

**UNIVERSITY OF GHANA
COLLEGE OF HUMANITIES**

PROCEDURAL JUSTICE AS FAIRNESS IN GHANA

BY

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COLLEGE OF HUMANITIES**

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DECEMBER 2025

DECLARATION

I, Tuinese Edward Amuzu hereby declare that this thesis is my own work produced from research under the supervision of my supervision team.

TUINESE EDWARD AMUZU



NAME OF SUPERVISOR

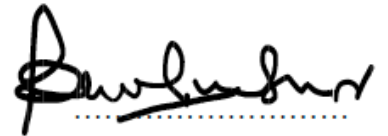
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ABSTRACT

This thesis seeks to develop an appropriate theoretical and normative framework to assess the fairness of the application of procedural rules in Ghana. It posits that, to be fair, the application of the rules must be from the original position as a preferred standpoint, be de-colonised and aim at achieving relationality. This is because the combined effect of article 19(13) of the 1992 Constitution of Ghana and Order 1, rule 1(2) and Order 81, rule 1(1) of the High Court (Civil Procedure) Rules, 2004 (CI 47) creates a certain normative framework of fairness which encourages expedition and eschews technicalities. However, these norms are not routinely relied upon in the application of procedural rules, leading to setting aside cases which are deemed to have fundamentally offended the rules. The insistence of courts to strictly apply procedural rules often deny litigants the opportunity to have their substantive concerns addressed. This reflects the situation which existed in 15th century England where every claim had to comply with a specific writ or it failed. The writ system was influenced by a philosophy of strict compliance with *form, which* was imported into Ghana through colonialism. Through a qualitative doctrinal legal research, I explore an appropriate framework for the application of procedural rules. I rely on John Rawls's justice as fairness theory built on the 'original position', where participants in a thought experiment, make choices of principles from 'behind a veil of ignorance' to govern them. This veil deprives them of their peculiar identities which pre-dispose them to bias choices, making their choices fair, and therefore just. The choices at the original position may reflect colonial influences. Where this is the case, divesting the people of these tendencies (de-colonisation) is crucial. Further, Rawls's justice as fairness theory has been criticised as based on the individual as the moral agent, hence may not adequately take account of African ideas of

‘relationality.’ To resolve this potential tension, this thesis borrows Metz’s afro-communitarian relational theory of justice to moderate decisions at the original position to create a *Modified Afro-Communitarian Relational Theory of Justice* (MART Justice). When MART Justice guides the application of procedural rules, the result is that the rules will go through a fundamental shift and be contextually more just, hence fair. To demonstrate the application of MART Justice, this thesis uses three cases decided by the Supreme Court of Ghana on originating processes.



DEDICATION

This thesis is dedicated to:

Benedicta Esinam Dzikunu and Gabriel Etse Amuzu

(My parents)

Joana Akorfa Mortoti-Amuzu

(My wife)

Setutsi Amuzu, Selimdo Amuzu, Sedudzi Amuzu, Sekorkoe Amuzu and Senyam Amuzu

(My children)

And

All members of the Amuzu, Dzikunu and allied families and everyone in search of fairness in court processes.



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LIST OF ABBREVIATIONS AND DEFINITION OF TERMS

ADR	Alternative Dispute Resolution
CI	Constitutional Instrument
CLT	Classical Legal Thought
CPC	Civil Procedure Code
CPR	Civil Procedure Rules
GLR	Ghana Law Report
ICCPR	International Covenant on Civil and Political Rights
JA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
LI	Legislative Instrument
LN	Legal Notification
MART	Modified Afro-Communitarian Relational Theory
MP	Member of Parliament
OR	Order
OR+DE+R	Original Position, De-colonisation and Relationality as concepts
SALL	Santrokofi, Akpafu, Likpe and Lolobi
SCGLR	Supreme Court of Ghana Law Report
SWOT	Strength, Weaknesses, Opportunities and Threats
WAEC	West African Examinations Council
UN	United Nations
UNDP	United Nations Development Programme

CHAPTER 1 : INTRODUCTION

I. INTRODUCTION

A functioning legal system must have substantive laws (primary rules) and procedural laws (secondary rules).¹ Primary rules define entitlements in any given situation.² Secondary rules provide the avenue through which the primary rules may be changed (rule of change), recognised as rules (rule of recognition) or enforced (rule of adjudication).³ According to Hart, these secondary rules together with the primary rules form the basis of a functioning legal system.⁴ Out of these secondary rules, the rule of adjudication embodies all procedural rules.

In Ghana, the subsisting rules of procedure are District Court (Civil Procedure) Rules, 2009 (CI 59) for District Magistrate Courts; and High Court (Civil Procedure) Rules, 2004 (herein referred to as 'CI 47') for the High Court and Circuit Courts. There is also Court of Appeal Rules, 1997 (CI 19) and Supreme Court Rules, 1996 (CI 16). All these Rules apply with amendments which have been made to them. An examination of civil procedural rules in Ghana may require an analysis of any or a combination of these Rules of Court. The aim of this thesis, however, is the analysis of the fairness of the application of civil procedural rules at the High Court of Ghana, with particular reference to originating processes.

¹ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Law Series, Oxford University Press 1994) 81, 94.

² *ibid* at 81.

³ *ibid* at 94, 95 - 97.

⁴ *ibid* at 99.

Originating processes are methods by which one may commence a case in court.⁵ In Ghana, originating processes include *writs of summons*, *petitions*, and *applications (originating notice of motions)*.⁶ I examine whether the application of the rules regarding which originating process is appropriate for which particular type of case at the High Court is fair. In this context, fairness aims at the design and or application of procedural rules in a way to avoid undue delay, prevent excessive cost, and minimise if not eliminate complexities, technicalities and gamesmanship of legal practitioners. Fairness here means developing and or applying the rules from an *original position*, in a *de-colonised* way, aimed at achieving *relationality* between the parties. What do the concepts - *original position*, *de-colonisation* and *relationality* mean? These are defined below.

II. DEFINITION OF KEY CONCEPTS

A. The original position

The *original position* is a standpoint from which one can assess whether the formulation and or the application of any law, policy or principle is fair.⁷ This standpoint makes it possible for the

⁵ Order 2, rule 2 of CI 47 makes issuing a writ of summons the default originating process. Hence, unless the rules prescribe or permit any other method, a writ of summons must be used as the originating process.

⁶ As provided in Order 55, rule 1 of CI 47, cases which invoke the jurisdiction of the High Court for judicial review for orders in the nature of mandamus, prohibition, certiorari or quo warranto must be initiated by an application. Similarly, as provided in Orders 66, rule 1 and 67, rule 1, probate and administration actions, and human rights litigation respectively, must be commenced by applications. However, in accordance with Order 65, rule 2, all cases related to divorce, custody and associated matters must be commenced by a petition. Similarly, by section 16(1) of the Representation of the People's Law, 1992 (PNDCL 284), a case to challenge the valid election of a member of parliament must be commenced by a petition. These laws show that there are different originating processes for different types of cases in Ghana.

⁷ John Rawls, *A theory of Justice* (Oxford University Press, Oxford 1992), (Original work published in 1971) 15-19, 102-105. See also D. Reynolds, 'a theory of justice by John Rawls,' available at <<https://www.enotes.com/topics/theory-justice/questions/understanding-the-concept-and-objectives-of-the-3116692>> (last accessed 18 June 2025).

development and or application of the law, policy or principle without personal biases of the lawmaker or the judge.⁸ The original position is the preferred standpoint for this thesis.⁹

B. Conceptual de-colonisation

The rules of civil procedure in Ghana have a history traceable to the colonial period.¹⁰ Since then, there has not been any fundamental shift in the structure and content of these laws, even after Ghana became independent in 1957.¹¹ After independence, the application of both substantive and procedural laws in Ghana have remained colonial.¹² This is because colonisation comes with mental influences associated with colonial rule often including tendencies to dominate and deprive the colonised of their rights and liberties.¹³ According to Wiredu, de-colonisation is the process of divesting oneself or the undoing of these colonial influences, and recreating ways of thinking with indigenous African ideas.¹⁴

⁸ *ibid* (Rawls).

⁹ The 'original position' as a standpoint is fully explained in chapter 3 of this thesis.

¹⁰ Kofi Quashigah, 'The historical development of the legal system of Ghana: an example of the coexistence of two systems of law', (2008) 14-2 *Fundamina* 100, available at <https://journals.co.za/doi/pdf/10.10520/AJA1021545X_19> (last accessed 18 June 2025).

¹¹ Raymond A Atuguba, 'Ghana @ 50, Colonised and Happy', in *Ghana Law since independence - History, Developments and Prospects* (Black Mask Ltd, 2007) 571 available at <<https://static1.squarespace.com/static/59f0534551a584527a9d8df3/t/5b55fd27352f53c5d15b018e/1532362095589/Ghana+%40+50+Colonised+and+Happy.pdf>> (last accessed on 26 May 2025).

¹² Kwadwo Appiagyei-Atua, 'Coloniality and contestations over academic freedom in Africa', (2024) *Global Constitutionalism* 1-20 at 9, available at <https://www.researchgate.net/publication/385548091_Coloniality_and_contestations_over_academic_freedom_in_Africa> (last accessed 20 June 2025).

¹³ Frantz Fanon, *The Wretched of the Earth*, Grove Press, New York (1963) 249, available at <https://monoskop.org/images/6/6b/Fanon_Frantz_The_Wretched_of_the_Earth_1963.pdf> (last accessed 26 May 2025).

¹⁴ Kwasi Wiredu, 2002 'Conceptual Decolonization as an Imperative in Contemporary African Philosophy: Some Personal Reflections', *Rue Descartes* 36 (2): 53 - 64. See also Kwasi Wiredu, 2004. 'Introduction: African Philosophy in Our Time.' In K. Wiredu (ed.), *A Companion to African Philosophy*. Malden, MA: Wiley-Blackwell, 1-27 at 15.

C. Relationality

In this thesis, the idea behind *relationality* is that every law is a reflection of the culture of the people, either what is being practised or what the law intends the way of life of the people to be. The African is characterised as relational. If this characterisation holds true, the questions is whether the development and or the application of Ghanaian procedural rules should not reflect norms of *relationality*? In this context, relationality means aiming for harmony of the whole and avoiding discord within a community.¹⁵ Relationality is achieved by ‘solidarising’ and ‘identifying’ with others.¹⁶

D. MART Justice

In order to ensure civil procedural justice in Ghana, the development and or the application of the rules of procedure must be carried out in a way to help to avoid unnecessary delays, reduce cost inefficiency and prevent complexities. The rules of procedure should be developed and or applied relying on a ‘*modified afro-communitarian relational theory*’ of justice (This thesis refers to this theory as ‘MART Justice’). MART Justice is the theoretical framework for this thesis. MART Justice posits that in order for a rule of procedure to be fair, it must be developed and or applied from the original position, be de-colonised and promote relationality. MART Justice as a theoretical framework is fully explained in chapter three of this thesis.

¹⁵ Thaddeus Metz, ‘An African Theory of Social Justice’ in Camilla Boisen and Matthew C. Murray (eds), *Distributive Justice Debates in Political and Social Thought Perspectives on Finding a Fair Share* (Routledge - Francis and Taylor Group, New York and London 2016) at 171, available at <<https://philpapers.org/archive/METAAT-6.pdf>> (last accessed 26 May 2025).

¹⁶ *ibid.*

The subsequent sections of this chapter provide background information on this research, discuss the research problem, and provide the justification for this study. The sections also outline the objectives of the study, set out the research questions and indicate the research hypothesis. Lastly, the sections lay out the methodology, the significance and limitations of the study, and provide outlines of the rest of the chapters of this thesis.

III. BACKGROUND TO THIS STUDY

Courts cannot function well without well defined procedural rules and court room procedures. *Procedures* are the ‘how’ of *substantive* rights (the ‘what’). Civil procedural law defines the purpose of a functioning legal system and must work towards an effective and efficient adjudication, lest society is not likely to make progress.¹⁷ In spite of how important civil procedure is to the fair adjudication of cases, in Ghana, civil procedure is often puzzling. This puzzle is even more heightened when highly trained and evidently qualified senior legal professionals are not always able to make the appropriate choice of originating processes with certainty. It is often a nightmare attempting to commence a case with the slightest novelty in Ghana. Will the courts consider the case to be an election matter, requiring commencement by a *petition*, or the courts will consider the case to be a human rights claim, requiring commencement by an *application*?¹⁸ Is it a constitutional matter requiring commencement by a *writ of summons* or it is an electoral case, requiring commencement by a *petition*?¹⁹ Should the

¹⁷ Atuguba (n 11) at 574.

¹⁸ This was the situation which residents of the Santrokofi, Akpafu, Lolobi and Likpe (referred to as ‘SALL’) in the newly created Oti Region faced in their attempt to seek redress for being disenfranchised from electing a member of parliament on 7th December, 2020.

¹⁹ This was the situation in *Sumaila Bielbiel (No 1) v Dramani and Another* [2011] 1 SCGLR 132 which was about whether the defendant was validly elected as a member of parliament for Bawku when at the time of his election, he held nationalities of the Britain, Burkina Faso alongside Ghana.

lawyer just issue a *writ of summons* if unclear which way to go or rather issue an *originating notice of a motion*?²⁰ But really, what purpose does it serve to have these different but similar originating processes? Does one mode provide different information which are not needed in the other originating processes? The difficulties posed to lawyers in making a choice between issuing a writ of summons, filing applications or filing petitions to commence a case, from a simple set of facts is enough to require a thorough study of this area of law.

In recent times, in Ghana, the Rules of Court Committee²¹ has been busy with amendments to CI 47 to give effect to its objectives.²² Order 1, rule 1(2) of CI 47 requires lawyers and judges to interpret CI 47 and apply the Rules in a manner ‘... so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided.’

In order to help achieve the objectives of CI 47, the High Court (Civil Procedure) (Amendment) Rules, 2020 (CI 133) came into force on 5th November, 2020 to make some changes to CI 47. CI 133 amended Order 32 (Application for Directions), Order 51 (Appeals from the District Court)

²⁰ This was the situation in *Awuni v. West Africa Examinations Council* [2003-2004] SCGLR 471 in which case counsel for the applicants went to court by an originating summons to enforce the administrative rights violations of the applicant students whose West African Senior Secondary School Examination results were cancelled without giving them a hearing contrary to article 23 of the 1992 Constitutions.

²¹ Article 157 of the 1992 Constitution established the Rules of Court Committee to make rules and procedures to guide practice in all courts in Ghana. It is chaired by the Chief Justice. Other members of the Committee are six members of the Judicial Council and two lawyers nominated by the Ghana Bar Association.

²² CI 47 is the subsisting Rules of Court for the High Court in Ghana. The historical background of CI 47 dates back to the Courts Ordinance (No. 4) of 31 March 1876 (CAP 7).

and Order 58 (Commercial Court Rules) and repealed Order 42 on review jurisdiction of the courts. The jurisdiction conferred on the High Court and the Circuit Court to review their own decisions upon stated grounds has been revoked. Order 51, rule (1) of CI 47 which is on stay of execution of the judgment of the District Court has been amended and has ceased to be a permitted repeat application. Under CI 133, the High Court has the authority to stay the execution of a decision of the District Court. Further, the High Court (Civil Procedure) (Amendment) Rules, 2019 (CI 122) came into force on 3rd December, 2019 to introduce electronic service of processes.²³ These recent amendments are intended to bring clarity to bear on some pertinent procedural issues in the courts. Yet, some of these amendments have already become the subject of contention in the courts. Consequently, the decision of the court has created doubts as to whether the intended changes would see the light of day. Thus, in the case of the *Republic v. High Court, Accra, Ex parte ECOBANK Ghana Ltd, Origin 8 & Anor*,²⁴ the Supreme Court has decided that the jurisdiction of the High Court to stay its own decisions cannot be entirely taken away by procedural rules.²⁵ The effect of this decision is that the High Court retains its authority to stay its own decision. This decision has the potential to negatively affect the expedition of trials through the court system through to the Supreme Court.

²³ Rule 3A is to the effect that a party who issues a writ and would like to be served by electronic means or enters an appearance and would like to be served by electronic means shall indicate so.

²⁴ *Republic v. High Court, Accra, Ex party ECOBANK Ghana Ltd, Origin 8 & Anor* (Respondents and Interested Parties, Unreported decision of the Supreme Court in CM J5/10/2022 dated 18th January, 2022.

²⁵ These aspects of civil procedure are very important for procedural justice. However, they fall outside the scope of this thesis and will not receive any further attention beyond the mention received in this Section by way of background information for this thesis.

Unclear procedures for adjudication impair the obligation of Ghana to respect, protect and fulfil human rights as required by the international bill of rights.²⁶ Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that States shall ensure that persons whose rights are violated have an effective remedy. This requires that litigants have reasonable access to competent judicial, administrative or legislative authorities to deal expeditiously with their claims.²⁷ Though these principles from the ICCPR are designed to aid primarily the adjudication of human rights cases, they can be extended to normal civil cases which do not allege human rights violations. This will ensure that litigants enjoy an effective redress mechanism in court. With this background, the next section of this thesis fully explains the research problem.

IV. THE PROBLEM STATEMENT

In 2004, CI 47 repealed Ghana's High Court (Civil Procedure) Rules, 1954 (LN 140A).²⁸ Legal practitioners expected that problems such as undue delay, cost ineffectiveness, and technicalities would be relegated to the past as CI 47 mandates judges to interpret the rules in such a way to reduce cost, avoid delays and multiplicity of suits.²⁹ This objective to render justice to the public

²⁶ The International Bill of Rights includes the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights.

