

# RIGHT TO PROPERTY; THE GHANAIAN PERSPECTIVE

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## INTRODUCTION

The alleged failure by the Supreme Court to lay down in *Re Akoto* the criteria for the protection of human rights and its interpretation under the Constitution as well as the arguments of J.B. Danquah did not fall on deaf ears. It was for this reason that Nana Dr. S.K.B. Asante, said;

*“Although Danquah’s submission did not prevail in the Re Akoto case, they subsequently became the cornerstone of the juristic edifice which was erected after his death for the protection of human rights. All Constitutions promulgated after 1966 have faithfully incorporated Danquah’s arguments in the [Re Akoto Case].”*<sup>2</sup>

The above led to the following result that in Ghana since the 1960 Constitutions, all subsequent constitutions till date made sufficient provision for the protection of the fundamental human rights. The right to property has been no exception.

A *property right* is the exclusive authority to determine how a resource is used, whether the resource is owned by government or individually, etc... Private property rights thus allows the exclusivity of rights to choose the use of a resource, the exclusivity of rights to the services of the resources and the right to exchange the resource at mutually agreeable terms.

Generally, the right to property has been a very controversial right in terms of protection and interpretation by the courts in many legal jurisdictions of the world.

This has caused many jurisdictions such as America though regarding it, do not elevate it to a constitutional right. However, according to Professor Richard Epstein, *“all rights are, as it were fundamental”*<sup>3</sup> and thus for this reason jurisdictions like Ghana and Germany just to name a few, classify

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<sup>2</sup> Nana Dr. S.K.B. Asante, *“Reflections on the Constitution, Law and Development”* (J.B. Danquah Memorial Lecture Series. 35, March 2002)

<sup>3</sup> Epstein, p. 143

the right to property as a fundamental right equal in rank and stature to such other rights as right to life, expression, speech, religion and as a primary tool in the effort to resist distributive governmental measures etc...

Thus Anin Yeboah JSC in a recent Supreme Court case was quoted as saying, *“The plaintiff as a citizen of this country is entitled under the constitution to own property and can exercise his right to sue to protect same, subject of course to the existing laws regulating his access to the courts for redress.”*<sup>4</sup> Clearly, it is seen that the purpose of legal property rights, then, is to secure the requisite degree of control of self-determination as a necessary means of facilitating self-development.

A notable American scholar Margaret Jane Radin puts it, *“to achieve proper self-development-- to be a person--an individual needs some control over resources in the external environment.”*<sup>5</sup> Property rights are very fundamental rights which must never be overlooked. They in truth embody all other rights without which other rights may not be effectively enjoyed.

When a man is said to have a right to his property, he may be equally said to have a property in his rights.<sup>6</sup> Indeed all constitutional rights like the right to property are designed to protect individuals against the oppressive exercise of government power as well as individual power<sup>7</sup>.

Whether one thinks of freedom of speech, freedom of religion, due process of law, the protection of property or other form of rights, the foundational model is the same; the individual's interest are protected by these rights, against the dangers of unchecked majoritarian power.

Generally the right to property means the protection of one's business, the protection to develop one's land. Property rights in their various forms structure our daily lives, our human relationships, and our assurance of physical survival.

They dictate our ability to realize our dreams and our ability to avoid our fears. Notwithstanding the above, it shall be seen that the right to property is not unlimited, and that in accordance with the

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<sup>4</sup> John Atta Wusu v Mr. Fosuhene, Supreme Court of Ghana, Civil Appeal, Suit No. J4/36/2009.

<sup>5</sup> Radin, Property and Personhood, p. 957.

<sup>6</sup> James Madison, the principal author of the Constitution.

<sup>7</sup> See Laura S. Underkuffler, The Idea of Property: Its Meaning and Power 38-46 (2003)

common law apothegm, *sic utere tuo ut alienum non laedes* which means use your thing in a way that does not interfere with the legal interests of other, private property rights are always subordinate to the public interest.

## **PROPERTY - definition?**

Black's Law Dictionary<sup>8</sup> defines property by quoting John Salmond saying:

*"In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is his in law. This usage, however, is obsolete at the present day, though it is common enough in the older books... In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares and the debts due him are his property; but not his life, liberty or reputation... In a third application, which is that adopted [here], the term includes not even all proprietary rights, but only those which are both proprietary and in rem. The law of property is the law of proprietary rights in personam being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or a copyright, is property; but a debt or the benefit of a contract is not.... Finally, in the narrowest use of the term, it includes nothing more than corporeal property – that is to say, the right of ownership in a material object or that object itself."*<sup>9</sup>

The term *property* is used in different senses. In its most comprehensive sense it is said to include things whether animate or inanimate which belong to a person. It includes all legal rights of whatever description. Thus if that is acceptable, then a person's life, liberty, reputation and estate constitute his property.

However this usage as seen above has become obsolete and can be found only in the works of older jurists.<sup>10</sup> In the narrower sense it is believed to include proprietary rights but not personal rights. This means that land, chattels, shares, debts, copyrights etc., constitute one's property but not his life, liberty or reputation. In this sense, property includes any right, which has an economic value.

