected gravely? It is upon this basis that the writer asserts that such an arrangement is inimical to not only sound corporate governance but also inconsistent with the economic rights of auditors.

The writer suggests an introduction of a regulatory regime with stringent supervisory guidelines by the Registrar of Companies aimed at promoting transparency and accountability instead of the cooling off period. The writer further contends that reckless auditing is not dependent on longevity at post but rather, due to lack of proper supervision.

External auditors, play a crucial role in the affairs of a company. It is in fact a statutory requirement for a company to have an auditor. The external auditor stipulated is one appointed by an ordinary resolution pursuant to Section 139(3) of Act 992[26]. Act 992[27] provides that a person is disqualified for appointment as an auditor, if that person is an officer of the company or of an associated company or a partner of, or in the employment of an officer of the company or of an associated company.

In support of the foregoing, the authors of Gower and Davies have stated that a person may not act as an on the ground of lack of independence if he is an officer or employee of the company to be audited.[28]

An external auditor is an independent person who provides a service to the company, hence not an officer of a company. The need for their independence is what requires them to act as watchdogs of the company and not stooges of the directors. The importance of the independence of an external auditor has always been prevalent for they risk serious sanctions if found culpable for engaging in reckless auditing standards as was seen in the case of Arthur Andersen and Enron Corporation.[29]

Act 992 provides that Auditors in the performance of their duties of companies, stand in a fiduciary relationship with the members of the company as a whole. As fiduciaries, they must act in a faithful, diligent, careful, and ordinarily skillful manner as auditors would have acted[30]. No matter how it's looked at, there exists an engagement of contract existent between the auditor and the company, even though they are not officers or employees of a company.

It is the opinion of the writer that, the cooling-off period does not promote fairness to the auditor. The Constitution under chapter 6[31] mandates the State to promote the economic rights of persons in a quest to create an enabling environment for the private sector to thrive[32].

Date-Bah JSC in Ghana Lotto Operators Association & others v National Lottery Authority, held that

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26 Despite a contrary provision in the constitution of a company, an auditor shall be appointed by an ordinary resolution of the company and not otherwise.

27 Section 138(2) (a) and (b)

28 Principles of Modern Company Law

29 Gower and Davies in Principles of Modern Company Law stated that "This was an issue brought to the fore in recent years by the collapse of the Enron Company and others in the United States in the early years of this century, which col lapses were thought to reveal weaknesses in the provisions on auditor independence".

30 Section 142 (1) of Act 992

31 Directive Principles of State Policy

32 Article 36(2)(b) provides that the State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy.

> *"a presumption of justiciability in respect of Chapter 6 of the Constitution, dealing with the Directive Principles of State Policy, would strengthen the legal status of economic, social and cultural rights in the Ghanaian jurisdiction"*[33]

7. Legal personality of a company

Act 992[34] reiterates the common law position that a company, from the date of incorporation, is a body corporate by the name contained in the application for incorporation and, subject to Section 13, is capable of performing the functions of an incorporated company. It further provides that a company shall have full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and has full rights, powers and privileges[35].

Sophia Akuffo JSC (as she then was) in the oft-quoted case of *Morkor v. Kuma*[36] restated this principle and held that except as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorized business. In this capacity, a company is a corporate being, which, within the bounds of the Companies Code, 1963 (Act 179) and the regulations of the company, can do everything a natural person might do in its own name. It can sue and be sued and it can have assets and liabilities. A company is thus a legal entity with a capacity separate, independent and distinct from the persons constituting or employed by it. Since the time the House of Lords clarified this cardinal principle more than a century ago in the celebrated case of *Salomon v Salomon & Co. [1897] AC 22,* it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Companies Code, Act 992, is grounded.

A company, as a person, albeit artificial, has rights under the Constitution that ought to be protected. The writer asserts that a combined effect of Articles 24(1), 36(2)(b), and Sections 14 and 18 of Act 992 results in the curtailment of the rights of a company to smoothly run as a going concern, especially when its auditors would have to step aside for a 6-year period before they could be eligible to act as auditors for the company. This does not only truncate the pre-existing working relationship between the auditor and the company but also sins against the Auditors right to work and do business under the Constitution.

8. Conclusion

It is refreshing that the Supreme Court has given a right interpretation to the provisions of Article 19 of the Constitution. It is worth stating that a director, is a person with rights under chapter five of the Constitution, which includes the right to a fair hearing.

A director who is charged with any offence is an accused person as stipulated in the 1992 Constitution and is presumed innocent until tried and properly convicted. Inherent in his right to a fair hearing is the presumption of innocence guaranteed under the 1992 Constitution. It is therefore unconstitutional that merely charging a person with fraud or dishonesty should not bar him from being appointed as a director and or disqualify him from continuing as a director.

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33 [2007-2008] SCGLR 1088 @ 1106
34 Section 14(2) of Act 992
35 Section 18 (1) (a) and (b) of Act 992
36 [1998–1999] SCGLR 620 @ 632

Similarly, in a quest to maintain best practices in corporate governance, an external auditor should not be made to step aside for six (6) years, for this provision in my opinion is unconstitutional and same amounts to a breach of his right to work if the auditor and his firm is made to step aside after working for six (6) years.