²⁷ Principles 12, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Resolution 60/147 (16 December 2005), available at <<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>> (last accessed 25 May 2025).

²⁸ High Court (Civil Procedure) Rules, 1954 (LN 140A) used to be Supreme Court (Civil Procedure) Rules (LN 140A) until 4th February 1975 when the Rules of Court Committee under its powers in section 75 of the Courts Act, 1971 (Act 372) changed it.

²⁹ Order 1, rule 1(2) of CI 47. Emphasis mine.

as the role of the court remains largely unrealised.³⁰ The problem is insistence of the courts on strict procedures. Strictness was the situation with the writ system in England in the 15th century, where every claim in a court had to comply with a specific writ or it failed.³¹ The writ system was influenced by a philosophy of strict compliance with *form*.³² An example from the early developments of English Law of Contract throws light on the requirement of strict adherence of the common law to *form*. In *Watton v. Brinth*³³, an action failed because of a distinction between what cases could be maintained under a malfeasance (doing something badly) and nonfeasance (doing nothing at all). In other words, if one promised to do something and ended up doing it badly, a different cause of action availed the claimant as opposed to the defendant not doing anything at all. This kind of situation led to parties being tossed between different courts - from courts of chancery to courts of law and vice versa.³⁴ This mindset of strict compliance with *form* was imported into Ghana through colonialism, and informed the creation of multiple originating processes, with a wrong choice most likely to lead to setting the case aside. This is why this thesis wish to examine procedural justice or the lack thereof as far as civil procedure in Ghana with a focus on originating processes.

³⁰ Modibo Ocran, 'The clash of legal cultures: the treatment of indigenous law in colonial and post-colonial Africa', (2006) *Akron Law Review* 465 at 465, available at <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1282&context=akronlawreview> (last accessed 20 June 2025).

³¹ MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (12 ed, Butterworth & Co Ltd Publishers) 5.

³² John Sheahan, Brief history of the court in Law Council of Australia/Federal Court of Australia 'Case Management Handbook' (2011) at 13, available at <https://lawcouncil.au/publicassets/2a7b4c07-0f36-ec11-9443-005056be13b5/Case Management Handbook_Updated Version 2021.pdf> (last accessed 26 May 2025).

³³ Furmston (n 31).

³⁴ Sheahan (n 32) at 13.

Before 2004, Ghanaian procedural rules were made in 1954 with some amendments during the intervening period.³⁵ LN 140A was made before Ghana gained independence from the British on 6th March, 1957. These laws were made or exported to the Gold Coast during a period (1840-1914) within which classical legal thought was the dominant legal conceptual vehicle for what the law was meant to do.³⁶ The period of the rise of classical legal thought coincided with the period for the rise in colonialism, particularly as Ghana is concerned. Hence, it may be observed that these rules for the administration of civil justice in Ghana have been built on colonial foundations.³⁷ Therefore, it is not surprising that Ghanaian legal academics make the point that Ghanaian laws are a product of a colonial project.³⁸ The aim of the colonial enterprise included keeping the atmosphere stable for the exploitation of resources of the colony.³⁹ Hence, these laws may not respond to the aspirations of Ghanaians if a ‘de-colonisation’ is not achieved.⁴⁰ According to Kennedy, the next major epoch (1900-1968) for legal conceptual and institutional development saw the development of ‘social law’ ideas with heavy emphasis on the law as a means to social advancement, with the legal ideal being the promotion of solidarity.⁴¹ The application of procedural rules in Ghana, however, have not changed to reflect these ‘social

³⁵ By a gazette notification dated 20th May 1977, the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107) amended LN 140A by fixing the maximum period of six weeks after the close of the case for the delivery of judgment by the court.

³⁶ Duncan Kennedy, The three globalisations of law, available at <<https://duncankennedy.net/wp-content/uploads/2024/01/three-globalizations-of-law-and-legal-thought.pdf>> (last accessed 26 May 2025).

³⁷ Atuguba (n 11) at 574. See also Raymond A Atuguba, *Contemporary Constitutional Issues in our Multi-Party Democracy*, Fourth Re Akoto and Seven others Memorial Lecture, (Ghana School of Law / Friedrich-Ebert-Stiftung, Ghana, 2009) at 10, available <<https://library.fes.de/pdf-files/bueros/ghana/10482.pdf>> (last accessed 1 July 2025).

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Kennedy (n 36) at 37.

law' ideas, perhaps because the justice sector is a conservative environment.⁴² This is why it should not be surprising that portions of the colonial relic including the design and or application of the rules of court persist, with the courts been stuck in the classical legal thought paradigm. This is seen as a 'mental' captivity.⁴³ Fanon refers to this baggage of colonialism as a 'psychiatric problem' to be eliminated.⁴⁴ This elimination can be inspired by the 1992 Constitution of Ghana which requires that adjudicating authorities must act independently, impartially, and within a reasonable time.⁴⁵ Article 19(13) of the 1992 Constitution requires courts and other bodies which perform civil adjudication roles to act independently, be neutral and afford fair hearing to the parties.⁴⁶ What this article could have also dealt with is the need for courts to interpret and apply rules in a manner which would ensure that the form in which cases are presented before the courts does not deprive the courts the opportunity to deal with the substantive concerns of the parties. CI 47 was to give effect to this constitutional provision, hence its requirement for CI 47 to be interpreted and applied in a manner to achieve speedy and effective trials and to avoid multiplicity of civil suits. The literature, however shows that efficiency in adjudication of civil cases in Ghana is far less than desired.⁴⁷ For instance, the World Bank Doing Business 2020 Report notes that it took 710 days to enforce a contract and 330 days to enforce a judgment in

⁴² Charles Manga Fombad et al, *Re-thinking the role of law and justice in Africa's development*, Edited volume of discussion papers (UNDP, 2013) at 12.

⁴³ Fanon (n 13) at 249.

⁴⁴ *ibid.*

⁴⁵ Constitution of Ghana 1992 art 19(13).

⁴⁶ *ibid.*

⁴⁷ World Bank ranking for doing business that placed Ghana at 118th position out of a total of 189 national economies in Doing Business Contract Enforcement Indicators at https://archive.doingbusiness.org/en/data/exploreconomies/ghana#DB_ec (last accessed 25 May 2025).

Ghana.⁴⁸ Certainly, trials which face challenges of ‘wrong’ originating processes would take much longer. In the case of *Awuni v. WAEC*,⁴⁹ it took more than 3 years for the substantive matter to be concluded. This length of time alone makes these processes far from being efficient and negatively affects what procedural justice means, necessitating a thorough study into this area of law.

V. MEANING OF PROCEDURAL JUSTICE

In general, procedural justice is about fairness in the processes that resolve disputes and or allocate resources among different parties.⁵⁰ It is only an aspect of procedural justice which deals specifically with legal proceedings.⁵¹ When used in connection with the fair administration of justice in the court room, procedural justice is referred to as due process of the law by Americans, fundamental justice by Canadians, procedural fairness by Australians, and natural justice in other common law jurisdictions.⁵² But often, when the phrase ‘procedural justice’ is used, it is in connection with the exercise of state power by organs of the State, particularly, the police against ordinary persons and how such ordinary persons can have redress relative to the use of police power.⁵³ This is a narrow viewpoint of what procedural justice means. It is focused

⁴⁸ *ibid.*

⁴⁹ *Awuni v WAEC* [2003-2004] SCGLR 471.

⁵⁰ Edith Barrett-Howard & Tom R Tyler, ‘Procedural Justice as a Criterion in Allocation Decisions,’ (1986) 50 J. PERSONALITY & SOC. PSYCHOL. 296, 300.

⁵¹ Tom R Tyler, ‘Court Review: Procedural Justice and the Courts’ (2007) 44/1/2, *The Journal of the American Judges Association* 26, 30, available at <<https://digitalcommons.unl.edu/ajacourtreview/217>> (last accessed on 1 December 2024).

⁵² Natural justice here goes beyond literally hearing the other side and not being a judge in one’s cause. In other words, the dictates of natural justice may not be entirely complied with even when these two aspects are covered, but there is some inherent unfairness in the law which leads to injustice.

⁵³ Justice Tankebe, ‘Moral contexts of procedural (in)justice effect on public cooperation with police: a vignette experimental study’ in Kutnjak Ivković, Maskály, Donner, Cajner Mraović, and Das (eds.), *Exploring Contemporary Police Challenges* (Routledge, New York 2022) at 5-6.

mainly on the use of State power in a manner which is fair to citizens who encounter the use of such State power, mostly by the police. The bulk of academic research on procedural justice focuses attention on this understanding of procedural justice.⁵⁴ Such research works reflect the search for fairness in criminal justice administration, particularly in encounters with the police. However, from a civil procedural law perspective, the focus is on how the rules of adjudication make the process of justice delivery fair.⁵⁵ In this light, procedural justice is widely understood to mean ‘the judgments about the fairness of procedures used to make decisions’.⁵⁶ In this thesis, ‘procedural justice’ is restricted to ‘fairness’ in civil trial processes in Ghana.

VI. JUSTIFICATION FOR THE STUDY

Civil procedural justice is largely an unexamined area in the law and legal theory literature. Research on the theoretical basis of civil procedure in Ghana and procedural justice is almost non-existent. There are some research works on specific areas of civil justice such as the need to abolish the writ system by Raymond Atuguba,⁵⁷ procedure and practice before the Court of Appeal by Sir Justice Dennis Adjei⁵⁸ and textbooks on civil procedure in Ghana.⁵⁹ These and others on the subject touch some limited aspects of civil procedural justice. Hence, there is an obvious gap on this rather important aspect of the Ghanaian legal system. There is a lack of

⁵⁴ John Thibaut and Lawrence Walker, ‘A Theory of Procedure’ (1978) 66 California Law Review 541, 542.

⁵⁵ Tom R Tyler and E. Allan Lind, ‘A Relational Model of Authority in Groups’ (1992) 25 Advances in Experimental Social Psychology 115, 122.

⁵⁶ *ibid.*

⁵⁷ Atuguba (n 11).

⁵⁸ Dennis Dominic Adjei, ‘The General Practice and Procedure before the Court of Appeal’ (2016-2020) XXIV Review of Ghana Law 76.

⁵⁹ Kwami S Tetteh, ‘*Civil Procedure: A Practical Approach*’ (2011). See also SA Brobbey, ‘*Practice and Procedure in the Trial Courts & Tribunals of Ghana*’ (2nd edn) (2011).

studies with sound theoretical frameworks on how the objectives of CI 47 including the need for speedy trials and avoiding multiplicity of suits can be achieved. The lack of research on procedural justice is not limited to Ghana. According to John Thibaut, one of the foremost scholars on procedural justice, not much writing exists on procedural theory in the United States.⁶⁰ Thibaut cited Millar as one of the few scholars with a focus on civil procedural justice.⁶¹ This research contributes to filling this void. Armed with the knowledge to be generated from this thesis, judges and policymakers will be better placed to respond to the need for changes to improve civil procedural justice in Ghana.

VII. RESEARCH OBJECTIVES

The objective of this thesis is to develop a theory which can serve as the measuring rod for fair procedural rules (focusing on originating processes) from an African de-colonised perspective. In order to achieve this over-arching objective of the study, 4 sub-objectives will be pursued. These sub-objectives are to:

1. Assess the available theoretical frameworks with which the fairness of civil procedural justice can be analysed and establish if these available frameworks are adequate;
2. Establish the role, if any, of colonisation in the fairness of the application of civil procedure rules in Ghana, with a focus on originating processes;
3. Examine the similarities and differences in how other jurisdictions such as Australia deal with fairness in civil procedural justice, with emphasis on originating processes, and

⁶⁰ Thibaut and Walker (n 54) at 541, 542.

⁶¹ RW Millar, 'The Formative Principles of Civil Procedure', (1923) 18 ILL. L. REV. 94; revised and reprinted in A. ENGELMANN, *History of continental civil procedure* (Continental Legal History Series, vol 7, 1927) 3-81.

4. Apply the Modified Afro-Communitarian Relational Theory (MART) of justice to determine the fairness of the application of civil procedural rules in Ghana.

VIII. RESEARCH QUESTIONS

The over-arching research question for this thesis is, what theoretical framework can make the application of Ghana's civil procedure rules (focusing on originating processes) 'fair'? The thesis relies on the following sub-questions in order to answer the over-arching research question:

1. What are the available theoretical frameworks with which the fairness of civil procedural justice can be assessed? Are these frameworks adequate? How may any gaps in the available frameworks be filled? I intend to assess these theoretical frameworks in chapter 2 (Literature Review).
2. What does colonisation have to do with the fairness of Ghanaian civil procedural rules? I intend to answer this question in chapter 3 (Theoretical Framework).
3. What are the key areas of similarities and differences in how other jurisdictions such as Australia apply their civil procedural rules to improve the chances of achieving fair outcomes? I intend to answer this sub-research question in chapter 4 (Comparative Study).
4. What does a fair procedural justice, compliant with the Modified Afro-Communitarian Relational Theory of Justice (MART Justice) look like. I demonstrate how to apply MART theory in chapter 5.

IX. HYPOTHESIS

This study proceeds on the hypothesis that the application of procedural rules on originating processes in Ghana do not fully comply with normative standards of fairness as required by

Order 1, rule 1(2) read together with Order 81 of CI 47 and article 19(13) of the 1992 Constitution. The hypothesis further posits that the continued reliance on procedural frameworks shaped by colonial logic contributes to systemic inequities in civil litigation. It is assumed that a more context-sensitive and relationally grounded model of justice such as the Modified Afro-Communitarian Relational Theory (MART) can provide a more effective evaluative lens for procedural fairness. This framework is expected to reveal normative gaps in the current system and guide recommendations for reform that better reflect Ghana's constitutional values and socio-legal realities. This hypothesis will be proved through literature review and analysis of selected supreme court cases.

X. METHODOLOGY

This thesis relies on qualitative analysis of secondary data to examine what Hart refers to as the rules of adjudication. The main sources of secondary data for this thesis are academic literature and decided court cases. The methodology for this research is doctrinal, comparative and normative. A doctrinal study involves systematic examination of law and problems relating to law with the aid of appropriate methodological frameworks.⁶² Westerman uses the term 'legal doctrine' for research in which the legal system is 'the main supplier of concepts, categories and criteria'.⁶³ The doctrinal methodology is hence a 'self-contained' approach to the study of law and legal institutions.⁶⁴ Knowing that civil procedural justice is not an issue peculiar to Ghana,

⁶² A Kharel, 'Doctrinal Legal Research' (2018) 2 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130525> (last accessed 26 July 2025).

⁶³ PC Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' in, *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Mark Van Hoecke (ed), Hart Publishing 2011) 94. See also Van de Graaf C, 'Procedural fairness: Between human rights law and social psychology' (2021) *Netherlands Quarterly of Human Rights* 39.

⁶⁴ *ibid* (Westerman).

this thesis takes the view that a comparative study will provide learning opportunities and beneficial results for Ghana. In that direction, Australia from a common law tradition, has been chosen for comparison. This is to establish areas where Ghana may learn from Australia as far as the rules on the originating processes are concerned. Australia shares a history of colonialism with Ghana. But, in spite of its colonial past, Australia is generally considered to be progressive in delivering justice. Hence, it may offer some good lessons worthy of adaptation. Further, Australia has some recent history of civil procedural justice reforms that Ghana can learn from. An additional reason for the choice of Australia for comparison is that both Ghana and Australia have tried civil procedural justice reform measures including good case management. Despite all these similarities, Australia provides an additional different perspective as it practices a federal system of governance and has Federal and State courts with different procedural rules, which this thesis can explore. This thesis is normative as it aims to develop a theory of procedural justice (MART Justice) and to critique certain cases on account of MART Justice. In so doing, the study relies on a thought experiment method of analysis as used by John Rawls in the development of his justice as fairness theory.⁶⁵ This thought experiment relies on three cases decided by the Supreme Court of Ghana, purposively selected for the analysis.

The study relies on an interdisciplinary approach taking into account the relationality and colonisation themes of the thesis. Here, it is useful to recall that Ghanaian law has been tremendously influenced by its colonial history. Hence, procedural rules in Ghana cannot be appropriately understood without taking their colonial contexts into account. Contextual

⁶⁵ Rawls (n 7) at 11.

understanding of the mental elements of colonisation can help shed light on the concepts of Ghanaian procedural rules.

XI. SIGNIFICANCE OF THE STUDY

This thesis proposes a fundamental shift in the way the courts and all legal practitioners approach the application of procedural rules so as to reflect the values of an African society like Ghana. It offers a new lens through which fairness and justice can be achieved taking into account the context of African norms, as it proposes de-emphasising technicalities. This will lead to a more efficient civil procedure for the enforcement of fundamental rights and freedoms. It will provide an effective mechanism for dispute resolution, hence providing the legitimacy that courts need to exist. When civil procedure is efficient, it reduces the cost of doing business and ultimately improves the chances of wealth creation. This in turn contributes to reduce poverty. Also, an effective civil procedure regime makes Ghana more competitive in litigation, with its spill over effects on Alternative Dispute Resolution (ADR), particularly arbitration as it improves the redress opportunities for the investment community. An inefficient civil procedure defeats the social contract between the government and the governed.

XII. LIMITATION OF THE STUDY

This study can be multi-dimensional and with greater depth. Procedural justice can be examined along the lines of all the processes from the commencement of cases to the end of trial and the execution of the outcomes of the case. This thesis is limited to originating processes in civil procedure. The study does not cover ideas in criminal procedural justice.