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<sup>8</sup> Black's Law Dictionary (9<sup>th</sup> Edition) 2009, Bryan A. Garner at page 1336

<sup>9</sup> John Salmond, *Jurisprudence* 423 -424 (Glanville L. Williams ed., 10<sup>th</sup> ed. 1947).

<sup>10</sup> Such as Hobbes, Blackstone and Locke.

In the oldest and narrower sense, property is said to include nothing more than corporeal property i.e. the ownership of material objects alone. Some Jurists however refer to it as comprising only proprietary rights in rem, that is to say such proprietary rights only as are available against the world at large.

The above seems to suggest that a patent or a copyright is property, but not so in the case of a debt or the benefit of a contract.

Thus generally property is classified into *corporeal and incorporeal*. Corporeal is further divided into movable and immovable. Corporeal property is said to be the right of ownership in material things, such as land, chattel, etc.

Incorporeal on the other hand are the other proprietary rights in rem. They are also further classified into two thus i.e. the proprietary rights over immaterial things e.g. patents, copyrights and trademarks, and on the other hand encumbrances whether over material or immaterial things.

In Ghana, property is conceptually categorized into movables and immovable. Movable property means “property of every description except land.”<sup>11</sup> Thus under Sale of Goods Act<sup>12</sup> movable property is defined as property of every description and it includes growing crops or plants and other things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale.”

Immovable property basically refers to land. Thus under the Conveyancing Act<sup>13</sup> land is defined as including “land covered by water, any house, building or structure whatsoever; and any interest or right in, to or over land or water.”

This essay would as much as possible touch on relevant types of property in Ghana as classified above but to a larger extent on immovable property.

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<sup>11</sup> Oppong, R.F. (2010) Private International Law, Kluwer Law International: Netherlands page 82.

<sup>12</sup> 1962 (Act 137).

<sup>13</sup> Section 46 of the Conveyancing Decree, 1973 (Act 175).

## JUSTIFICATION OF THE RIGHT TO PROPERTY

It is believed that property rights are rooted and guaranteed in the bible. It was given by God at creation as a means by which man exercises a call to stewardship and dominion as man filled the earth and developed it. *Walter C. Kaiser, Jr*<sup>14</sup> wrote that;

*“It was at creation that God the creator committed the world and its resources to humanity (Genesis 1:28-29). It was because the man and the woman were made in the image of God that they were commanded to subdue the created order and to exercise dominion over the whole of it. As a result God granted dominion to the first human pair under his law, but he did not grant his sovereignty to them, for God alone is Lord and the only sovereign over all.*

The writer says that nowhere in the scripture is it explicitly said that property is a right but a right to acquire property is present in scripture. For example 2 of the Ten Commandments assume the right in that they provide that “*you shall not steal*”<sup>15</sup> and “*you shall not set your desire on your neighbor’s house or land or anything that belongs to your neighbor*”.<sup>16</sup>

Kaiser cites 1 Corinthians 9:9-11 as evidence that human beings are “*entitled to appropriate the rewards of their labors.*” Thus to him, property is both a gift and a certain type of power God has entrusted to humanity as stewards. It was God’s intention that mortals should be equipped with this gift and power and that under God they should exercise dominion over the earth.

Karl Widerquist<sup>17</sup> wrote that it was based on the above that, John Locke devised a theory of *unilateral appropriation* in an attempt to show how individuals can come to have unequal private property even if the Earth and all its natural resources in the initial state of nature “belong to Mankind in common” (§25-§27).<sup>18</sup> Locke begun in a state of nature with abundant natural resources but no government, money, or trade. He says that the first person to mix his or her labor with land needs no one else’s consent to appropriate it (§26-31).<sup>19</sup>

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<sup>14</sup> Walter C Kaiser Jr, *Ownership and Property in the Old Testament Economy*

<sup>15</sup> Exodus 20:15.

<sup>16</sup> Deuteronomy 5:21.

<sup>17</sup> Karl Widerquist, Georgetown University-Qatar, *Lockean Theories of Property: Justifications for Unilateral Appropriation*, 2010

<sup>18</sup> Unless otherwise specified, section numbers (denoted §) refer to Locke 1960, *Second Treatise*.

<sup>19</sup> Locke actually discusses only the first *man* (§26-27) and his family (§36, 48). Waldron 1988, 161-62, argues that Locke’s family-based ownership is important. However, most contemporary Lockeans apply appropriation theory on an individual, non-gender-specific basis. For discussion of the family in Locke’s theory see Pfeffer 2001.

Thus to him, a farmer (who alters the land through labor) appropriates it; a hunter-gatherer (who labors on land without significantly altering it) does not. *In the Second Treatise on Civil Government (1689)* Locke proclaimed that *"everyman has a property in his person; this nobody has a right to but himself. The labor of his body and the work of his hand, we may say, are properly his"* <sup>20</sup> in order to justify his assertion as stated above that the right to property derives from one's labor.

The Qur'an also bestows upon humans the right to deal with property as well as the freedom to deal and trade as they please in what they own provided they do so fairly. <sup>21</sup>

## **PROPERTY RIGHTS, THE CONSTITUTION AND OTHER INTERNATIONAL LAWS**

*The 1992 Constitution of Ghana* expressly provides for certain economic and property rights which are enforceable and justiciable by the courts of Ghana. These rights generally enable the holder of the right to own, acquire ( either through purchase, gift, or inheritance), manage, enjoy, and dispose of tangible and intangible property, including land, house, money, bank accounts and other assets, livestock, and crops. **Article 18** provides;

*(1) Every person has the right to own property either alone or in association with others.*

*(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.*

Thus from the above provision, except for the above cases where the law would allow justifiable interference with a person's rights, the right to property are fully guaranteed. It must be stated that property as said above also includes intangible property and also protection of legal rights associated with the creative efforts or the commercial reputation and goodwill known as intellectual property though generally it is regarded to concern immovable property. <sup>22</sup>

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<sup>20</sup> Second Treatise of Civil Government, § 27

<sup>21</sup>Shakir M.H " The Qur'an: (Quran, Koran, Al-Qur'an) (MobileReference.com, 01 Jan, 2010) at Ch 004:029, 062:010.

<sup>22</sup> Intellectual Property (6<sup>th</sup> Edn)" , David I. Bainbridge, at Page 2

The Universal Declaration of Human Rights which also is binding on Ghana specifically **Article 17**<sup>23</sup> provides that;

*“(1) Everyone has the right to own property alone as well as in association with others.  
(2) No one shall be arbitrarily deprived of his property.”*

The African Charter on Human and Peoples' Rights (ACHPR) protects the right to property most explicitly in Article 14<sup>24</sup> stating that:

*"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

Property rights are furthermore recognized in Article 13 of the ACHPR, which states that every citizen has the right to participate freely in the government of his country, the right to equal access to public services, and "the right of access to public property and services in strict equality of all persons before the law".

Article 21 of the ACHPR also recognizes the right of all people to freely dispose of their wealth and natural resources and that this right shall be exercised in the exclusive interest of the people, who may not be deprived of this right. Article 21 also provides that "in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation." In addition to the above, there are many other treaties which recognize and guarantee the protection of property rights.

In the International Convention on the Elimination of All Forms of Racial Discrimination which, Article 5 provides that everyone has the right to equality before the law without distinction as to race, color and national or ethnic origin, including the "right to own property alone as well as in association with others" and "the right to inherit".

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<sup>23</sup> Universal Declaration of Human Rights. United Nations. pp. Article 17.

<sup>24</sup> African Charter on Human and Peoples' Rights. Organization of African Unity. pp. Article 14.

The Convention on the Elimination of All Forms of Discrimination against Women recognizes the property rights in Article 16, which establishes the same right for both spouses to ownership, acquisition, management, administration, enjoyment and disposition of property, and Article 15, which establishes women's' right to conclude contracts.<sup>25</sup>

Property rights are also enshrined in the Convention relating to the Status of Refugees and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights require that there will be no discrimination based on the “property” of a person.

*Common law* also protects people's right to own and freely use property. At Common law, people are not required to obtain a permit before they can use their property no more than people today are required to obtain a permit before they can speak freely. This puts the burden on those who object to a given use to show how it violates a right of theirs thus amounting to having to show that their neighbor's use takes something they own free and clear.

Failure to do so means the legitimate use of the other may continue. Thus, the common law limits the right of free use only when a use encroaches on the property rights of others, as seen in the classic law of nuisance or risk. Properly conceived and applied, then, property rights are self-limiting: they constitute a judicially crafted and enforced regulatory scheme in which rights of active use end when they encroach on the property rights of others.<sup>26</sup>

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<sup>25</sup> Alfredsson, Gudmundur; Eide, Asbjorn (1999). *The Universal Declaration of Human Rights: a common standard of achievement*. Martinus Nijhoff Publishers. p. 372. ISBN 978-90-411-1168-5.

<sup>26</sup> Cato Handbook for Policymakers, Cato Institute 7<sup>th</sup> Edition, pp. 347-348



## ENFORCEMENT OF THE RIGHT TO PROPERTY IN GHANA

It must be said that the right to property has been enforced and upheld many times by the judiciary in Ghana and by so doing have protected willful abuse of the right which is not appropriate in a free and democratic society as Ghana.

### BANK ACCOUNTS

In the case of *Nana Yaa Ayebea v Amalgamated Bank Limited*<sup>27</sup> the applicant, Nana Yaa Ayebea invoked the jurisdiction of the High Court for an order that the respondent, Amalgamated Bank Ltd., remove the unauthorized restrictions imposed on the personal bank account of the applicant with the respondent. The facts were that she was arrested and detained at the Kotobabi Police Station, Accra and subsequently charged with the offences of conspiracy to steal and stealing contrary to sections 23 (1) and 124 (1) of the Criminal Offences Act, 1960 (Act 29).