XIII. THE COURSE OF THE THESIS

A. Introduction and background of the study

Chapter 1 of this thesis is this Introduction. It provides a background to the study, identifies the research problem, presents the research questions, and explains the methodology and approach of the research. In addition, this chapter sets out the key objectives of the thesis and discusses the hypothesis. The chapter also identifies the limitations of the study and provides an outline of the rest of the chapters of this thesis.

B. Literature review of procedural justice

Chapter 2 reviews the existing literature on procedural justice. It observes that the bulk of the literature on procedural justice focuses very much on the criminal law aspects of justice. It was not until 1974 that John Thibaut and Laurens Walker commenced work in relation to procedural justice from an angle other than focusing on criminal procedure and the use of police powers. The major finding by the work of Thibaut and Walker is that disputants and uninvolved persons were equally as concerned with the fairness of the processes for adjudication as much as they were concerned about the fairness of the outcomes. The works of Thibaut and Walker and others (law as a natural arena for procedural justice assessments) and Nancy Welsh (dispute resolution as a distribution of burdens and benefits of social cooperation) and more recently Justice Tankebe and Anthony Bottoms (procedural justice as a normative concept) provide the basis for this study.

C. Theoretical framework of this research

Chapter 3 deals with the theoretical framework for the study. The framework focuses on the rule of adjudication for analysis and borrows from Rawls's justice as fairness theory. For Rawls, the rules for the administration of a society can only be fair if they are decided through a thought experiment of members of the group 'from behind a veil of ignorance', referred to as the original position. This veil of ignorance strips the participants off their personal attributes, making them unaware of their identities in the society in which the principles they are to select would be implemented. As rational decision-makers, the veil of ignorance forces the participants to make the most fair and therefore just decision regarding which principles to select. But Rawls's theory of justice as fairness has been criticised as having been built in a libertarian context, hence may not be entirely appropriate for societies which are communitarian in nature. To take care of this critique and tension, the decision at the original position is moderated with Thaddeus Metz's afro-communitarian theory of justice (relationality). Then, whatever result is produced therefrom is de-colonised based on ideas from Kwasi Wiredu (conceptual de-colonisation). This produces what this thesis refers to as the modified afro-communitarian theory of justice (MART Justice). MART Justice is the theoretical framework for this research. To be MART compliant, the development and or application of a rule must be from the *Original position*; be *De-colonised* and ultimately aim at engendering *Relationality*. This is the '*ORDER*' of MART Justice.

D. Comparative Study Findings

Chapter 4 presents the results of comparative study of the rules on originating processes in Australia and Ghana. Both Ghana and Australia are common law countries and have a history of

British colonisation. This history has an effect on the rules of procedure of both countries. Significantly, Australia is a Federal State as opposed to Ghana being unitary. As a result, Australia has rules of procedure at the Federal and State courts. This chapter considers how Ghana fares in terms of the rules on originating processes and the lessons Ghana can learn from Australia. Separate comparisons have been done with the rules at the Federal and State levels.

E. Application of MART Justice

In chapter 5, the study applies MART Justice to originating processes to test the soundness of this theory in determining fairness of the application of procedural rules. The study demonstrates the application of MART Justice with three cases decided by the Supreme Court. The three cases under scrutiny are *The Republic v. High Court, Ho, Ex parte Attorney General, (Electoral Commission - Interested Party)*;⁶⁶ *Ahinakwa II and another v. Okaidja III and others*;⁶⁷ and *Jonah v. Aggrey, Kulendi and Kulendi*.⁶⁸ MART Justice is applied in a manner to ensure that universally accepted norms such as hearing all sides adequately before arriving at decisions are at all times respected. The simplicity in the procedure should require that the disputants lay out a claim in substance and the judge organises the claim in the required form as supported by the plaintiff of the claimant. After all, *form* though important, should just play a midwifery role to deliver *substance* of the case.

⁶⁶ Civil Motion No. J5/21/2021.

⁶⁷ [2011] 1 SCGLR 20.

⁶⁸ [2013-2014] 1 SCGLR 272.

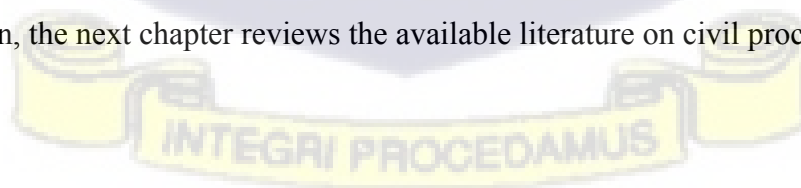
F. Summary, conclusion and recommendations

Chapter 6 summarises the study. This final chapter provides the conclusions and recommendations of the study. It also provides an indication of the areas for future research in the area of procedural justice in Ghana.

XIV. CONCLUSION

This chapter provides the background information for the study into civil procedural justice in Ghana. The thesis identifies over-reliance on form to the detriment of the substance in civil cases in Ghana as a problem. The lack of thorough research in this area of procedural justice readily provides the justification for this study. By way of methodology, the study is doctrinal and qualitative. In addition, it relies on a thought experiment. This thesis is normative as it develops MART Justice as its preferred theory of procedural justice. The study examines the de-colonisation and relationality of Ghanaian procedural rules, making it also inter-disciplinary. The study adopts a comparative approach to unearth good practices which Ghana may borrow from Australia to adapt to aid civil procedural justice in Ghana.

As the main focus of this thesis is examining procedural justice, it is important to review the available literature on procedural justice in order to ascertain the available ideas on which to build. In this vein, the next chapter reviews the available literature on civil procedural justice.



CHAPTER 2 : PROCEDURAL JUSTICE - A LITERATURE REVIEW

I. AN INTRODUCTION TO THE LITERATURE REVIEW

Chapter 1 of this thesis introduced the search for fairness in civil procedure as the area of focus for this thesis. In pursuance of that search for fairness, a key objective of this thesis is to examine the available literature on civil procedural justice and to determine whether the development and or application of Ghanaian civil procedural rules on originating processes are fair. In addition, as laid out in chapter 1, this thesis assesses the available theoretical frameworks with which the fairness of civil procedural justice can be analysed to establish if these available frameworks are adequate. This chapter reviews the available literature on different notions of justice, fairness, and procedural justice. In the end, the major concern for this literature review is the research gap that this thesis can fill regarding the fairness of the development and or application of procedural rules. The fairness of procedural rules takes place within specific legal system with their own influences as discussed in the next section.

II. PROCEDURAL LAW AND THE LEGAL SYSTEM

A. The goals of the common law and civil law systems

The major legal systems of the world include the common law and the civil law systems.⁶⁹ Each of these two systems was designed to deliver justice. Yet, the procedural rules and practices of these systems reflect different choices between some worthy goals.⁷⁰ According to Stephen Yeazell, different ‘legal systems, for example, may primarily seek *truth*, or *fairness* between the

⁶⁹ Aside the Common Law and the Civil Law, the Islamic Legal System and the African Customary Legal Systems are recognised as part of the major legal systems of the world. However, these have been heavily influenced by the traditions of the common law and the civil law systems, hence attention is paid only to the common law and the civil law in this thesis.

⁷⁰ Stephen C. Yeazell, ‘Civil Procedure’, Britannica, available at <<https://www.britannica.com/topic/procedural-law/Historical-development>> (last accessed 25 May 2025). Emphasis mine.

parties, or a *speedy resolution*, or a *consistent application* of legal principles.⁷¹ Often, these goals may be compatible with each other. But, sometimes, these goals do not necessarily align but may instead clash with each other.⁷² Yeazell notes that when this happens, the rules of that particular legal system may reveal the priorities it has established among various values.⁷³ The common law and the civil law systems are designed to achieve these goals of justice delivery, albeit through different processes and with emphasis on some of these goals over others. For example, the ‘civil law system centralises responsibility for deciding disputes and maintaining consistency in legal rules.’⁷⁴ To achieve this, the civil law system assigns primary responsibility to state officials, particularly, the judge for the investigation, assessment and to render the decision in the case.⁷⁵ On the other hand, the common law tradition decentralises power, ‘giving the parties and their representatives primary responsibility for presenting factual evidence and legal arguments’ to the judge.⁷⁶ Each of these two legal systems has its own merits and downsides. As the civil law system emphasises the responsibility of a professional judge, there is less likelihood that the outcome of cases will heavily depend on the wherewithal of litigants. The focus of the judge as an ‘investigator’ increases the likelihood of the result of cases and rules remaining consistent.⁷⁷ Yet, these same attributes can result in the tendency of the parties feeling that they have not been fairly heard and that their cases or concerns have not been adequately

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

investigated.⁷⁸ This is because the investigation is not led by the litigation team of the party to the case.⁷⁹ On the other hand, common law system of adjudication lays so much emphasis on devolving power to the litigant to determine the course of the case. Traditionally, the role of the common law judge is less pronounced.⁸⁰ The judge here is a ‘disinterested’ third party umpire.⁸¹ A good outcome of the case depends largely on the industry of the litigation team.⁸² At the outset, this is likely to make the parties more satisfied that their case has been adequately heard.⁸³ But this thesis posits that the downside of this approach is that the pronounced role that parties play tend to push litigants to seek the help of lawyers and other experts, with the attendant heavy expenditure, time consumption and complexities. In view of the fact that in the common law system, the outcome of the case depends to a great extent on the capabilities of the litigant and the litigation team, the results may not be consistent as compared to the civil law outcome.⁸⁴ As a common law country, the Constitution of Ghana and CI 47 provide the normative framework for adjudication, as the basis of procedural justice.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Geoffrey C. Hazard Jr. and Angelo Dondi, ‘Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits’ (2006) 39 *Cornell Int’l L. J.* 59, 61, available at <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1896&context=faculty_scholarship> (last accessed 25 May 2025).

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ John Thibaut and Laurens Walker and Stephen LaTour and Pauline Houlden, ‘Procedural Justice as Fairness’ (1974) 26 *Stan L Rev* 1271, 1272.

⁸⁴ *ibid.*

B. The basis of procedural law in Ghana - the rule of adjudication

The courts and all other adjudicatory bodies cannot function well without well defined procedural rules. As previously stated, procedures are the “how” of substantive rights (the what). It is also the ‘means’ (procedural justice) by which the ‘ends’ (distributive justice) are attained.⁸⁵ Distributive justice is about the content and consequences of decisions reached through procedural means.⁸⁶ Fair and timely adjudication of civil cases is a constitutionally guaranteed human right in Ghana.⁸⁷ Under the 1992 Constitution, the law requires that adjudicating authorities set up for the determination of civil claims, rights and obligations must act independently, impartially, and within a reasonable time.⁸⁸ The Constitution requires a functional legal system in order to achieve these goals. Such a functional legal system will reflect and be guided by the values of independence, impartiality and expedition as contained in the 1992 Constitution. This is the policy rationale behind Order 1, Rule 1(2) and Order 81 of CI 47.

As mentioned earlier, primary rules define entitlements in any given situation.⁸⁹ Secondary rules provide the avenues through which the primary rules may be recognised as rules (rule of recognition) or may be changed (rule of change) or may be enforced (rule of adjudication).⁹⁰

⁸⁵ Robert Folger and Jerald Greenberg, ‘Procedural Justice: An Interpretive Analysis of Personnel Systems’ 3 *Research in Personnel and Human Resources Management*, 141-183, available at <<http://ereserve.library.utah.edu/Annual/MGT/7800/Brief/folger.pdf>> (last accessed on 1 December 2024). See also Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 3, available at <https://law.exeter.ac.uk/v8media/facultysites/hass/law/imeges/hamlyn/Genn_judging_civil_justice.pdf> (Last accessed 26 May 2025).

⁸⁶ Genn (n 85) at 13.

⁸⁷ Constitution of Ghana 1992 art 19(13).

⁸⁸ *ibid.*

⁸⁹ Hart (n 1) at 81.

⁹⁰ *ibid* at 94-95, 97-99.

According to Hart, primary rules are first level rules and regulate the behaviour of everyone.⁹¹ Most of them are duty imposing,⁹² provide the substantive idea of what is to be achieved or redressed or realised. To illustrate, a Ghanaian who is 18 years or above, of sound mind and who is registered by the Electoral Commission as a voter is entitled to participate in public elections and referenda. This is a primary rule about elections and governance of the State of Ghana. If one is apprehensive that his right to vote is under threat of violation or is being violated, he may seek redress in the High Court through the steps provided by the Representation of the Peoples Law, 1992 (PNDCL 284). To provide another example, in contract law, if an offer is accepted by a competent person, an agreement is formed. The coincidence of an offer and an acceptance, all things being equal creates an agreement as a primary rule. Such an agreement if broken can be enforced through secondary rules - the rule of adjudication. So, secondary rules are rules about the rules.⁹³ Hart gives the rule of recognition the most prominent place in the legal system as it determines which rules are laws. But the role of the other two rules, the rule of change and the rule of adjudication are crucial for the efficient running of a legal system, yet they are rarely scrutinised. Without the rule of change, the law will be static and be overtaken by developments such as technological advancements. Today, human society lives in a digital world, not so much anticipated a few decades ago. Without the rule of adjudication, one cannot legitimately expect to enforce his or her rights if those rights are violated or threatened to be violated. The absence of the rule of adjudication will ultimately lead human society back to the state of nature where survival is for the fittest.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.*

As a public good, the rule of adjudication in Ghana must be efficiently enforced. It surprisingly has not attracted as much attention as the rule of recognition and the rule of change. The rule of adjudication provides for how justice may be administered. It is the rule which provides efficiency for the administration of the legal system and provides the procedure for the adjudication of cases. The rule of adjudication is at the core of what lawyers do in the courtroom. It has a central place in the efficient functioning of the legal system. Ultimately, the concern is how procedural rules can help litigants obtain justice in the courts. To serve this purpose effectively, the rule of adjudication must be fair and provide procedural justice.

III. UNDERSTANDING PROCEDURAL JUSTICE

A. Procedure as prescriptive rules

As noted earlier, court room procedures are essential for the realisation of substantive entitlements or claims. They are a necessary part of the rules in the courtroom for adjudication everywhere.⁹⁴ Rules of procedure regulate the court's machinery and methods by which both the state and the individual (the latter including groups, whether incorporated or not) can enforce their claims in court. According to Yeazell and Hazard, procedural law provides the avenue through which civil redress can be achieved.⁹⁵ As an enabler for the enjoyment of substantive law and rights created, these prescriptive procedural rules must be fair to the actors in the process of adjudication. They must also be applied in a manner which can be considered as fair.

⁹⁴ Jill A Howieson, 'Procedural Justice in Civil Court Mediation : A Critical Review of the Literature, & Procedural Justice in Civil Court Mediation : Exploring the Instrumental and Non-Instrumental Processes' (2000) Edith Cowan University 3, available at <https://ro.ecu.edu.au/theses_hons/885/> (last accessed 27 December 2024).

⁹⁵ Geoffrey Hazard, 'Procedural Law', Britannica, available at <<https://www.britannica.com/topic/procedural-law#ref28399>> (last accessed 20 May 2025).

When used in connection with the fair administration of justice in the court room, procedural justice is referred to as due process of the law or fundamental justice, procedural fairness, or natural justice in other common law jurisdictions.⁹⁶ But often, when the phrase ‘procedural justice’ is used, it is in connection with the unfair exercise of state power by organs of the State, particularly, the police against ordinary persons and how such ordinary persons can have redress relative to the use of police power.⁹⁷ This is a narrow viewpoint of what procedural justice means. Yet, this thesis observes that the bulk of academic research on procedural justice focuses attention on this narrow viewpoint of procedural justice. Such research works reflect the search for fairness in criminal justice administration, particularly in encounters with the police. However, from a civil procedural law perspective, the focus is on how the rules of adjudication make the process of justice delivery fair. In this light, according to Tyler and Lind, procedural justice is widely understood to mean ‘the judgments about the fairness of procedures used to make decisions’.⁹⁸ In the view of this thesis, this judgment can be passed by anyone associated with or who made contact with the justice system.

⁹⁶ Natural justice here goes beyond literally hearing the other side and not being a judge in one’s cause. In other words, natural justice may not be entirely complied with even when these two aspects are covered, but there are for instance, inherent unfairness in the law which leads to injustice.

⁹⁷ Tankebe (n 53).

⁹⁸ Tom R Tyler and E Allan Lind, ‘A Relational Model of Authority in Groups’ (1992) 25 *Advances in Experimental Social Psychology* 115, 122, available at <https://www.researchgate.net/publication/245038886_A_Relational_Model_of_Authority_in_Groups> (last accessed on 1 December 2024).

In general, procedural justice is about fairness in the processes that resolve disputes and or allocate resources among different parties.⁹⁹ Procedural justice is conceptualised as ‘the fairness of processes that lead to distributive decisions.’¹⁰⁰ It pertains to processes that guide the application of general distributive rules in concrete situations, which are usually controlled by authorities for the allocation of benefits and burdens.¹⁰¹ Both procedural and distributive justice can occur in and out of the courtroom.¹⁰² So, it is only an aspect of procedural justice which deals with the administration of justice, in broad terms and specifically with courtroom legal proceedings.¹⁰³ Procedural justice covers the fairness and the transparency of the processes that one relies on to make a decision.¹⁰⁴ It is often in contrast to *distributive justice* (fairness in the distribution of rights, resources or advantages - the primary goods), and retributive justice (fairness in the punishment of wrongs committed). In this thesis, the use of ‘procedural justice’ is restricted to ‘fairness’ in civil trial processes in Ghana, particularly at the High Court of Justice, with a particular focus on originating processes.

⁹⁹ Riel Vermunt & Kjell Y. Tornblom, ‘Introduction : Distributive and Procedural Justice’ (1996) *Social Justice Research* 1, available at <https://www.researchgate.net/publication/226977960_Introduction_Distributive_and_procedural_justice> (last accessed 1 July 2025).

¹⁰⁰ Matthias Dembinski, ‘Procedural justice and global order: Explaining African reaction to the application of global protection norms’ (2017) *European Journal of International Relations* 5, available at <https://www.researchgate.net/publication/321705420_Procedural_justice_and_global_order_Explaining_African_reaction_to_the_application_of_global_protection_norms> or <<https://d-nb.info/1225072808/34>> last accessed 25 May 2025.

¹⁰¹ Manuel Velasquez et al, ‘Justice and Fairness’, Santa Clara Markkula Center for Applied Ethics, available at <<https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/>> (last accessed 1 July 2025).

¹⁰² *ibid* at 1-2.

¹⁰³ Tyler (n 51) at 29.

¹⁰⁴ *ibid* at 27.

B. Principles of procedural justice

There are four main well known procedural justice principles which are typically assessed in any analysis regarding procedural justice in the courts. According to Tyler, these principles are *voice*, *neutrality*, *respect*, and *trust*.¹⁰⁵ The understanding is that when all these four principles are appropriately complied with, where applicable in justice delivery, a fair outcome is likely to result. What do these principles mean?

i. Voice

Voice refers to the desire of court users to have the chance to tell their side(s) of the story in their own words before decisions are made about how to resolve the dispute.¹⁰⁶ This has a positive effect on people's experiences with the legal system irrespective of the outcome of the adjudication.¹⁰⁷ Interestingly, this effect is felt whether the litigants express their views before the decision is made (pre-decisional voice) or after judgment is rendered (post-decisional voice).¹⁰⁸ This positive effect is expressed so as long as court users feel that those charged with the mandate to resolve their disputes honestly took their views into account before reaching a verdict.¹⁰⁹ As indicated earlier, the common law system is generally considered to offer more voice opportunity to the litigants as compared to the civil law system. This is principally because, in the common law system, the litigant is in charge of the litigation to the best of his

¹⁰⁵ *ibid* at 30.

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid*.

¹⁰⁸ Vermunt (n 99) at 6.

¹⁰⁹ Tyler (n 51) at 30.

abilities.¹¹⁰ Contrary to this widely-held view, I posit that the adversarial nature of litigation in the common law world tend to defeat *voice* as parties and their lawyers engage in the search for technicalities to ‘knock out’ their opponents even before the parties are heard. This is why alternative dispute mechanisms are thriving.¹¹¹ People value the chance to communicate with the mediator so as to express what they understand the problem to be and their suggestions about possible solutions.¹¹² But, this principle of *voice* may not be properly adhered to when extremely technical language is used in court proceedings. In other words, it is the position of this thesis that even when the opportunity to be heard is provided, the extreme technical manner by which actors such as lawyers, judges and other court officials carry out their duties has the potential to detract substantially from the *voice* opportunity created. *Voice* can be defeated at different levels through the operation of different factors which may be called ‘*voice gaps*.’ *Voice gaps* are those occurrences which do not make it easy for the articulation of a party’s case to the party’s lawyer or to the court. These *voice gaps* may occur simply as a result of the different levels at which a lawyer and his client may operate relative to the matter before the court. If the lawyer is not conscious enough to bridge the gap, *voice* is defeated and procedural justice consequently suffers. Complicated procedural laws and lack of physical infrastructure can also stultify *voice* of litigants in the court room. For instance, inadequate interpretation facilities in the High Courts in Ghana literally prevent court users from adequately expressing their *voice*. Adequately dealing with *voice gaps* through simplification of procedural laws, improving the infrastructure of courts

¹¹⁰ Yeazell (n 70).

¹¹¹ *ibid*.

¹¹² *ibid*.

and generally improving facilities will make it possible for voice as an important principle of procedural justice to be amplified.

ii. Neutrality

Neutrality is about the view court users take of the officials of the court, particularly, the judge.¹¹³ Disputants bring their disputes to court because they are of the view that ‘judges are neutral, principled decision makers who rely on rules and not personal opinions, and who apply legal rules consistently across people and over cases.’¹¹⁴ Neutrality requires that ‘judges are transparent and open about how the rules are applied and how decisions are made.’¹¹⁵ Explanations of how the relevant rules are applied are helpful to the perception of the parties experiencing procedural justice. The focus, however, should not only be on judges but all officials who play significant roles in the delivery of justice in the courtroom including court registrars, interpreters, clerks, bailiffs and recorders. When viewed against the fact that judges as humans make rationale choices, which choices may at times be informed by their personal experiences, personal beliefs, the judge’s background and worldview, the classical understanding of *neutrality* may not be realistic.¹¹⁶ This is the situation when one takes into account the adjudicator’s privileged position in determining what the law is. Therefore, neutrality in the sense of judges not taking extra-legal factors into account in their work can be a mirage. Hence,

¹¹³ Tyler (n 51) at 30.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ Richard A. Posner, ‘Rational Choice, Behavioral Economics, and the Law’ (1997) 50 *Stanford Law Review* 1551, 1551, available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2879&context=journal_articles> (last accessed 21 June 2025).

instead of expecting *neutrality*, the focus should rather be on *professionalism*. *Professionalism* requires actors, including judges, to act according to the dictates of their professional training and communicating their positions in a candid manner, regardless of which factors influenced their positions.¹¹⁷ Professionalism requires adhering to professional ethical standards, and disclosing situations in which the actors cannot be realistically expected to stay true to their professional ethics.¹¹⁸ In this sense, it is the position of this thesis that a judge should be free to rely on an ideological disposition, philosophical and theoretical frameworks to make a decision as long as such reliance is disclosed and not hidden from the parties under the pretence of staying neutral.

iii. Respect

Respect is a key principle of procedural justice. Persons such as court clerks and judges, who work in the legal or judicial environment, ‘represent the state and communicate important messages to people about their status in society.’¹¹⁹ Respect for people and their rights affirm to the people that they are viewed as important and valuable.¹²⁰ Court users wish to feel that they and their problems will be taken seriously by the legal system.¹²¹ Respect matters at all stages of the litigation process, and can potentially involve all officials of the court.¹²² Respect requires

¹¹⁷ Nickolas J James, ‘More Than Merely Work-Ready: Vocationalism Versus Professionalism in Legal Education’ [2017] UNSWLJ 8; (2017) 40(1) UNSW Law Journal 186, available at <<https://classic.austlii.edu.au/au/journals/UNSWLJ/2017/8.html>> (last accessed 21 June 2025).

¹¹⁸ *ibid.*

¹¹⁹ Tyler (n 51) at 30.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.*

treating people well from an objective point of view. This means treating actors within the court process with courtesy and politeness, and showing consciousness for the rights of people.¹²³ This is even more required when people act around technical environments such as within court premises and before court officials. In Ghana, for instance, when people come to court for even the simplest of cases, they may be confused about how cases are handled. This is partly because of the technical language and intimidating posture of some actors. Here, it is critical that court officials led by the judge understand that their disputants and followers are clients of the court in order for appropriate client orientation or some form of customer service to drive the actions and in-actions of court officials. Courts must realise that they are created to render service to court users. Court officials, including judges must understand that they are agents within the framework of the *principal-agent* theory of accountability.¹²⁴ As agents are normally disposed to shirking responsibility and free-riding where possible, social accountability measures such as social audits are important mechanisms to ensure accountability and greater efficiency of courts.¹²⁵ Courts must as a matter of necessity, be conscious of the power dynamics between themselves and the public and adopt appropriate orientation in order to offer the necessary respect, and earn reciprocal respect. This way, the prospects of achieving procedural justice are enhanced.

¹²³ *ibid.*

¹²⁴ Sandra Van Thiel & Amanda Smullen, 'Principals and Agents, or Principals and Stewards? Australian Arms Length Agencies Perceptions of Arms Length Government Instruments' (2021) 44:4 *Public Performance & Management Review*, 758, 760-761, available at <<https://www.tandfonline.com/doi/epdf/10.1080/15309576.2021.1881803?needAccess=true>> (last accessed 21 June 2025).

¹²⁵ *ibid.*

iv. Trust

Studies of legal institutions often demonstrate that one of the key factors that influences public views of legal authorities is an evaluation of ‘the character of the decision maker.’¹²⁶ The key elements in this evaluation involve issues of sincerity and caring.¹²⁷ People check whether court personnel such as judges are listening to and considering their views;¹²⁸ are being honest and open about the basis of their actions;¹²⁹ are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.¹³⁰ To engender *trust*, distributive justice must not suffer at the altar of procedural missteps. Just as consciousness of the power dynamics between judges, lawyers and clients affect *respect*, trust can be lost if the key actors do not act and appear to act fairly and appropriately considerate of the real situations of the parties. When a party is refused a hearing of a substantive matter because of a possible procedural mis-step, particularly in the invocation of the jurisdiction of the court, many questions which affect *Trust* as a principle of procedural justice may arise. For example, what is the difference between commencing an action by petition and commencing an action by an application? Does anyone lose anything substantial if one uses one instead of the other? Is the information provided on these different forms of invocation of the jurisdiction of the courts substantially different to deprive any of the disputing parties or the court the required information to work with? If the answer is in the negative, then it is not reasonable for a party to

¹²⁶ Tyler (n 51) at 31.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ *ibid.*

be deprived of a hearing because of such a procedural mis-step. Otherwise, *trust* in the legal system is eroded, and therefore, procedural justice is negatively affected.

Voice, Neutrality, Respect and *Trust* as key principles of procedural justice show some of the key fundamental areas of concern which can lead to the consideration of the outcome of a trial as fair. However, these principles do not satisfy the overarching objective of this thesis, thus to develop a theory of procedure from an African de-colonised perspective. But where did the discussions of procedural justice come from? The next section discusses briefly the history of procedural justice to provide context to the discussions of theories of procedural justice which follows.

IV. HISTORICAL DEVELOPMENT OF PROCEDURAL JUSTICE

A. Historical background of procedural justice

It is tempting to assume that the concept of procedural justice has been part of human history from time immemorial. This is mainly because procedures guide the allocation of resources and human beings always desire more of what is good. The reality is that the history of mankind has been the history for the struggle to control resources. In this vein, procedural justice would seem to be a natural part of the intellectual discourse from the time of the emergence of modern society. Interestingly, however, the bulk of the available literature on the subject suggests that the use of the specific words ‘procedural justice’ has a recent origin. It is a 20th century concept. The origin of the study of procedural justice is often traced back to the work of Thibaut and

Walker.¹³¹ Thibaut (a psychologist) and Walker (a lawyer), in their 1975 book¹³² and in an earlier article in 1974 with Stephen LaTour and Pauline Houlden, first used the term procedural justice to refer to social psychological consequences of procedural variation. Their emphasis was on the procedural effects on the fairness of judgments.¹³³ The thrust of the work of Thibaut and Walker is captured succinctly by Neil Vidmar as a comparison of dispute resolution procedures which involved a third party, including procedures such as adjudication, arbitration and mediation.¹³⁴ The work revealed that the parties and even non-parties to a case all took serious views of the fairness of the procedures as well as with the result itself.¹³⁵ In a nutshell, the processes through which people receive redress matter to them.¹³⁶ The quest for civil justice is not just simply about the outcome of a case. The process is as important as the end result.¹³⁷ This is why procedural justice is distinguished from the justice of the end result, thus, distributive justice. Distributive justice refers to the fairness of outcome distributions.¹³⁸ With this background information, it is startling to think that procedural justice would have its origins in the 20th century. This thesis believes that the origins of procedural justice can be traced back to

¹³¹ John Thibaut and Laurens Walker and Stephen LaTour and Pauline Houlden, 'Procedural Justice as Fairness' (1974) 26 *Stan L Rev* 1271, 1272. See also Catherine Van de Graaf, 'Procedural fairness: Between human rights law and social psychology', (2021) 39(1) *Netherlands Quarterly of Human Rights* 11–29. See also E. Allan Lind and Tom R. Tyler, 'The Social Psychology of Procedural Justice' (1998) *Springer Science + Business Media* 7.

¹³² John Thibaut and Laurens Walker, (1975) 'Procedural justice: A psychological analysis', Hillsdale, NJ: Erlbaum.

¹³³ Thibaut (n 131).

¹³⁴ Neil Vidmar, 'The Origins and Consequences of Procedural Fairness' (1990) 15 (4) *Law & Social Inquiry* 877–892, available at <<http://www.jstor.org/stable/828590>>. (Last accessed 3 August 2023).

¹³⁵ *ibid*.

¹³⁶ Lind et al (n 131).

¹³⁷ *ibid*.

¹³⁸ Van de Graaf (n 63) 11-29 at 14.

the classical period, starting with what *justice* as a concept, has been understood to mean from the classical period.

B. The classical era concept of justice (500 BC to 500 AD)

The concept of justice has engaged the attention of the great legal philosophers of all time. Great legal philosophers including Socrates, Plato, and Aristotle, had occasion to debate what justice meant and the role of justice in ordering human society during the classical era. The views of Socrates, Plato and Aristotle can be considered as precursors for contemporary discussions of procedural justice. For *Socrates*, justice implies superior character and intelligence while injustice means deficiency in both respects.¹³⁹ Therefore, 'just men are superior in character and intelligence and are more effective in action, whereas injustice implies ignorance, stupidity and badness.'¹⁴⁰ Injustice cannot be superior in character and intelligence.¹⁴¹ For Socrates, a just man is wiser because he acknowledges the principle of limit.¹⁴² Socrates held the view that unlimited self-assertion is not a source of strength for any group organised for a common purpose.¹⁴³ Unlimited desire and claims lead to conflicts.

¹³⁹ D R Bhandari, 'Plato's Concept of Justice: An Analysis' in *Ancient Philosophy* at 2, available at <<https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm#>> (last accessed on 1 December 2024).

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *ibid.*

Plato discussed justice in terms of harmony within the state and the soul.¹⁴⁴ Plato is one of the classical philosophers whose views on justice and procedural justice are worth exploring. In this vein, Bhandari posits that ... 'Plato contended that justice is the quality of soul, in virtue of which men set aside the irrational desire to taste every pleasure and to get a selfish satisfaction out of every object and accommodated themselves to the discharge of a single function for the *general benefit*.'¹⁴⁵ The context of the above views of Plato was that Athens was at the verge of collapse and Plato saw justice as the instrument by which life could be restored to Athens in particular and Greece in general.¹⁴⁶ But what was Plato concerned about for which he thought justice was the only solution? Plato was worried about some natural tendencies of the human being, including political selfishness, which he considered prevalent in the Greek environment at the time.¹⁴⁷ Then, classes - rich and poor, oppressor and oppressed emerged.¹⁴⁸ Hence, justice as a solution in this context required that people would have the 'will to fulfil the duties of one's station and not to meddle with the duties of another station.'¹⁴⁹ How was this view of Plato of a just society to be achieved? *Justice* is, for Plato, a part of human virtue and the bond, which joins human beings together in society.¹⁵⁰ Justice is an order and duty of the parts of the soul, it is to the soul as health is to the body.¹⁵¹ For Plato, justice is not mere strength, but it is a harmonious

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.* Emphasis mine.

¹⁴⁶ *ibid.*

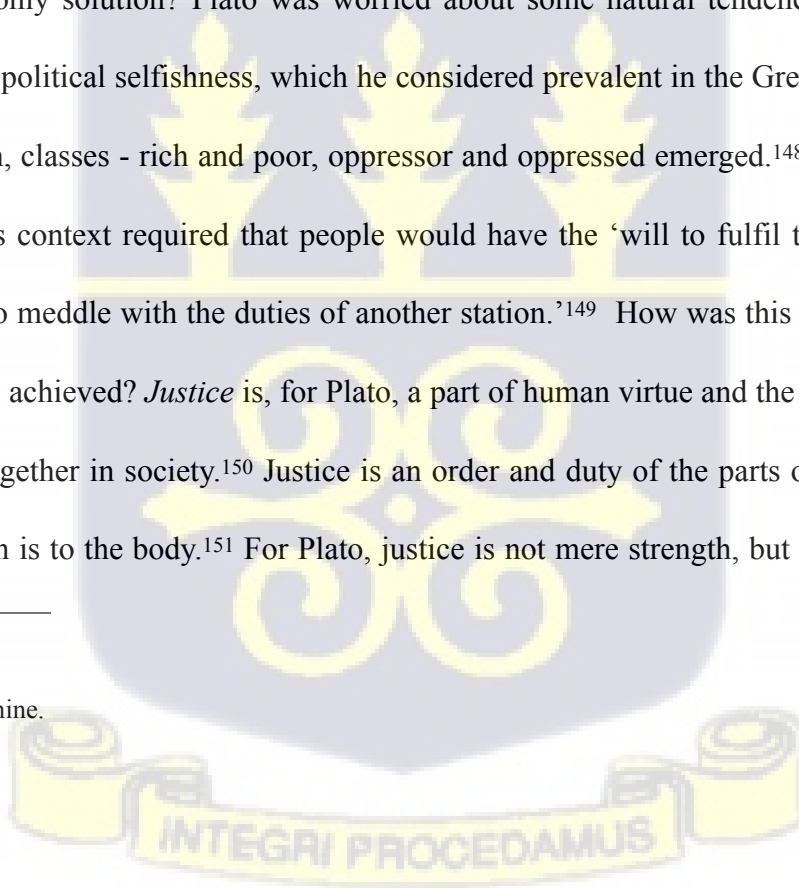
¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*



strength and the effective relationality of the whole.¹⁵² In the view of Plato, all moral conceptions of justice should revolve around the good of the whole - the good of the individual as well as the society to which he belongs.¹⁵³ In other words, in order for any procedure for the distribution of the benefits and burdens of society to be deemed as just, such a procedure must take into account the needs of the individual and the community as a whole. This is profoundly a relational perspective of what justice should be.