The respondent bank alleged that the applicant in breach of her duties, responsibilities and trust towards the respondents and the customer, amongst other things conspired with her collaborators and fraudulently and criminally transferred an amount of US \$120,000.00 or GH¢168,000.00 from the account of its customers Zoomlion Ghana Limited into another and that the applicant and her accomplices then succeeded in stealing a total amount of GH¢165,000.00 from the said account.

Thus the respondents case was that it owes a fiduciary relation to its customers (in this case, Zoomlion Ghana Limited) to protect their accounts as such it is entitled to block the applicant's account so that in the event of her being found guilty the money in the account would be used to pay Zoomlion Ghana Limited for the loss it incurred by the theft. In allowing the application, *the Court per Justice Uter Paul Dery held that:*

*“The unauthorized blockage of her account offends against her fundamental human rights to property, that is her personal account which the respondent has no right to interfere with in accordance with article 18 (2) of the 1992 Constitution. It is again the case of the respondent that it is entitled to restrict whatever sum there is in its possession which is due to the applicant pending her exoneration or otherwise so as to use same to offset part of the customer's monies if found guilty.*

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<sup>27</sup> In the High Court Accra, Presided over by Justice Uter Paul Dery, HRCM 81/10 16<sup>TH</sup> July, 2010.

**Article 18 of the Constitution guarantees the protection of property. Article 18 provides as follows: "1. every person has the right to own property either alone or in association with others. 2. No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."** By article 12 of the Constitution, the fundamental human rights and freedoms enshrined in the Constitution are to be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, and where applicable, by all natural and legal persons in Ghana and the courts are enjoined to enforce these rights and freedoms. **The respondent, a limited liability company, is a legal' person. It is, thus, required to respect and uphold the rights and freedoms contained in the Constitution. In this case, the respondent is expected to respect and uphold the right of the applicant to access her bank account which the respondent is keeping pursuant to article 18 of the Constitution. The respondent is only entitled to restrict the applicant's access to her account if it does so "in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."** (See article 18 (2) of the Constitution). **...But that does not entitle it to, suo motu, interfere with the personal account of the applicant however much it thinks that the applicant is culpable of charges she is standing trial before a court of law. It simply amounts to taking the law into its own hands. The respondent has thus violated the applicant's right to own property (that is money in her personal bank account with the respondent) by refusing her access to the said account."**

## INTELLECTUAL PROPERTY

Intellectual property refers to a category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily copyright, trademark, patent rights, trade secrets, publicity rights, moral rights and rights against unfair competition.<sup>28</sup>

Patents give temporary protection to technological inventions and registered designs to the novel appearance of mass produced goods. It gives the right to exclude others from making, using, offering to sell, selling, or importing the invention during the term of the patent. It deals with inventions and discoveries in the field of science, technology and medicine.

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<sup>28</sup> Black's Law Dictionary (9th Edition) 2009, Bryan A. Garner at page 881.

The Patent Act<sup>29</sup>, provides adequate protection for such rights by vesting such right in the inventor<sup>30</sup>. The Act further provides that where an invention is made in the execution of an employment contract, the right to the patent belongs in the absence of any provisions to the contrary to the employer.<sup>31</sup>

However, when the invention has an economic value much greater than the parties could have reasonably foreseen at the time of the conclusion of the contract, the invention shall be entitled to special remuneration which shall be fixed by the court in the absence of an agreement.<sup>32</sup>

A copyright on the other hand gives longer lasting rights in for example literary, artistic and musical creations. They apply to original works of authorship as soon as they are fixed in any tangible medium of expression.

An author of such work owns the copyright. Under the Copyright Act of Ghana<sup>33</sup> any protected copyright work has the exclusive economic right in respect of the work.

Such author has the right to do or authorize the reproduction of the work in any manner or form, the translation, adaptation, arrangement or any other transformation of the work, the public performance, broadcasting and communication of the work to the public, the distribution to the public of originals or copies of the work by way of first sales or other first transfer of ownership and the commercial rental to the public of originals or copies of the work.<sup>34</sup>

In addition to the above economic rights, under the Ghanaian Copyright Act, the author of protected copyright work has the sole moral right to claim authorship of the work and in particular to demand that the name or pseudonym of the author be mentioned when any of the acts referred to above are done in relation to the work.<sup>35</sup>

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<sup>29</sup> 2003 (Act 657).

<sup>30</sup> Section 4(1) of Act 657.

<sup>31</sup> Section 4(5) of Act 657.

<sup>32</sup> Section 4(6) of Act 657.

<sup>33</sup> 2005 (ACT 690).

<sup>34</sup> Section 5 of Act 690.

<sup>35</sup> Section 6 of Act 690.

Similarly, the author has the right to object to and seek relief in connection with any distortion, mutilation or other modification of the work where that act would be or is prejudicial to the reputation of the author or where the work is discredited by the act.<sup>36</sup>

However where in an employment situation and during the course of his employment an employee authors any such work which is copyrightable especially it being directly related to or connected with his employer's business, the legal right to make use of and enjoy the benefits of the work belongs to the employer and not the employee.<sup>37</sup>

This is justified on the grounds that the owner has invested lots of money which he ought to recover and also mainly because the work is that of the employer.