Aristotle distinguished between distributive and corrective justice.¹⁵⁴ For Aristotle, justice is ‘a moral disposition which renders men apt to do just things; and which causes them to act justly and to wish what is just.’¹⁵⁵ When *one takes more than one’s due*, Aristotle calls that ‘*unfairness*’.¹⁵⁶ In other words, fairness is justice.¹⁵⁷ Further, the term ‘just’ applies to ‘anything which produces and preserves the happiness, or the component parts of the happiness, of the political community.’¹⁵⁸ According to Jean Dabin, Aristotle and St. Thomas Aquinas divided justice into three types, depending on the persons concerned.¹⁵⁹ Thus, justice is *commutative* if

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ Aristotle, ‘The Nichomachean Ethics (Book V)’ in Clarence Morris (ed), University of Pennsylvania Press, Philadelphia, *The Great Legal Philosophers, selected readings in jurisprudence* at 16 (translated by H. Rackham in the Loeb Classical Library and reprinted by the permission of the Harvard University Press).

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ Jean Dabin, ‘General Theory of Law,’ in Clarence Morris (ed), University of Pennsylvania Press, Philadelphia, *The Great Legal Philosophers, selected readings in jurisprudence* at 460 (reprinted by the permission of Publishers from Translation by K. Wilk, *The Philosophies of Lask, Radbruch and Dabin*, Cambridge, Massachusetts, Harvard University Press).

the issues under consideration are between private persons.¹⁶⁰ When the persons in question are a collectivity and its members, especially, the state and its citizens, justice is said to be *distributive* as to what is due from the collectivity to its members.¹⁶¹ But when what is due is from the members to the collectivity, justice is said to be *legal*.¹⁶² Distributive justice is in relation to various kinds of distributions which every social body is called upon to effect among its members, thus, the distribution of social benefits.¹⁶³ According to Jean Dabin, these kinds of justice would have to be rooted in *just laws*.¹⁶⁴ In his view, ‘a law is just when it prescribes what is within its role to prescribe.’¹⁶⁵ In this sense, *a just law is a law adjusted to its ends, the public good, and to its proper means of realization...*, a law conforming to the legal method.’¹⁶⁶ The *means of realisation* that Dabin speaks about is in essence the procedure for the distribution of benefits and burdens - procedural justice. This means the law must be procedurally just. Hence, this is traceable as one the earliest statements regarding the meaning and importance of procedural justice.

C. The classical African justice

The understanding of *justice and procedural justice* discussed in this thesis is heavily influenced by the views of the philosophers of the global north - Socrates, Aristotle, Plato, Rawls, Thibaut

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

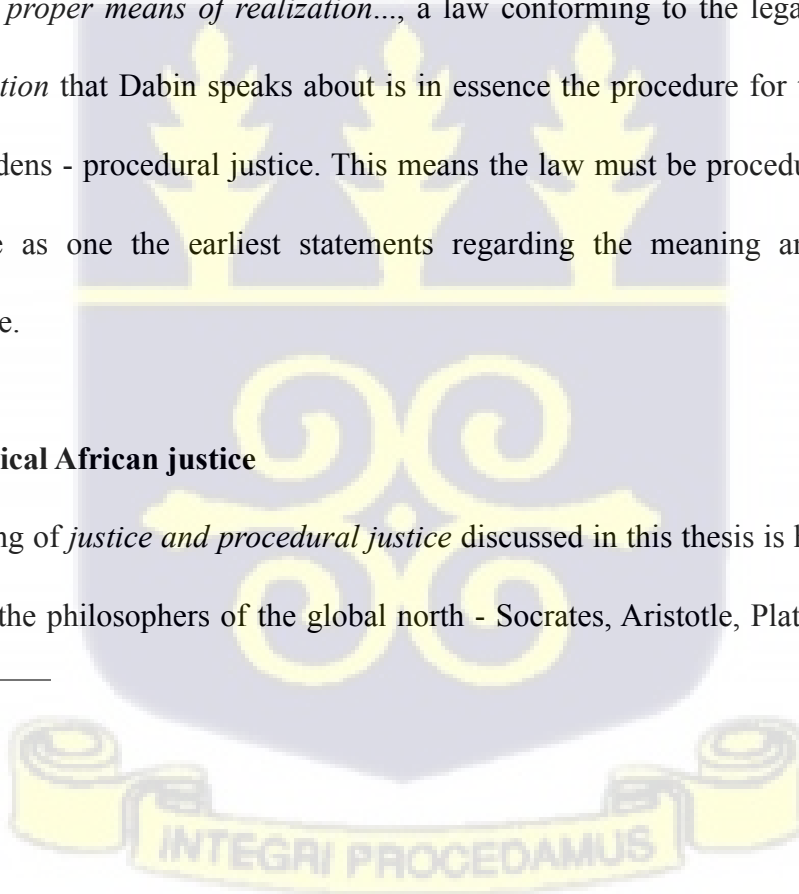
¹⁶² *ibid.*

¹⁶³ *ibid* at 491.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid* at 494. Emphasis mine.



and Walker, Tyler, Lind and so forth. So, what remains to be investigated is the classical African conception of justice and procedural justice. In other words, what did the African contemporaries of Socrates, Plato and Aristotle as examples, think about *justice and procedural justice*? Classical African philosophical perspectives of *justice and procedural justice* remain an untapped area for the legal academy globally and particularly in Ghana. However, information available suggests that African history of procedural justice can be traced back to ancient Egypt and Libya (northern Africa) and Mesopotamia (present day Iraq), where the Code of Hammurabi was one of the earliest statutory laws.¹⁶⁷

The *Edicts of Augustus and Decree of the Senate on the Judicial Process in Cyrene, Libya*, made around 64 BC provide an insight into the procedural justice contributions by Africa.¹⁶⁸ In these Edicts, Augustus regulated the senatorial province of Cyrene, Libya, and provided for mixed courts in the province.¹⁶⁹ He prescribed the nature of the court to try disputes and established a *new procedure* for the trial of provincial governors.¹⁷⁰ The Edicts dealt with the composition of a jury for civil and criminal trials, the opportunity to call witnesses and decision making by judges.¹⁷¹ Interestingly, even during the period around 64 BC, there were concerns of delays in trials, and the fairness of reliance on witnesses who had to travel from long distances and those

¹⁶⁷ J G Manning, 'The Representation of Justice in Ancient Egypt' 2012 (24) Yale Journal of Law and Humanities 111, 113, available at <<https://openyls.law.yale.edu/server/api/core/bitstreams/72f78b13-cd73-41e4-a869-4fdaa6330c77/content>> (last accessed 30 June 2025).

¹⁶⁸ This Edicts was found in 1926 at Cyrene, Libya, Africa. See the records of the Avalon Project by the Yale Law School, available at <https://avalon.law.yale.edu/ancient/hamframe.asp> (last accessed on 15 December 2024). Emphasis mine.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

who were physically weak.¹⁷² This is one of the earliest precursors of the concerns relative to procedural justice - undue delays, excessive cost, etc. During this period, in Libya, there were reforms which made it possible to excuse the elderly, sick and frail bodies from witness duties to the courts.¹⁷³ These laws and procedures adopted provide the basis for the development of civil procedural laws, built upon through the medieval period to the modern era.

D. The Medieval Period (500 AD to 1500 AD)

The Medieval period saw the rise of feudalism.¹⁷⁴ During this period, justice was administered by feudal lords.¹⁷⁵ A significant development regarding justice administration during this period is the proclamation of the Magna Carta in 1215.¹⁷⁶ The Magna Carta is recognised as a milestone in procedural justice as it established the principle that the king was subject to the law and guaranteed certain legal rights, including fair trials for ordinary persons.¹⁷⁷ Social Contract theorists such as St. Thomas Aquinas, Thomas Hobbes, John Locke, and Jean Jacques Rousseau emphasised the importance of justice as part of the social contract between rulers and the ruled. Locke, in particular, stressed the need for *fair procedures* to protect individual rights.¹⁷⁸ For

¹⁷² *ibid.* Edict 5 on the Decree of the Senate provides that Senate established court to make it easier for persons to have access to courts taking into account the advanced age and sometimes sicknesses of the parties and the long distances they had to travel.

¹⁷³ *ibid.*

¹⁷⁴ This information is available at <<https://www.lordsandladies.org/middle-ages-justice-law.htm>> (last accessed on 30 June 2025).

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Krzysztof Lazarski, 'John Locke's State of Nature and the Origins of Rights of Man' at 64, available at <https://philarchive.org/archive/LAZLSO> (last accessed 1 December 2024).

Locke, within the framework of his social contract theory, man had to be protected against the enormous powers of the state, through safeguards such as fair trial and protection of property.¹⁷⁹ These ideas, the fair trial components of his views, have laid the foundation for the principles which govern civil procedure and fairness in civil adjudication today.

E. The Early Modern era (1500 AD to 1800 AD)

This period saw the development of ideas around individual rights and the rule of law. Philosophers like Immanuel Kant emphasised the importance of treating individuals as ends in themselves, which includes fair treatment in legal processes.¹⁸⁰ From the viewpoint of Kant, justice may be *protective*, *commutative* or *distributive*.¹⁸¹ Kant's conception of distributive justice, in particular, the declaration of the law as to what is just and the extent of that justice, can accommodate notions of procedural justice, thus the process by which the declarations of what is just may be reached. In this period, the State as the unit for the organisation of human society saw growth, with monarchs mainly trying to control both the public and private lives of their citizens.¹⁸² The role of the law in organising societies, due process and when to legitimately derogate from same were questions that ordinary persons, who were at the receiving end of harsh

¹⁷⁹ *ibid* at 62. Emphasis mine.

¹⁸⁰ Immanuel Kant, 'Kant's Philosophy of Law (An exposition of the fundamental principles of jurisprudence as the science of rights)' in Clarence Morris (ed), University of Pennsylvania Press, Philadelphia, *The Great Legal Philosophers, selected readings in jurisprudence* at 252 (Translated by W. Hastie, reprinted by permission of T. & T. Clark, Edinburgh).

¹⁸¹ *ibid*. Emphasis supplied.

¹⁸² University of Cambridge, Faculty of History, The 'rule of law' in early modern Britain: State power, criminal justice, and civil liberties, c.1500–c.1800, Course Material for 2024/2025, available at <<https://www.hist.cam.ac.uk/rule-law-early-modern-britain-state-power-criminal-justice-and-civil-liberties-c1500-c1800>> (last accessed on 15 December 2024).

judgments had begun to ask.¹⁸³ These questions continue to resonate with law even today. This is the era of the rise of social law with emphasis on social movements and social legal structures.¹⁸⁴ The idea here is that the law must not give recognition to just the state and individuals as juridical persons and legal creatures, but everything in-between for the advancement of human society.¹⁸⁵ This is about the law promoting harmony of the whole and not rendered as a tool in the hands of capitalists, mainly for the exploitation of resources.¹⁸⁶ This social law orientation has a close resemblance to the well known communitarian and relational contexts of the African way of life.¹⁸⁷ An example of this communitarian and relational concept of life is the idea encapsulated in ‘ubuntu’, to wit, ‘I am, because we are.’¹⁸⁸ Along the lines of the role of law in the lives of communities, Kwame Nkrumah subscribes to the Maliki school of legal thought which postulates that there is the need to link law to the progress of the people.¹⁸⁹ Nkrumah believes in the ‘social solidarity’ thought of Ibn Khaldun who argues that the development of law and its institutions should involve and have the support of the people.¹⁹⁰ This means that African law must reflect the ideals of the people of Africa, and Ghanaian laws must reflect such African and Ghanaian norms.

¹⁸³ *ibid.*

¹⁸⁴ Duncan Kennedy, ‘The three globalisations of law’ available at <<https://duncankennedy.net/wp-content/uploads/2024/01/three-globalizations-of-law-and-legal-thought.pdf>> (last accessed 26 May 2025).

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ Metz (n 15).

¹⁸⁸ *ibid.*

¹⁸⁹ Kwame Nkrumah, Ghana (1962) 6 *Journal of African Law* 2, 103-12, 103.

¹⁹⁰ *ibid* at 103.

F. The Modern era (1800 AD to present)

An important feature of the modern era is the growth of democratic institutions and the rise of some great philosophers such as Friedrich Carl Von Savigny, Georg Wilhelm Friedrich Hegel, John Austin, John Stuart Mill and Jeremy Bentham. Utilitarianism as a mechanism for the fair distribution of resources was a major concept during this period.¹⁹¹ In this direction, Bentham conceptualises justice in the sense of achieving the greatest pleasure for the greatest number of people.¹⁹² As one of the main thought leaders of the principle of utility, Mill advocated for utilitarian ideas and procedural fairness in the search for just outcomes in the distribution of resources.¹⁹³ Mill builds on the ideas of Bentham, arguing that there are qualitative differences in pleasures and advocating for individual rights as essential ingredients to achieving overall happiness.¹⁹⁴ This is the era in which John Rawls emerged with his ‘A Theory of Justice’¹⁹⁵ and introduced his theory of ‘justice as fairness,’ which includes both distributive and procedural justice perspectives.¹⁹⁶ Modern legal systems increasingly emphasise procedural safeguards, such as the right to a fair trial, due process, and equal protection of the law. Justice in the modern era is also technological and multifaceted. It requires adapting traditional notions of justice to the new challenges and opportunities presented by technological advancements such as video conferencing facilities. In this modern era, the search for simplified ways of rendering civil

¹⁹¹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789).

¹⁹² *ibid.*

¹⁹³ John Stuart Mill, (1861) *Utilitarianism* in Clarence Morris (ed), University of Pennsylvania Press, Philadelphia, *The Great Legal Philosophers, selected readings in jurisprudence* at 364 (From Number 482A, Everman’s Library and reprinted by the permission of E.P. Dutton & Co).

¹⁹⁴ *ibid.*

¹⁹⁵ Rawls (n 7).

¹⁹⁶ *ibid.*

justice is very much pronounced in societies which are conscious of the need to deliver substantive justice to its people.

To sum up this section, justice and procedural justice have evolved from a focus on divine or royal mandates to a complex system of legal principles designed to ensure fairness, transparency, and accountability in decision-making processes. As part of the institutions of a democratic State with enormous powers, courts must continuously examine their ways of work in order to live up to their mandate. The mandate of the courts must be delivered within the context of the dictates of modern justice delivery, requiring substantial justice. With this background, this thesis now turns to the history of the development of civil procedure rules in Ghana. This may be traced back to pre-colonial and the colonial period of the Gold Coast to provide an insight into the role of the colonialism in laying the foundations of the current rules of civil procedure in Ghana.

V. HISTORICAL DEVELOPMENT OF CIVIL PROCEDURE IN GHANA

A. PRE-COLONIAL ERA CIVIL PROCEDURE

The history of CI 47 may be traced back to pre-colonial and the colonial period of the Gold Coast.¹⁹⁷ In the pre-colonial period, the procedure for the commencement of an action in the courts as organised mainly by the chiefs was the invocation of an oath.¹⁹⁸ That was enough to allow the plaintiff to render his or her plaint. This procedure was later codified in the Gold Coast (Colony) Native Courts Ordinance, 1944.¹⁹⁹ Today, one of the ways to commence a case at

¹⁹⁷ Atuguba (n 11).

¹⁹⁸ Gold Coast (Colony) Native Courts Ordinance, 1944.

¹⁹⁹ *ibid.*

Judicial Committee of the Traditional Councils is the invocation of the chief's oath.²⁰⁰ This is a simple mode of initiating an action for the resolution of a cause or matter affecting chieftaincy. There is no reason the resolution of other cases should not benefit from a simple procedure akin to what happens in the chieftaincy courts, but adapted to the specific peculiarities of each case. This will reduce excessive technicalities in the commencement of cases in the courts in Ghana.

B. FIRST COLONIAL PERIOD CIVIL PROCEDURE - SUPREME COURT ORDINANCE, 1876

The history of civil procedural justice in Ghana is closely tied to Ghana's colonial past and subsequent legal developments. During British colonial rule, the legal system in the Gold Coast, was influenced by British legal principles.²⁰¹ Some of what the British emphasised included relying on witnesses as opposed to trials by ordeal, and the introduction of institutions such as the legislative and executive councils to administer the Gold Coast. These institutions, including the introduction of a Supreme Court in 1876, laid the foundation for the development of civil procedural law in Ghana.²⁰² Following Ghana's independence in March 1957, the country retained many aspects of the British legal system, including its procedural laws. The civil procedural system in Ghana, like in many former British colonies, is based on common-law principles, which emphasise party control of litigation and the role of judges as impartial arbiters.

²⁰⁰ Regulation 4(1)(A) of the Chieftaincy (Proceedings and functions) (Traditional Councils) Regulations, 1972 (LI 798). These Regulations were made under Chieftaincy Act, 1971 (Act 370). Act 370 was repealed by Chieftaincy Act, 2008 (Act 759) via section 77(1) of Act 759. However, section 77(2)(f) continues LI 798 in force as a statutory instrument.

²⁰¹ Atuguba (n 11).

²⁰² Preamble to the Supreme Court Ordinance, No. 4 of 1876 (CAP 7).

This is unlike the civil law system of justice administration where the judge has an enhanced role as an investigator in search of the truth.

The first formal introduction of civil procedural law by the British to the Gold Coast came with the merger of the Gold Coast and Lagos into the Gold Coast Colony.²⁰³ Title III of the Laws of the Gold Coast dealt with the administration of justice in the Gold Coast. Chapter 7 of these laws dealt with the Supreme Court Ordinance, 1876.²⁰⁴ This Ordinance provided that the laws which could be deemed to be of general application and were in force in England as at 24th July, 1874 applied to the Gold Coast.²⁰⁵ 24th July, 1874 was the cut-off date for the applicability of these English laws to the Gold Coast because that was the date on which the Gold Coast has its own first legislature to make laws to govern its affairs. Hence, this provision was a transitional measure to ensure that there were no gaps in the application of the rules of this newly constituted Supreme Court for the Gold Coast. By this, where there were gaps in the Supreme Court Ordinance, the judges of the Supreme Court were at liberty to rely on relevant sources including the common law in England, the rules of equity and statutes developed to deal with issues in England but of a character that they could be deemed to be of general application. The Court was to carry out its mandate in line with the provisions of the Ordinance or any other laws made thereunder.²⁰⁶ Commencement of suits and proceedings in courts were regulated by the then subsisting Rules of Court, the Supreme Court Ordinance (No. 4), 1876 which contained 3

²⁰³ *ibid*.

²⁰⁴ This Supreme Court Ordinance was made on 31st March 1876. The long title of this Ordinance show that it is an Ordinance for the Constitution of a Supreme Court and for other purposes related to the administration of justice.

²⁰⁵ Supreme Court Ordinance, No. 4 of 1876 (CAP 7) section 14.

²⁰⁶ *ibid* section 15.

Schedules of the Rules of Court.²⁰⁷ These Rules of Court regulated the pleading, practice, and procedure of the Court, including all matters connected with the forms to be used.²⁰⁸

The first formal documentation of procedures for the commencement of suits in the Gold Coast Colony was contained in the Second Schedule to the Supreme Court Ordinance (No. 4) of 1876. Order II of this Ordinance provided for the form and commencement of suits. Cases were to be initiated by the issuance of a writ of summons, even without an application in writing.²⁰⁹ Some details such as the name and place of abode of the plaintiff were required to be endorsed on the writ of summons.²¹⁰ Apart from commencement of a case by a writ of summons, the rules also made room for other forms of commencement as the rules defined a suit to include cases initiated in accordance with modes under the Rules of Court.²¹¹ But even in this case, other types of cases were to be instituted in like manner as ordinary claims. For instance, in respect of probate or administration, suits were required to be instituted and carried on as nearly as may be in the like manner as suits in respect of ordinary claims.²¹² Proceedings before the court for divorce and matrimonial causes were to be commenced by a petition.²¹³ This petition was to be supported with an affidavit.²¹⁴ This mode of invoking the jurisdiction of the Courts in a divorce or

²⁰⁷ *ibid* section 85.

²⁰⁸ *ibid* section 86(2).

²⁰⁹ Supreme Court Ordinance (No. 4) of 1876, Order II(1).

²¹⁰ *ibid* Order II(2).

²¹¹ *ibid* section 2 (Interpretation Section).

²¹² *ibid* section 17.

²¹³ Supreme Court Ordinance (No. 4), 1876 (CAP 7), Order LI, Rule 1(1).

²¹⁴ *ibid* Order LI, Rule 1(2).

matrimonial cause by way of petition remains unchanged even under CI 47 after almost 150 years of its introduction to the Gold Coast.

C. SECOND COLONIAL PERIOD CIVIL PROCEDURE - THE RULES OF COURT (AMENDMENT) RULES, 1954

The Rules of Court (Amendment) Rules, 1954 and the Supreme Court (Civil Procedure) Rules, 1954 form the second effort of the colonialists to introduce procedural rules to the Gold Coast. These Rules were made through a Subsidiary Supplement to the Gold Coast Gazette Number 21 dated 30th March 1954.²¹⁵ The Rules were made on the authority of sections 106 and 107 of the Courts Ordinance, 1876. Essentially, the Rules of Court (Amendment) Rules, 1954 created these Rules of Court as a standalone subsidiary legislation for the first time for courts other than the Supreme Court. These Rules applied to Magistrates' Courts and Chief Commissioners' Courts.

D. THIRD COLONIAL PERIOD CIVIL PROCEDURE - THE HIGH COURT (CIVIL PROCEDURE) RULES, 1954

The Supreme Court (Civil Procedure) Rules were amended in 1975 through the High Court (Civil Procedure) Amendment Rules, 1975 (LI 1001) to make it the High Court (Civil Procedure) Rules, 1954 (LN 140A) through a legal notification (LN). This amendment was simply to change the title of the Rules from the Supreme Court (Civil Procedure) Rules, 1954 (LN 140A) to High Court (Civil Procedure) Rules, 1954. The Rules of Court Committee made this amendment under the Courts Act, 1971 (Act 372).²¹⁶ Under the LN 140A, suits were mainly to commence by writs of summons. There were other options for the invocation of the jurisdiction of the courts

²¹⁵ Subsidiary Legislation Supplement No. 15 to the Courts Ordinance (CAP 7).

²¹⁶ Courts Act, 1971 (Act 372), section 75.

including petitions and originating summons mainly for judicial review in the courts, and originating notice of motions. LN 140A which was the last colonial period Civil Procedure Rules for Ghana was operational until it was repealed in 2004, ushering in CI 47.

E. FIRST POST-COLONIAL CIVIL PROCEDURE RULES, CI 47

The first attempt at modernising Ghanaian civil procedure after independence was concluded in 2004 with the entry into force of CI 47. These Rules were made on 1st June 2004.²¹⁷ CI 47 was made pursuant to article 157 of the 1992 Constitution of Ghana. Litigants may commence action under CI 47 in various ways. This can be done through issuing writs of summons; through filing of applications; and through petitions. Often, a “faulty” commencement spells doom for the plaintiff or the applicant or the petitioner as the case may be. This is in spite of specific provisions in CI 47 to prevent faulty commencement from being treated as a ‘nullity’.²¹⁸ Order 81(1) of CI 47 provides that ...

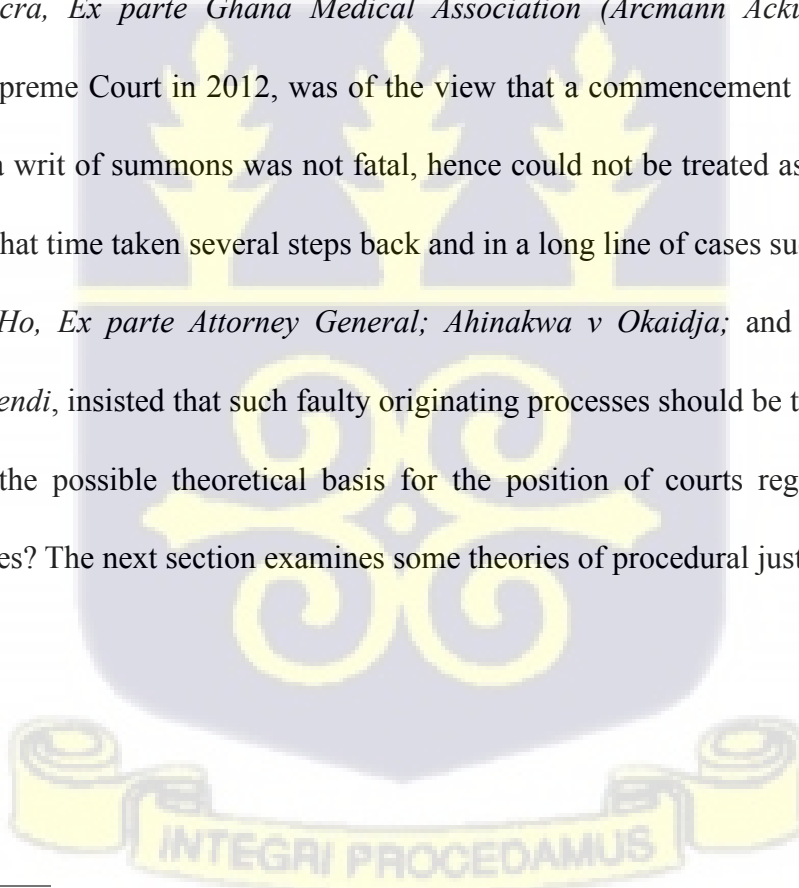
Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it.

In several cases, some which are analysed in subsequent chapters of this thesis, the Supreme Court was of the opinion that faulty commencement of cases goes to the jurisdiction of the courts

²¹⁷ A preambular statement to CI 47 provides this information.

²¹⁸ CI 47 Order 81(1).

and therefore amounts to a nullity.²¹⁹ What is problematic about such positions of the apex court is that the plain wording of Order 81 of CI 47 says in the beginning or *purporting* to begin, clearly sending the signal that it is possible to purport to begin, an acknowledgement that there could be a faulty beginning and that such a faulty attempt should not be treated as an irregularity. Even the most crude literalist would agree that the real intendment of Order 81 is to prevent occurrences such as the choice of faulty originating processes to be treated as nullity. The clear and literal words of Order 81 speak to this effect. Interestingly, the Courts have not always taken the path that faulty originating processes are a nullity. For instance, in the case *The Republic v. High Court, Accra, Ex parte Ghana Medical Association (Arcmann Ackumey - Interested Party)*,²²⁰ the Supreme Court in 2012, was of the view that a commencement of a human rights case by issuing a writ of summons was not fatal, hence could not be treated as a nullity. But the court, has since that time taken several steps back and in a long line of cases such as *the Republic v. High Court, Ho, Ex parte Attorney General; Ahinakwa v Okaidja*; and *Jonah v. Aggrey, Kulendi and Kulendi*, insisted that such faulty originating processes should be treated as a nullity. What could be the possible theoretical basis for the position of courts regarding procedural justice preferences? The next section examines some theories of procedural justice.



²¹⁹ Some of the cases include the *Republic v. High Court, Ho, Ex parte Attorney General* Motion No. J5/21/2021 dated 5th January 2021; *Ahinakwa v. Okaidja* [2011] 1 SCGLR 20, *Jonah v. Kulendi & Kulendi* [2013-2014] 1 SCGLR 272. These cases shall be specifically dealt with in the Chapter 5 of this thesis.

²²⁰ *The Republic v. High Court, Accra, Ex parte Ghana Medical Association (Arcmann Ackumey - Interested Party)* [2012] 2 SCGLR 768.

VI. THEORIES OF PROCEDURAL JUSTICE

A. The normative perspective of procedural justice

From a normative point of view, justice is an abstract goal and an ideal of the law from the perspective of the values or norms which inform the law.²²¹ Such values may include fairness, transparency and equality.²²² In the case of procedural rules in Ghana, a normative question can be, *what norms or values should inform what procedural justice should be understood to mean in the Ghanaian courts?* The normative perspective of justice distinguishes between distributive justice and procedural justice. Distributive justice concerns the fair allocation of burdens and benefits, and giving people what is due them (the end result). On the other hand, procedural justice concerns the way in which the allocation of the burdens and benefits takes place, thus, the way in which one gives people what is due them (the means). But both distributive and procedural justice are guided by ideas of fairness. Does the fairness of the end depend on the fairness of the means? The off the cuff answer is likely to be in the affirmative. How about vice versa? Does fairness of the *means* necessarily mean fairness of the *end*? The answer is that it depends on the norm at stake and under scrutiny. This is because fairness of the means may mean strict compliance with a legal process which may not necessarily produce a fair or an equitable result. The mere fact of complying with a legal process does not mean that the end result will be objectively equitable. An unethical use of discretion, for example can produce an unfair result though a fair process is used. Distributive justice is determined by substantive law, which comprises the substantive body of rules and values that govern how people live together in

²²¹ Hilke AM Grootelaar, *Interacting with Procedural Justice in Courts* at 4, PhD thesis (2018) ISBN 978-94-6182-876-7, available at <<https://dspace.library.uu.nl/handle/1874/364150>> (last accessed 31 December 2024).

²²² *ibid.*

society, how communities organise human behaviour, and how people should behave in society. On the other hand, procedural justice is determined by procedural law, thus, the rules that explain how to abide by substantive rules, and how to resolve disputes about the correct application of these rules in specific cases.

Two approaches dominate the normative perspective of procedural justice. One approach deals with realisation of economic, social, and cultural concerns of people.²²³ This deals with the second generation rights in international human rights discourse, which are mainly socioeconomic in nature. The other approach referred to as procedural fairness or procedural due process is considered as a constitutional right to a fair legal proceeding in any given context.²²⁴ This focuses on first generation rights, which highlights mainly civil and political rights. As already observed, procedural justice in Ghana has a constitutional and legislative basis. Hence, regarding fairness of court room procedures, the approach for the realisation of first generation rights strongly underpins civil procedural justice. Various constitutional provisions which mandate the meaningful participation of the citizenry in governance also give protection to the second generation rights perspective of procedural justice.

What criteria does the normative perspective use to assess whether a procedure is fair or not?

The legal principle of procedural fairness carries with it ideas such as *equity* and

²²³ See, for example, John Rawls, (1992). *A theory of Justice*. Oxford: Oxford University Press. (Original work published in 1971), Lawrence B Solum, (2004). *Procedural Justice*, *Southern California Law Review*, 78, 181-238 and Sandel, M. J. (2007). *Justice*. Oxford: Oxford University Press, for a comprehensive overview of multiple theories on justice.

²²⁴ R Hollander-Blumoff, *The psychology of procedural justice in the federal courts* (2011) *Hastings Law Journal* at 63, 127-178.

reasonableness.²²⁵ In other words, the question of what constitutes procedural justice, is strongly associated with values such as *legal certainty, equity, and equality* that are considered to be important in a legal system.²²⁶ From a normative perspective, what is just in the sense of a procedure cannot exclude reasonableness. This is reasonableness from an objective point of view, taking into account all the relevant factors there are to take into account.

Galligan created a framework in which the normative perspective of procedural justice and its relationship to these values or norms can be understood.²²⁷ In his view, the normative function of procedures is to give effect to *values* in legal procedures. Fair procedures are those procedures that lead to fair treatment according to authoritative legal standards.²²⁸ Such standards may include norms contained in constitutions, statutory provisions, customs and policies.²²⁹ The standards may also include international instruments which contain the relevant norms under discussion. This means that for legal procedures to be considered to be fair, they must serve to realise fair treatment of the persons participating in such procedures. For example, *audi et alteram partem* or hearing both sides, and allowing a person to be assisted by legal counsel can be considered to be fair only if one first knows the standards by which to make the assessment.²³⁰ These authoritative legal standards, in turn, are based on values which are considered to be

²²⁵ S Grossi, 'Procedural Due Process', (2017) 13 Seton Hall Circuit Review 155-202.

²²⁶ *ibid.*

²²⁷ DJ Galligan, *Due process and fair procedures: a study of administrative procedures* (1996) Oxford: Oxford University Press.

²²⁸ Grootelaar (n 221) at 5.

²²⁹ Galligan (n 227).

²³⁰ *ibid.*

important in the relevant legal environment.²³¹ These values may also be informed by ethical considerations. These values should form the basis of any meaningful and functional legal system as “the fountain from which all procedural rules and doctrines flourish.”²³² This should be the situation though societies differ in their normative perspective of procedural justice.²³³ Once these values are adopted or accepted, they must permeate the law making process and for the purposes of this thesis, and more importantly, the application of these norms in the adjudication processes.

Diverse societies and cultures mean that the authoritative legal standards of fair treatment, and the procedures considered most suitable for applying them, will be different.²³⁴ There are, however, normative procedural fairness principles that go beyond conceptions of one society. These fairness principles can be drawn from human rights statements, constitutions and case law, and concern principles such as impartiality, consistency, and the opportunity to be heard.²³⁵ Article 7 of the African Charter on Human and People’s Rights (‘The Banjul Charter’), for example, includes a number of universal values and safeguards which constitute fair

²³¹ Grootelaar (n 221) at 5.

²³² Grossi (n 225) at 156.

²³³ Grootelaar (n 221) at 5.

²³⁴ *ibid.*

²³⁵ Articles 6, 7, 8, 10 and 11 of the Universal Declaration of Human Rights (1948) guarantee the right to a fair trial. The Universal Declaration of Human Rights is available at <https://www.un.org/en/universal-declaration-human-rights/> (last accessed on 1 May 2024).

procedures.²³⁶ These safeguards do not only focus on the importance of a fair outcome but protect a number of values such as accessibility, legal certainty, and judicial independence, all of which are aspects of a fair procedure. Often, these are considered as universal norms and hence should be generally applicable to all societies irrespective of their peculiar circumstances. But these ‘universal’ norms would have originated from a particular community taking into account its peculiar customs before later becoming widely accepted and achieving a ‘universal’ status. Hence, the possibility that such norms may clash with some other norms in a particular society taking into account their own understanding, aspirations and experiences is real. The question then is how to resolve such conflicts when they do occur. The answer lies in understanding all these norms and applying them in a harmonious manner such that as much as possible, each norm is preserved without unnecessarily hindering the application of the other.²³⁷

As noted earlier, the major legal systems too differ in their normative perspectives of procedural justice. An example is the question of whether the adversarial nature of procedures in common law is to be preferred in terms of fairness over the more inquisitorial nature of procedures in the civil law system? From a normative stance, one could say that each of these two major traditions try to reach appropriate outcomes subject to the frailties of the adjudicating system. However, the

²³⁶ Article 7 of the Banjul Charter provides that ‘every individual shall have the right to have his cause heard’ by competent national organs. The individual shall also be presumed innocent, have the right to counsel of his choice and be tried within a reasonable time. Article 7(2) of the Banjul Charter protects persons against the use of *ex post facto* laws as the basis for criminal trials and convictions. Ghana is a State party to the Banjul Charter as it ratified the Charter on 24 January 1989. Ghana signed the Banjul Charter on 3 July 2004. The Banjul Charter is available at <<https://www.researchnewworld.com/search/search2.html?partid=rolbng&p=universal+declaration+of+human+rights&subid=004>> (last accessed on 1 May 2024).