In the case of **Musician Union of Ghana v Abrahams**<sup>38</sup> the high court stated that, "*where the work was made in the course of the author's employment the copyright became vested in the author's employer. [The plaintiffs who were mere employees of either the first defendant or T. Ltd., had no right assigned to them under the agreement between the defendants and thus they could not be owners of the copyrights of the works so as to control its release].*"

In terms of duration, the author of the work initially owns the copyright but it lasts for his life plus seventy (70) years thereafter.<sup>39</sup>

The doing of anything contrary to the rights of the author entitles the author to seek relief under a civil action. The court can thus grant an injunction to prevent the infringement or prohibit the continuation of the infringement or grant of the recovery of damages for the infringement.<sup>40</sup> There are also criminal sanctions available under the Act.<sup>41</sup>

The Courts of Ghana have decided cases upholding intellectual property rights. In the case of *Opanin Kwame Afreh v Copyright Society of Ghana*<sup>42</sup>, the Court of Appeal had to decide an appeal lodged by the

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<sup>36</sup> Ibid.

<sup>37</sup> Section 7 of Act 690.

<sup>38</sup> [1982-83] 337-345.

<sup>39</sup>Section 12 of Act 690.

<sup>40</sup> Section 47 of Act 690.

<sup>41</sup> Section 42 and 43 of Act 690.

<sup>42</sup> [1999-2000] I GLR 135 – 148.

Copyright Society of Ghana (COSGA) (the appellant) against the ruling of the High Court, Kumasi delivered on October 3 1997 by which the court made an emphatic pronouncement that the appellant had no legal right whatsoever to enforce any payment of royalties or copyright fees against members of the National Drinking Bar Operators Association of Ghana in respect of their public use of any musical work in their drinking bars.

The court held that;

*“...right of authors has received international treaty status under article 15 of the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT) Geneva, 1996. This article goes under the banner headline “Right to Remuneration for Broadcasting and Communication to the Public.” Ghana has adopted this provision in our law on copyright. On a proper construction of the provisions of section 6(1) (c) of the Copyright Law 1985 (PNDCL 110). I am clearly of the view that COSGA has every right to surcharge any drinking bar operation or hotelier or restaurant proprietor or others in this class of business, remuneration or royalties for playing musical work on a radio cassette or any other means at the said bars, hotels and restaurants etc., because the playing of the music to the hearing of members of the public buying and drinking at the said places constitutes communication of musical work to the public within the ambit of section 6(1) (c).”*

## IMMOVABLE PROPERTY

In Ghana the right to own land is protected under law. It carries with it the right to possession and the right to deal with it as one pleases. Thus unless with respect to certain exceptional cases as discussed below, this right must not be interfered with.<sup>43</sup>

The 1992 Constitution as explained above guarantees the right to ownership of property.

In the case of *Hon. Shirley Ayorkor Botchway v 1. Brig.-Gen. (Rtd) Joseph Nunoo Mensah 2. Lt.-Col. (Rtd) Larry Gbevlo Lartey 3. Attorney General*<sup>44</sup> decided upon by Uuter Paul Dery, the constitutional right to property as enshrined in the 1992 Constitution was discussed. It involved an application by the Attorney-General, who was the 3rd respondent in the case for an order for

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<sup>43</sup> Article 18 of the 1992 Constitution.

<sup>44</sup> In the High Court Accra, Presided over by Justice Uuter Paul Dery, HRCM 58/10 15<sup>TH</sup> July, 2010

interlocutory injunction to restrain Hon. Shirley Ayokor Botchway, from constructing buildings on a particular property.

The original action was instituted by Hon. Shirley Ayokor Botchway, as applicant, invoking the jurisdiction of the High Court for an order enforcing her fundamental human rights. She claimed that by a lease between the President of the Republic of Ghana, acting by the Chairman of the Lands Commission as lessor and the applicant as lessee, the lessor, leased a piece or parcel of land known as plot no. 12 A situate at Ridge Residential Area in Accra to the applicant for a term of ninety-nine (99) years. Since the execution of the lease, the applicant had been in lawful possession.

She had developed a dwelling house thereon which was at an advanced stage of completion. She said while her workmen were busily at work on her said property a group of men claiming to be National Security operatives sent by and acting on the authority of the 1st and 2nd respondents purporting to act in their official capacities as National Security Advisor and National Security Co-ordinator respectively, visited the site and ordered the applicant's workmen to stop work immediately.

They visited the applicant's property once again, took away various construction tools belonging to her workmen with orders to them to stop work once again. She thus applied to the High Court for a declaration that the respondent's interference with her right to develop, use and enjoy her said land *is wrongful and an unlawful interference with her right to property and constitutes a violation of her fundamental human rights. She was successful.*

The Government thus by an application for interlocutory injunction applied to prevent the applicant/respondent from further enjoying her rights. *It was dismissed on grounds that* the Government of Ghana, having properly leased out the plot in issue to the applicant/respondent, no more had any legal right to protect that would entitle it to a grant of an order of interlocutory injunction.

Furthermore, even if the Government of Ghana showed that the grant it made to the applicant/respondent is void, the latter to the knowledge of the Government had put up a building and had roofed same leaving finishing works.