²³⁷ The Supreme Court of Ghana has on some occasions relied on harmonious interpretations of different conflicting norms. See for example the case *Paul Uuter Derry v. Tiger Eye P.L., the Chief Justice and the Attorney General* (Writ No. J1/29/2015 (SC, 4 February 2016). See also the Irish Supreme Court case, *Attorney-General v. X and others* (1992) ILRM 401.

real debate when comparing these two legal system is not about which procedure will lead to more correct outcomes, but rather what values are relevant and undergird their operations? The norms at stake here are on one hand, an equal contest and autonomy of parties in adversarial procedures, as compared to the importance of centralised control and unrestricted investigation by the judge in inquisitorial procedures. The real difference between these two traditions then is which values prevail, and what standards of fair treatment derived from these values should govern the trial?²³⁸

In sum, procedural justice is essential to the law. Procedures are instrumental to standards of fair treatment. The values that are considered to be important in a certain jurisdiction provide the basis for the standards of fair treatment. This means that, from a normative point of view, procedures are fair to the extent that they lead to the proper application of the norms of fair treatment in a particular society. But whose perspective of fairness should be of concern to courts seeking to deliver procedural justice?

B. Perceived fairness

Justice is an idea that exists within the minds of individuals in the subjective sense of what is right or wrong, assessed against a certain backdrop.²³⁹ This means that fair procedures are those which are perceived to be fair from a cognitive point of view as well as how the persons involved

²³⁸ Galligan (n 227).

²³⁹ Grootelaar (n 221) at 7.

are affected by the actions under scrutiny.²⁴⁰ So, justice is also a perception. The term “perceived” refers to people’s subjective perceptions.²⁴¹

The literature on perceived procedural justice emerged from the pioneering research of John Thibaut, a professor of psychology, and Laurens Walker, a legal academic, both fascinated by the fundamental question: *what procedures are just?* These researchers were inspired to learn more about the common law and civil law systems of adjudication. They compared common law adversarial and civil law inquisitorial procedures. They exposed students to a mock adjudication in situations where they varied the opportunity the students had to make their preferred choices of lawyers.²⁴² The result is that the students in the adversarial group rated their procedure as fairer, and the verdict as more satisfactory, regardless of whether they had won or lost the case.²⁴³ According to Howieson, the satisfaction produced by the adversarial procedure whether the outcome (decision) was favourable or unfavourable to the disputant appears to be the most fascinating result of this research by Thibaut and Walker.²⁴⁴ Thibaut and Walker argued that the adversarial procedure, which limits third-party control and allows process control for the parties involved, constituted a fairer procedure.²⁴⁵ Thus, process control appeared to be one of the main criteria people use to assess the fairness of legal procedures. In the view of Howieson, a crucial

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² Thibaut et al (n 131) at 1287-1288.

²⁴³ *ibid* at 1287-1288.

²⁴⁴ Howieson (n 94) at 10.

²⁴⁵ Thibaut et al (n 131) at 1289.

part of the results of this research is the chance created for the parties to put forward their side of the argument.²⁴⁶ In other words, where the litigants have more control over the procedure, they are more likely to conclude that the process and the outcome were fair, regardless of the result. If the result of the study by Thibaut and Walker is extrapolated and applied to the real world, what this means is that participants in the common law adversarial system will more often return a verdict of fairness because the parties would take their destinies into their own hands and procure the best of services to prosecute their cases. But fairness and justice are such crucial public goods which should not be achieved on the altar of the strength of the parties as the key determinant. If this is the case, obviously, where majority of the population is economically poor, socially excluded and marginalised, they will be denied fairness and justice. Further, where ethical considerations are not fully integrated into the practice of law, full control of the procedure for adjudication by the parties in the common law accusatorial system will compel rational litigants to exploit the adjudicatory system to its possible disintegration. The moderating effect of the judge as an investigator in the civil law system should provide buffers against the possible excessive over exploitation by litigants and their lawyers in common law system.

The views of litigants on fairness of procedures are affected by the quality of the interpersonal treatment they receive.²⁴⁷ In addition, whether the authority properly complied with the formal procedure also affects perceptions of procedural fairness.²⁴⁸ As a result, people use interactional

²⁴⁶ *ibid.*

²⁴⁷ Tom R Tyler et al, *Beyond formal procedures: The interpersonal context of procedural justice* (1990) In J. S. Carroll (Ed.), *Applied social psychology and organizational settings* (pp. 77-98). Hillsdale, NJ: Erlbaum.

²⁴⁸ *ibid.*

considerations such as *respectful and polite treatment* as criteria to evaluate the fairness of procedures.²⁴⁹ This leads to discussion of a distinction between formal and informal perceived procedural justice.²⁵⁰

C. Formal and informal perceived procedural justice

The *formal component* of perceived procedural justice refers to how people perceive the formal procedures used in courtrooms as fair or not.²⁵¹ This should include the formal papers filed, the formal communication between parties, lawyers and the courts, and the rules which regulate these formal processes.²⁵² The *informal* component of perceived procedural justice on the other hand, concerns the good quality of treatment that litigants receive.²⁵³ Thus, politeness, courtesy, and client orientation form part of the informal aspects of procedural justice in the courtroom.²⁵⁴ From a perceived procedural justice perspective, procedures are fair when people perceive them as fair. This is about when people have the perception that they are treated fairly and that the procedures are implemented in a just manner.

²⁴⁹ RJ Bies, DL Shapiro, 'Interactional fairness judgments: The influence of causal accounts' (1987) *Social Justice Research*, 1, 199-218.

²⁵⁰ R Hollander-Blumoff, & Tom R Tyler, (2008) 'Procedural justice in negotiation: Procedural fairness, outcome acceptance, and integrative potential, 33 *Law & Social Inquiry*, 473-500.

²⁵¹ Grootelaar (n 221) at 8.

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ *ibid.*

Procedural justice studies frequently examine how justice receivers perceive the way they have been treated.²⁵⁵ However, there is only limited knowledge on how justice actors perceive the way they treat justice receivers.²⁵⁶ In other words, how judges perceive the fairness of their own adjudication and treatment of litigants as fair is not often examined. Even less studied is how the rules which are to facilitate procedural justice stifle the goals of the rules.

But what factors affect the meaning of procedural justice for different courtroom actors such as litigants, judges and court administrative staff? Grootelaar has found that the views people hold about processes may be affected by what they have at stake when they go to court.²⁵⁷ This means that when end results are considered to be very crucial, litigants most likely give more attention to how fairly they are treated.²⁵⁸ In other words, the more people have at stake, the more they may care about the way they are treated by court officials. This same reasoning holds true for judges. Thus, when judges consider outcomes as crucial for litigants, judges are more likely to pay more attention to how fair they treat these litigants.²⁵⁹ It was argued that how important litigants perceive their outcomes to be (perceived outcome importance) is related to how important judges perceive litigants' outcomes to be (proactive outcome importance).²⁶⁰ But this conclusion is likely to be fraught with some difficulties. First, the importance that a party

²⁵⁵ *ibid.*

²⁵⁶ *ibid* at 90.

²⁵⁷ *ibid.*

²⁵⁸ Tom R. Tyler, What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures (1988) *Law & Society Review* 22, 103-135.

²⁵⁹ Grootelaar (n 221) at 88.

²⁶⁰ *ibid.*

attaches to the outcome of a case is likely to be dependent on some values the litigant cares about. This is about the monetary and non-monetary significance of the case to the litigant. Hence, in a socially diverse and economically disproportionate environment, the coincidence of the *perceived outcome importance* and the *proactive outcome importance* cannot always hold true. Second, a judge's professional training puts him or her in a peculiar situation to assess the importance of the case independent of how important the parties perceive the outcome to be. The lack of knowledge, skills and general appreciation of what is at stake may produce a result such that an important case from the perspective of the judge may mean little to the litigant. For instance, in the common law system of practice, a judge may consider a case as important because of its precedent setting value. The litigant may care less and not consider the case as that crucial. Thirdly, what is the justification for one to receive less *proactive procedural justice* because of less *perceived outcome importance*? Where human rights norms guide the application of the rules of procedure in the courtroom, such a conclusion should constantly be under scrutiny. The inter-relatedness and the indivisibility of human rights demonstrate that such discordance should not occur in a well functioning court system. A case should receive an adequate attention and be disposed efficiently whether there is high *perceived outcome importance* or not.

Some procedural justice studies contain concrete recommendations for judges on how to promote procedural justice components such as *voice*, *respect*, and *neutrality*, suggesting that those are the components judges should focus on during court hearing.²⁶¹ It remains unclear, however,

²⁶¹ Tyler (n 51) at 44, 26-31.

whether these components are indeed always perceived as the most important principles by litigants. As pointed out by Grootelaar, it has been found that civil litigants prioritise *decision quality*, *bias*, and *correctability* when compared to citizens dealing with the police.²⁶² Furthermore, Bennett-Howard and Tyler, who examined situational variations in the importance attached to procedural justice criteria, found that ‘bias suppression, accuracy, consistency, and representation’ are less important in informal situations than in formal situations, such as courtroom hearings.²⁶³ These findings suggest that the question of what is the most important procedural fairness component might be context related and dependent.

The importance of procedural justice components not only depends on the courtroom-specific context of each case, but also on the perspective of who is evaluating procedural justice. For example, one can distinguish between the quality of the verdict of the judge (consisting of elements such as neutrality and consistency of rule application on one hand, and quality of interpersonal treatment (consisting of aspects such as politeness, and dignity).²⁶⁴ This distinction is important for courtroom litigation. Naturally, the professional legal background of judges may make it likely for judges to attach more importance to components such as impartiality, and consistency in the application of the law. Informal aspects such as politeness, client orientation and courtesy towards litigants will likely receive less attention. Why is this the case? As judges need to be in control of proceedings in the court room, they may sometimes appear abrasive,

²⁶² Tyler (n 258) at 22, 103-135.

²⁶³ E Barrett-Howard & Tom R Tyler (1986). Procedural justice as a criterion in allocation decisions. *Journal of Personality and Social Psychology*, 50, 296-304.

²⁶⁴ Tom R Tyler, PE Callahan., & Frost J, ‘Armed, and dangerous (?): Motivating rule adherence among agents of social control’ (2007) *Law & Society Review*, 41, 457-492.

impolite and lacking courtesy. From the perspective of the judge, this may be interpreted as being firm to ensure order and smooth progress of proceedings. The actions and in-actions of the judge ultimately affect informal aspects of procedural justice in the courtroom.

D. Control theories - process and decision controls

As observed earlier, the extent of control that a party exercises over the adjudication processes in the adversarial system is one of the main reasons for such parties to conclude that the procedures are fair.²⁶⁵ *Decision* or *outcome* control means ‘the degree to which any one of the participants may unilaterally determine the outcome of the dispute’.²⁶⁶ The participants include the third party adjudicator. *Process control* is the extent of the opportunity to participate in processes to identify and select ‘information that will constitute the basis for resolving the dispute.’²⁶⁷ These controls can be achieved through hearing the parties. According to Folger, this creates a *voice* effect.²⁶⁸ This means providing a hearing opportunity has a value in and of itself.²⁶⁹ It does not really matter for a sense of procedural justice if a hearing opportunity is created but does not end up influencing the outcome. But this fairness through the decision or process controls can only materialise if the parties are able to invoke the jurisdiction of the courts in the first place. Control here is about choices to make in the invocation of the jurisdiction of the courts, thus, the choice

²⁶⁵ According to Thibaut and Walker in their research in 1975, the reaction of litigants to the fairness of a procedure is associated with the distribution of control between the participants and the third party “adjudicator.” See Howieson (n 94) at 11.

²⁶⁶ Thibaut (n 132) at 546.

²⁶⁷ *ibid.*

²⁶⁸ R Folger, Distributive and procedural justice: Combined impact of ‘voice’ and improvement on experienced inequity, (1977) *Journal of Personality and Social Psychology* 35(2), 108-119.

²⁶⁹ *ibid.*

to issue a writ, file a petition or make an application to the courts. So, when one takes away that control from the parties, it makes it possible for them to have entry and then exercise control over the rest of the process. In other words, the parties can originate with zero control at the time of commencement and end up with absolute control at the time of decision making in the case.

In the research that followed the work of Thibaut and Walker, Leventhal identified six additional factors for procedural justice.²⁷⁰ According to Leventhal, procedures are considered as fair if they are implemented, taking into account *consistency*, *bias suppression*, and *accuracy of information*. Other factors are *correctability*, *representativeness* and *ethicality*.²⁷¹ There must be consistency in the application of civil procedure across persons and time in order to meet the *consistency* requirement. The requirements expect that the decision maker will suppress his or her own biases (*bias suppression*) in the course of decision making on the case. In order to achieve procedural fairness, full and accurate information must be presented to the parties and all actors concerned (accuracy of information).²⁷² Regarding *correctability*, some form of appeal procedure must be incorporated into the process that can make it possible to correct a bad decision.²⁷³ This requirement reminds all that there is nothing full proof about court room procedures and that it is entirely possible for judges, no matter how well trained, and how good their intentions may be, to get their decisions wrong. Correctability is key as a remedial measure. *Representativeness*

²⁷⁰ Gerard S Leventhal, 'What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships', in Kenneth J. Gergen, Martin S. Greenberg and Richard H. Willis (eds), *Social Exchange: Advances in Theory and Research* (1st edn, Plenum Press 1980).

²⁷¹ *ibid.*

²⁷² *ibid.*

²⁷³ *ibid.*

means that the process must reflect the basic concerns, values and outlook of important subgroups in the population of individuals affected or to be affected by the process.²⁷⁴ This means that implementation must be done with the interests of all concerned parties represented.²⁷⁵ Finally, ethicality requires that the process must conform to ethical and moral standards.²⁷⁶ This is crucial as good ethical behaviour will motivate practitioners and all others to act appropriately in the circumstances even when no one is watching over their shoulders.

E. Reactive and proactive procedural justice

As noted earlier, often, the priority area for procedural justice legal scholars and researchers is the perspectives of the recipients of justice services on how they feel about the processes leading to the outcomes of their cases. This means that such researchers take the perspectives of citizens on procedural justice as their departure point for their enquiries. The views of litigants and other court service users are a reaction to the work of judges. Hence, this is a *reactive* concept of procedural justice.²⁷⁷ But an interesting way to obtain another perspective on the work of judges is to have judges make a proactive reflection on the procedural justice aspects of their work.²⁷⁸ This can be done prior to, and along the way as the judges take steps in the adjudication process.

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ Grootelaar (n 221) at 7.

²⁷⁸ According to Grootelaar, Greenberg was the first to make a distinction between “reactive” and “proactive” theories of distributive and procedural justice in his conceptual paper on taxonomies of organisational justice theories. See Grootelaar (n 221) at 7 citing J. Greenberg, (1987), *A taxonomy of organizational justice theories*, *Academy of Management Review*, 12, 9-22.

This is a *proactive* concept of procedural justice.²⁷⁹ These two different conceptions of procedural justice were identified by Grootelaar when she conducted a study where Dutch Judges and litigants.²⁸⁰ Grootelaar found that Judges held different views on the importance they attached outcomes of litigation, and how fairly they perceived their own behaviour towards litigants. She also found that the perspectives of judges regarding the procedural justice angles of their cases is contextually dependent.²⁸¹ For instance, in the courtroom context, assessment of the *neutrality* of the judge and the *consistency of rule application* may be considered as more important factors of procedural justice to assess than voice and respect. Voice and respect may be more important in dealing with procedural justice when viewed from the perspective of criminal procedural justice. This conversation of how judges view their own actions from a procedural justice perspective underscores the importance of the *reactive* procedural and *proactive* forms of procedural justice.

F. Procedural justice as social justice

Dispute resolution must serve a social justice goal. If not, cooperation for the protection of lives and property rights of each and every member of society will be lacking. Hence, an appropriate question is whether the State ‘institutions are serving the goal of social justice?’²⁸² These questions and more about social justice are what attracted legal philosophers like John Rawls to

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² Nancy A Welsh, ‘Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories’ (2004) 54 (1) *Journal of Legal Education* 49 at 54.

develop his theories around justice. In his book, *A Theory of Justice*, John Rawls distinguished between three ideas of procedural justice. These are ‘perfect procedural justice, imperfect procedural justice, and pure procedural justice.’²⁸³ According to Rawls, in order to have *perfect procedural justice*, two attributes must be identified.²⁸⁴ There is an independent way to assess what a fair outcome looks like, and a process that ensures that fair outcome will be achieved.²⁸⁵ For imperfect procedural justice, although the first criterion of perfect procedural justice exists, there is no identified means by which the fair result will be achieved.²⁸⁶ For pure procedural justice, no criterion is identified to assess ‘what constitutes a just outcome other than the procedure itself.’²⁸⁷

H. Instrumental perspective of procedural justice

What roles do civil procedural rules play in the value that people place on procedural rules? From an instrumental perspective of procedural fairness, people value seeing justice being done because it increases the probability of the feeling of a fair outcome.²⁸⁸ In other words, procedural fairness can lead people to feel that the outcome of the litigation is fair as well. Procedural justice can be an instrument to an end. Procedural justice can also be an end in itself. It has been argued that one way by which people try to influence cases when they do not have power to alter the

²⁸³ Rawls (n 7) at 74-75

²⁸⁴ *ibid* at 74.