The applicant/respondent thus stood to suffer more harm if this application was granted for she had expended a fortune on the building.

The Government of Ghana was not bound to suffer any harm. An interlocutory injunction, being an equitable relief, would not be granted if it will cause unnecessary hardship to the respondent.

The above pronouncements by the judiciary in Ghana has clearly shown the courts' willingness to uphold the right of a person to own and enjoy his or her property without any form of unlawful restrictions or infringements to same.

#### **WHEN CAN SUCH RIGHT BE INTERFERRED WITH UNDER LAW?**

It is clear that the enjoyment of human rights in Ghana are guaranteed but subject to respect for the rights and freedoms of others and for the public interest.<sup>45</sup>

Also, article 18(2) which guarantees the right to property specifically provides that a person could be subjected to interference with the privacy of his home or privacy in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.<sup>46</sup>

Article 20 of the 1992 Constitution of Ghana goes further to protect a person from the deprivation of his or her property (*specifically immovable property*) by providing that:

*No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.*

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<sup>45</sup> Article 12(2) of the 1992 Constitution of Ghana

<sup>46</sup> Article 18(2) of the 1992 Constitution of Ghana

*(a) the taking of possession or acquisition if necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and*

*(b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.*

This means that the right to property can lawfully be interfered with.

## **COMPULSORY ACQUISITION**

The rights of a landowner to his land are subjected to a number of restrictions. One of them is known as *compulsory acquisition*.

The taking possession of or acquisition of property by the state is what is known as *Compulsory acquisition*. The process termed Compulsory Acquisition also known as compulsory purchase, expropriation or eminent domain or resumption of land is the means of the state's legitimate access to private property particularly land for purposes of public interest, advancement and community development as a whole.

Though every person is guaranteed certain property rights strictly protected by law, there may arise a time where legitimate public concerns override private ownership or property.

**Blackstone** stated as;

*“So great moreover, is regard of the law for private property, that it will not authorize the least violation of it, no, not even for the general good of the whole community. If an new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public, but the law permits no man or set of them, to do this without the consent of the owner of the land...In similar cases, the legislature can and indeed frequently does interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained.”<sup>47</sup>*

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<sup>47</sup> Commentaries, Vol. 1, p. 139



Thus the state has sufficient constitutional and statutory powers to compulsorily acquire private property of individuals, stools and families where intended or for public good, subject to the payment of just, prompt and adequate compensation.

The scope of compulsory acquisition has been provided under Article 20 of the 1992 Constitution of Ghana and the State Lands Act<sup>48</sup>, supported by the State Lands Regulations<sup>49</sup>, which lays down the detailed procedure by which such acquisition should be done.

It must be said also that there is also a procedure under the Administration of Lands Act<sup>50</sup>, which gives the President power to vest any Stool Lands in the state for the benefit of the people of Ghana.

However this is different from the process in Act 125 since in Act 123 the state only takes over the exclusive right to manage such lands but the landowners retain the beneficial interest in the Land and thus creates a form of trust between the Government and the Landowners.<sup>51</sup>

The other relevant provisions in relation to compulsory acquisition aside the ones stated above are as follows;

## **Article 20**

*“(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for.*

*(a) the prompt payment of fair and adequate compensation; and*

*(b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.*

*(3) Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.*

*(4) Nothing in this article shall be construed as affecting the operation of any general law so far as it provides for the taking of possession or acquisition of property.*

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<sup>48</sup>1962 (Act 125).

<sup>49</sup>1962 (L.I. 230).

<sup>50</sup> 1962 (Act 123).

<sup>51</sup> Section 1 of the Administration of Lands Act, 1962 (Act 123).

- (a) by way of vesting or administration of trust property, enemy property or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsafe mind, deceased persons or bodies corporate or unincorporated in the course of bent wound up; or*
  - (b) in the execution of a judgment or order of a court; or*
  - (c) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants; or*
  - (d) in consequence of any law with respect to the limitation of actions; or*
  - (e) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry; or*
  - (f) for so long as may be necessary for the carrying out of work on any land for the purpose of the provision of public facilities or utilities, except that where any damage results from any such work there shall be paid appropriate compensation.*
- (5) Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired.*
- (6) Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such reacquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the reacquisition.”*

## **Article 295**

*“Public interest” includes any right or advantage which ensures or is intended to ensure to the benefit generally of the whole of the people of Ghana;*

## **Act 125**

*(1) Whenever it appears to the President in the public interest so to do, he may, by executive instrument, declare any land specified in the instrument, other than land subject to the Administration of Lands Act, 1962 (Act 123), to be land required in the public interest; and accordingly on the making of the instrument it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made.*

*2) An instrument made under the preceding subsection may contain particulars in respect of the date on which the land so declared shall be surrendered and any other matter incidental or conducive to the attainment of the objects of the instrument including an assessment in respect of the compensation that may be paid.*

*(3) On the publication of an instrument made under this section, the land shall, without any further assurance than this subsection, vest in the President on behalf of the Republic, free from any encumbrance whatsoever.*

The effect of the acquisition under Article 20 and Act 125 is that the government acquires an indefeasible title to the said land free from any encumbrances once the instrument is published in

accordance with the law. Thus once acquired, formal control and management are thereby transferred to the government or the particular agency on whose behalf the land was compulsorily acquired.

Thus forthwith, the right or interest of the land owner in the property is diminished or extinguished and any person who claims to have any compensation rights against the government from the date of publication, can maintain a claim for compensation against the government provided it is made within 6 months from such date of publication.

It must be noted that under Act 125 compulsory acquisition has 2 *distinct dimensions* with the first step dealing with the acquisition of land whilst the second step deals with payment of compensation claims, however failure on the part of the government to pay compensation for land compulsorily acquired under Act 125 does not invalidate it since under Act 25 it does not prescribe any time frame within which any assessed compensation must be paid.

However, since the promulgation of the 1992 Constitution, a person whose interest in land may be affected by any compulsory acquisition by the government now has an unfettered constitutional right to prompt payment of fair and adequate compensation.<sup>52</sup>

Also, any person claiming an interest in the land is given a right of access to the High Court whether directly or on appeal from any other authority, to determine his interest or right and the amount of compensation he is entitled to.<sup>53</sup>

In this regard, it is submitted that any purported acquisition of land under Act 125 by the government shall be unconstitutional especially having reference to the Article in the constitution which states that “Compulsory acquisition of property by the State shall only be made under a law which makes provision for; (a) the prompt payment of fair and adequate compensation.”

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<sup>52</sup> Article 20(2) (a) of the 1992 Constitution.

<sup>53</sup> Article 20(2) (b) of the Constitution.

All the above is the current state of the law as has been expounded the cases of *Gyamfi and Onusu*<sup>54</sup>, *Amartei v State Insurance Corporation*<sup>55</sup>, *Memuna Amoudy v Mr. Kofi Antwi*<sup>56</sup>, *Nii Kpobi Tetteh Tsuru III v A.G*<sup>57</sup>.

The Supreme Court of Ghana has decided that the provisions of the Constitution and the remedies stated therein though applicable do not apply retrospectively to those lands acquired before the coming into force of the 1992 Constitution thus leaving such people without any remedy. This was re-iterated by Brobbey JSC in *Mr. Samuel Okudzeto Ablakwa and Ors. V The Attorney General and Hon. Jake Otanka Obetsebi Lamptey*<sup>58</sup>

*“The first point that may be made on these provisions is that this court has by the majority decision of four to three decided that article 20(5) and (6) do not apply to lands acquired compulsorily before the coming into force of the 1992 Constitution. That was the decision in Kpobi Tsuru III v Attorney General...it follows that the plaintiff’s reliefs do not hold water so long as they are grounded under article 20(5) and (6).”*

It has also been provided above that Article 20(5) and (6) of the 1992 Constitution provides that any property compulsorily acquired as provided above must be used in the public interest or for the public purpose for which it was acquired and thus gives the owner of the property immediately before the acquisition the right of first option to reacquire the property and upon such reacquisition that person should refund the whole or part of the compensation paid if any.

However in the cases of *Mr. Samuel Okudzeto Ablakwa and Ors. v the Attorney General and Hon. Jake Otanka Obetsebi Lamptey (supra)* and *Nii Kpobi Tsuru III v Attorney General*<sup>59</sup> the Supreme Court interpreted this provision liberally to mean that it could be used for any other purpose aside that which was stated when the property was being acquired once it is for a purpose which is the public interest. Thus the court expanded the meaning of public interest in the above cases. Brobbey JSC in the Okudzeto case referred to the Nii Kpobi case saying;

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<sup>54</sup> (1981) GLR 612 CA.

<sup>55</sup> (1992) 2 GLR 86.

<sup>56</sup> Part 3 (2006) 3 GMLR 183 CA.

<sup>57</sup> No. J6/1/09.

<sup>58</sup> Writ No. J1/4/200922/05/2012.

<sup>59</sup> [2010] SCGLR 904.

*“The issue here centers on the meaning of “public interest” or “public purpose” contained in article 20(5) & (6). These expressions were interpreted in **Kpobi Tsuru III v Attorney-General [2010] SCGLR 904**. In that case, this court took the view that the expressions should be given wide, broad, liberal and expansive interpretation. It was held in that case that:*

*“With such an interpretation and understanding, it would not be contrary to “public interest” or the “public purpose” if the State as was exemplified in the authority of the President, decided to use portions of La Wireless Station Land to build Executive Mansions for visiting Heads of States who were to attend the Ghana @ 50 Independence Anniversary and the African Union Conference.”*

*Rationalizing this decision further, my respected Brother, Dotse JSC stated that:*

*“This is because, as a country, there have been numerous examples where land that had been acquired for use in the public interest for specific purpose have had the use changed without any question or blemish....For example, part of the Accra Race Course land has had to be taken away for another public interest, purpose or use, and this was the construction of the multi-purpose Accra International Conference Centre. The second was the conversion of Makola No 2 Market to a modern public car park, known and described as the Rawlings Park... Once the use to which the land is to be put is not restricted to any personal or individual interest, but one to which the general public will have a benefit or the benefit of the project will inure to the entire country either directly or indirectly, the public interest purpose will be deemed to have been adequately catered for.”*

*In the same opinion, it was stated that even though the sale of the Executive Mansions were reckless, the sale was not inconsistent with the user clause because the actual sale of the houses was open to all members of the public based on the ability to pay.*

*The issue in this case is this: The plaintiffs contended that the property should be retained for the purpose for which it was originally acquired. That would mean that it would be used by one Minister or one public officer. The grant to the 2<sup>nd</sup> defendant was to develop the property into three blocks of flats of at least four storeys. Which of the two uses will benefit the public more or satisfy the public purpose as required by the constitutional provisions?*

*In the light of the explanations of the two expressions in the **Kpobi Tsuru** case referred to above, I take the view that the use to which the Lands Commission directed the 2<sup>nd</sup> defendant to put the land will serve public interest or will be for public purpose. This is because the three blocks of flats to be constructed will obviously be available to members of the public who can afford the cost involved in renting or buying them... ”*

## **RESTRICTION ON THE TYPE OF INTEREST GRANTED**

The Constitution has imposed restrictions on the type of interests which can be granted out of stool lands.

Article 267 states that, *“no interest in, or right over, any stool land in Ghana shall be created which vests in any person or a body of persons a freehold interest however described.”*

This suggests that not even members of a stool or a family can acquire a freehold interest in any land in Ghana which a stool or a family holds the allodial title.

Article 266 in respect of non-Ghanaian goes on further to expressly prohibit such persons from acquiring any freehold interest in any land in Ghana by providing that *“no interest in or right over any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana.”*

## **OWNERSHIP OF MINERALS**

The Constitution vests *“every mineral in its natural state in, under or upon any land in Ghana ... in the President on behalf of, and in trust for the people of Ghana.”*<sup>60</sup>

The grant of any right to any person for the exploration of any such minerals shall however be subject to Parliamentary ratification.<sup>61</sup> This simply means that an individual who owns land that contains minerals in their natural state has no right of ownership in the minerals also.

## **DISPOSITION OF STOOL LANDS**

The Constitution of Ghana imposes restrictions on the disposition and development of stool lands. Though generally, title to stool lands is vested in the appropriate stool on behalf of and in trust for the members of the stool community in accordance with customary law and usage,<sup>62</sup> the constitution provides that:

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<sup>60</sup> Article 257(6) of the 1992 Constitution.

<sup>61</sup> Article 268(1) of the 1992 Constitution.

<sup>62</sup> Article 267(1) of the 1992 Constitution.

*“There shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.”<sup>63</sup>*

This shows that as far as stool lands are concerned, the so called ownership by the stools is simply nominal. The stools control over the stool land is minimal and is restricted only to being consulted occasionally by the Administrator of Stool Lands and the Regional Lands Commissioner.

## **SOME STATUTORY CONSTRAINTS ON OWNERSHIP OF LAND**

The Town and Country Planning Department is given very wide powers to recommend the creation and declaration of planning areas.<sup>64</sup>

When an area is declared a planning area, the owner of the land within the planning area is not allowed to carry out any development, construction, demolition, alteration, repair etc. within the area until a final scheme of development is approved for the area concerned and the requisite planning permission is granted.

This is a fetter on a person’s right to the enjoyment of the property though legally justified.

Similarly under the Local Government Act, an approved district development plan shall be complied with by any person, body or organ in the district responsible for or connected with the implementation of the plans. No physical development shall be carried out in a district without prior approval in the form of written permit granted by the District Planning Authority.<sup>65</sup>

Lastly, the utility service providers such as the Electricity Company of Ghana, the Volta River Authority and the Ghana Water and Sewerage Corporation are empowered by the statutes establishing them to enter any land for the purposes of carrying out their statutory duties.<sup>66</sup>

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<sup>63</sup> Article 267(3) of the 1992 Constitution.

<sup>64</sup> Sections 9 and 10 of the Town and Country Planning Ordinance, 1945 (Cap 84).

<sup>65</sup> Local Government Act, 1993 (ACT 462).

<sup>66</sup> Volta River Development Act, 1961 (Act 46), Public Utilities Regulatory Commission Act, 1997 (ACT 538) and the Electricity Corporation of Ghana Decree, 1967 (NLCD 125).

In the doing of the above, the consent of the owner of the land is not required. This is provided since it is believed that if landowners unreasonably withhold their consent, if such was required, it would obstruct the performance of their duties and in that case the development of the country.

## **CONCLUSION**

There is no doubt, as has been stated above that the right to property in Ghana has been elevated to matter of constitutional importance and is fully guaranteed unless there are justifiable reasons for interfering with same. This is a right step that Ghana has taken since it is in line with modern democracy and the rule of law.

It is advocated that the laws on the protection of the right to be property be strengthened all the more since without it existence becomes meaningless and also the courts should not hesitate to uphold this right at all times unless it is necessary for such right to be made subject to the interests of the general public.