²⁸⁵ *ibid*.

²⁸⁶ *ibid*.

²⁸⁷ *ibid* at 75.

²⁸⁸ Howieson (n 94) at 14.

decision is to influence the process.²⁸⁹ Litigants take the view that if they take control of the process, they can use same as an instrument for their desired results. This is the *instrumental* perspective of procedural justice.²⁹⁰ Hence, from this perspective, people are not primarily concerned with the end result of a decision but with the procedure as an instrument to achieve that end result. The strict technical rules associated with litigation, the high costs and the prolonged delay in deciding cases make adjudication, and access to justice virtually inaccessible to many ordinary citizens in Ghana as an instrument to achieve some ends. Some citizens question the legitimacy of the dominance of lawyers and judges over the litigation process and their control over the norms and techniques used for decision making, quite often to the exclusion of the ordinary citizen. It is this popular dissatisfaction with the courts that partly accounts for much of the excitement for ‘alternative’ dispute resolution being employed to deal with rising cost and delay in the resolution of court cases. Rawls’s justice as fairness can explain this situation in the sense that it could be argued that alternative dispute resolution advocates perceive the courts as failing to operate in a manner that assures all citizens the opportunity to exercise their basic liberties, particularly the right to fair trial and the right to free expression, which are essential for the achievement of political and social justice. This is even more the case when the courts are operating so within the context of a large segment of the Ghanaian population being illiterate or not having had the benefit of high levels of education. To compound this, in Ghana as may be the case elsewhere, generally, illiterates do have poor disposal income to deal with procedural extravagance. The fact that ADR mechanisms have

²⁸⁹ *ibid* at 13.

²⁹⁰ Lind, & Tyler (n 131).

attracted the attention of parliament in Ghana, hence is backed by statute and is regularly forcefully advocated by the courts provide enough evidence that traditional court room work leaves much to desire as far as procedural justice is concerned.

Thibaut and Walker have built on Rawls's Justice as Fairness theory in their work Procedural Justice as Fairness. In Thibaut and Walker's hypothesis, people value process-control as an instrument to obtain their desired outcomes.²⁹¹ But individuals are also concerned with procedural elements which are not linked to the outcome of their dispute resolution.²⁹² Thus, Lind and others demonstrated that hearing what people have to say after the decision has already been made, still enhances procedural fairness.²⁹³ This supports the hypothesis that a fair procedure is valued for the message it conveys to the persons involved, for example, that their views are worthy of being heard.²⁹⁴ Hence, some refer to these as 'relational models' of procedural justice.²⁹⁵ Folger advocates a 'fairness-as-virtue' model.²⁹⁶ For this model, there is an intrinsic value in fairness.²⁹⁷ The focus here is the preservation of human dignity.²⁹⁸ Fairness qua fairness must be valued.

²⁹¹ Thibaut and Walker (n 54) at 541.

²⁹² *ibid.*

²⁹³ *ibid.*

²⁹⁴ *ibid.*

²⁹⁵ *ibid.*

²⁹⁶ Robert Folger, 'Fairness as Moral Virtue' in Marshall Schminke (ed), *Managerial Ethics Moral Management of People and Processes* (Psychology Press 1998) 17 and 32.

²⁹⁷ *ibid.*

²⁹⁸ Van de Graff (n 63) at 15 citing Robert Folger, 'Fairness as Moral Virtue' in Marshall Schminke (ed), *Managerial Ethics Moral Management of People and Processes* (Psychology Press 1998) 17 and 32.

I. Procedural justice as the search for “justice or truth”

The search for the most effective conflict resolution procedure requires identification of the primary objective in resolving different kinds of disputes. John Thibaut and Laurens Walker,²⁹⁹ in ‘A Theory of Procedure’, developed a general theory of procedure for attaining the objectives of ‘truth’ and ‘justice’ in situations of cognitive conflict, conflict of interest, and in ‘mixed’ disputes.³⁰⁰ Thibaut and Walker observed that the early clarity one has to have in stating a theory of procedure is to understand that there is a difference between the search for ‘truth’ and ‘justice’ in dispute resolution.³⁰¹ They believe the difference in the dispute resolution objective of finding ‘truth’ as opposed to finding ‘justice’ is as a result of differences in the type of conflict under scrutiny.³⁰² One way is to resolve the conflict through an autocratic process. In this context, an autocratic procedure means the person in charge of the process having heavy or absolute control over the process.³⁰³ They argued that in almost all situations, the subject matter of the dispute determines which of these two aims one can pursue. On one hand, the nexus between the conflicting parties may be such that a resolution of the dispute will benefit all, while the reverse is also true. Thus, an unfavourable outcome will similarly reduce their benefits. In a scenario like this, the interests of the parties are said to be coincident.³⁰⁴ The dispute is referred to as a ‘cognitive’ conflict.³⁰⁵ A cognitive conflict here means ‘a dispute as to which resolution is to the

²⁹⁹ Thibaut and Walker (n 54) at 541.

³⁰⁰ *ibid.*

³⁰¹ *ibid.*

³⁰² *ibid* at 541-542. Emphasis mine.

³⁰³ *ibid.*

³⁰⁴ *ibid.*

³⁰⁵ *ibid.*

common advantage' of all persons involved.³⁰⁶ In a cognitive conflict, the aim of the disputants is to uncover that commonly shared solution, the preference of everyone. Hence, these kinds of disputes are not very difficult to deal with, particularly where no party has an extreme attachment to a certain viewpoint. In this situation, it is likely that a procedure is not that much required as there is likely to be an accord immediately some answer to the problem is proposed, and even more so if the parties have a certain scale to assess the answer to be put forward. A scientific enquiry is an example of cognitive conflicts in a setting of common interest.³⁰⁷ In a cognitive conflict, the 'ethic of disinterestedness' of natural scientists suppresses their conflict, hence their conflicts are purely 'cognitive'.³⁰⁸ This helps natural scientists to pursue the truth.³⁰⁹ On the other extreme end is a 'maximum conflict of interest disputes'.³¹⁰ In a situation of maximum conflict of interest, the positions of the parties are not aligned as any proposed solution will increase the benefit of one side to the detriment of the other party.³¹¹ Here the greatest challenge to the proposed solution is how efficient the end result will be perceived as no solution will eventually be appreciated to be 'correct' by the parties. Here, looking for the truth cannot be the aim of this process. From the days of the great philosophers such as Aristotle, the aim of solving a conflict of this type has been called the search for 'justice'. The focus here is the end result of the process. It is distributive. If one loses sight of the procedure to achieve this distributive justice

³⁰⁶ *ibid.*

³⁰⁷ *ibid* at 543.

³⁰⁸ *ibid.*

³⁰⁹ *ibid.*

³¹⁰ *ibid* at 544.

³¹¹ *ibid.*

within the context of maximum conflict of interest, then the shortcomings of the procedure may shut the door on the possibility of achieving the desired distributive justice. The solution will be to consider procedural justice as inherently distributive in situations of maximum conflict of interest. Civil procedure aims mostly to find solutions to situations of maximum conflict of interest. In the view of Thibaut and Walker, a process developed to obtain distributive justice will work most efficiently if the control of the process is left in the hands of the parties in conflict.³¹² The authors refer to this as the ‘optimum control relationship’ as in their view the litigants are the most competent to make choices of how to proceed.³¹³ This view does not seem to take into account the fact that the process control referred to may be completely defined or stipulated by the law and hence, out of the control of the parties. What is more is that the law may outline multiple of such processes to choose from and a faulty choice will spell doom for the ultimate distributive outcome. So, how can this process control be fair when the parties are put to the election of one or the other which may end up being declared inappropriate thereby defeating the ultimate distributive outcome?

J. Relations between procedural and distributive justice

In 1979, Laurens Walker, E. Allan Lind, and John Thibaut conducted research on the relationship between procedural justice and distributive justice.³¹⁴ Their major concern was how people perceived fairness in legal dispute resolution. The authors wanted to identify factors and

³¹² *ibid.*

³¹³ *ibid.*

³¹⁴ Laurens Walker, E. Allan Lind, and John Thibaut, Relations between procedural justice and distributive justice, (1979) 65(8) Virginia Law Review 1401 at 1402.

processes that contribute to persons who have experienced the court system to conclude that the process was fundamentally fair for the parties.³¹⁵ The authors concluded that two types of fairness may be observed - procedural justice and distributive justice.³¹⁶ The question is how does the belief that a trial procedure is fair affect the belief that the trial outcome is fair? This question is even more poignant when the process terminates at the commencement stage because one party is deemed to have chosen the wrong procedure to invoke the jurisdiction of the courts.

For Laurens Walker, E. Allan Lind, and John Thibaut, procedural fairness means the belief that the techniques used to resolve a dispute are fair and satisfying in themselves. In other words, the actors believe that the trial of the dispute went according to “due process.” In the case of procedural justice, the authors were of the view that adversarial procedures are believed to promote consideration of the particular situations and circumstances of disputing parties, and that this is viewed as a basic requirement of maximally fair dispute resolutions.³¹⁷ The essence of this is that when the parties are in greater control of the procedure, they are able to put across their perspectives of the matter with the chance to present their perspectives fairly distributed between the parties. On the other hand, distributive justice means the final result of the resolution is fair.³¹⁸ The focus is on the individual's belief that the outcome of a dispute is fair and equitable, and that the outcome is deserved. Thibaut and Walker noted that even a favourable outcome may

³¹⁵ *ibid.*

³¹⁶ *ibid.*

³¹⁷ Thibaut and Walker (n 54) at 541.

³¹⁸ Laurens Walker, E. Allan Lind, and John Thibaut, Relations between procedural justice and distributive justice, (1979) 65(8) *Virginia Law Review* 1401 at 1402.

not be considered fair if the understanding is that the individual is entitled to more or less result in relation to the effort put into the realisation of a deal which brought about the conflict.³¹⁹ Walker and Thibaut then went on to examine the question, *how does the belief that a trial procedure is fair affect the belief that the trial outcome is fair?* This is an examination of the relationship between procedural justice and distributive justice. The authors identified three possible outcomes of the relationship between procedural justice and distributive justice. In the first instance, perceptions of *procedural justice* may influence perceptions of *distributive justice*. With this assumption, the expectation is that if procedural justice is improved, it will translate into improvement for distributive justice. Here, it is understood that it is the desired procedure which gives one the desired outcomes. The second possibility is that perceptions of distributive justice may influence perceptions of procedural justice. The point which underlies this possibility is that the ‘end justifies the means’ in the sense that if the outcomes are perceived as fair, then the procedure used in arriving at the outcome is also perceived as fair. The third and final possibility identified by the authors is the link between perceptions of procedural and distributive justice is one of no relationship whatsoever. With this third assumption, there is no necessity that beliefs concerning either type of justice, *procedural* and *distributive* affect beliefs about the other. Whether or not these assumptions play out depends on the perspective of the person evaluating the fairness of the procedures and the outcomes. Three different non-professional perspectives were identified and relied upon. These are direct participants in the litigation who are affected by the results, indirect participants such as participants in class actions who are affected by the results and non-participants such as members of the public. The results regarding the three

³¹⁹ *ibid.*

possibilities (that perceptions of procedural justice influence perceptions of distributive justice; that perceptions of distributive justice influence perceptions of procedural justice. This confirms that a good procedure for the resolution of civil cases is likely to lead to a high perception on the part of the litigants and their lawyers that the outcome of the litigation is fair. When the procedure is not fair and causes undue delay and excessive cost, the litigant can be compelled by the circumstances to settle the case on terms considered to be unfair.³²⁰ The reverse is not necessarily true. This means that a perception of a fair outcome does not necessarily lead to a perception of a fair process. In other words, the end does not necessarily justify the means. Then, for those who are not participants in the dispute resolution process, there is no relation between procedural justice and distributive justice.

VI. CONCLUSION

This literature review discusses ideas of procedural justice, commencing with how the attributes of the two major legal systems - the common law and the civil law contribute to shaping ideas of procedural justice, with the common law litigants generally feeling they have been treated more fairly because of the role the litigation team plays in arriving at the outcome of the litigation. Further, the four principles of procedural justice - voice, trust, neutrality and respect - also provide a lens from which fairness of court procedures can be assessed. Normative theories provide an avenue to understand the values which underlie ideas of procedural justice. Other theories including the instrumental perspective, control, formal and informal, the proactive and reactive perspectives of procedural justice also reveal peculiar learnings of procedural justice and

³²⁰ AAS Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice', (June 1995) 22(2) *Journal of Law and Society* 155 at 170.

can help to explain litigants' perceptions of the fairness of court procedure. As indicated earlier, the overarching objective of this thesis is to develop a theory which adequately covers the fair development and or application of procedural rules. This theory must also take into account the need for these rules to be conceptually de-colonised, and to ultimately promote relationality. The focus of this chapter has been procedural justice theories. Hence, the next chapter discusses ideas of colonisation and relationality of procedural justice as critical components of the theoretical framework for this thesis.



CHAPTER 3 : MART JUSTICE - A THEORETICAL FRAMEWORK

I. AN INTRODUCTION TO THE THEORETICAL FRAMEWORK

In chapter 2 of this thesis, theories of procedural justice including the normative, instrumental, proactive and reactive, formal and informal perspectives which provide the lenses through which procedural justice can be explained were discussed. As previously observed, the overarching objective of this thesis is to develop a theory which relies on an appropriate standpoint to apply procedural rules in order to achieve fairness. Whatever result this standpoint produces must be divested off its colonial attributes, if any, and ultimately aim at promoting relationality. The question is, what are the contours of this theoretical framework which can guide the application of the rules of procedure so as to ensure procedural fairness? This chapter responds to this question and discusses the theoretical framework for this research on procedural justice in Ghana. The chapter introduces and explores the *Modified Afro-Communitarian Relational Theory* (MART) of justice as the theoretical vehicle through which concerns of procedural rules can be appropriately understood, contextualised and applied. The chapter concludes that if the application of procedural rules by the courts in Ghana were to be guided by MART Justice as a theory, courtroom procedures will more frequently be fair and procedural justice often realised.

II. THE CONCEPT OF MART JUSTICE

MART Justice is a theory of procedural rules which aims to ensure that rules are applied from the original position as the appropriate standpoint, de-colonises the rule decided at the original position, and aims at promoting relationality. MART Justice is a hybridised theory which acknowledges the rule of adjudication as one of the secondary rules essential for the efficiency of the legal system). MART Justice borrows from John Rawls (justice as fairness theory, with

particular reference to the ‘original position’ and decision-making from behind the veil of ignorance),³²¹ Kwasi Wiredu (conceptual de-colonisation),³²² Kwame Gyekye (moderate communitarianism)³²³ and Thaddeus Metz (afro-communitarianism and the relational theory of social justice).³²⁴ It is acknowledged that while some of these theoretical ideas may have been developed in libertarian contexts (for example, Rawls original position and the choice of principles from behind the veil of ignorance), others (for instance, Gyekye’s moderate communitarianism) are more contextualised and shaped by indigenous African traditional values. But this apparent tension is the essence of this thesis - to borrow ideas, principles and concepts from different geo-political contexts, marry them and produce workable solutions for the courts in Ghana. Hence, MART justice takes into account any potential tensions and or contradictions that the contexts of the theories from which MART is developed may present.

III. THE BUILDING BLOCKS OF MART JUSTICE

A. THE ‘ORDER’ OF MART JUSTICE

The key building blocks of MART Justice as a theoretical framework as discussed below present an acronym (‘ORDER’) from its constituent parts. The ‘ORDER’ is taken from the *Original*

³²¹ Rawls (n 7).

³²² Kwasi Wiredu, ‘Conceptual Decolonization as an Imperative in Contemporary African Philosophy: Some Personal Reflections’, 2002 *Rue Descartes* 36 (2): 53 - 64. See also Kwasi Wiredu, ‘Introduction: African Philosophy in Our Time’ in K. Wiredu (ed.), *A Companion to African Philosophy*, Malden, MA: Wiley-Blackwell, 2004) 1-27 at 15.

³²³ Kwame Gyekye, *Tradition and Modernity; Philosophical reflections on the African experience* (Oxford University Press, 1997) at 40 available at <<https://philarchive.org/rec/GYETAM>> (last accessed 14 July 2025), ‘An Essay on African Philosophical Thought (Cambridge University Press,1987), Co-editor ‘Person and Community; Ghanaian Philosophical Studies 1 (CRVP, Washington D.C 1992) ‘ and ‘ Beyond Cultures; Perceiving a Common Humanity (CRVP & GAAS, 2004).

³²⁴ Metz (n 15).

position, *De-colonisation* and *Relationality*, thus OR+DE+R. The idea is to deploy this ‘ORDER’ of MART Justice to assess procedural justice in the courts, with a focus on originating processes. As such, each of the three concepts which form the building blocks of MART Justice are discussed below.

B. MART JUSTICE AND THE ORIGINAL POSITION

A critical part of the building blocks of MART justice is how to apply principles from the ‘original position.’ The original position is an essential part of Rawls’s theory of justice, particularly, ‘justice as fairness.’ Rawls’s theory of justice is anchored on what he calls the ‘original position.’ Rawls wrote his Book the ‘THE THEORY OF JUSTICE’ in 1971. In this book, Rawls proposed the ‘original position’ as the most ideal viewpoint from which to determine what is just or fair.³²⁵ He was of the view that it was possible to successfully deal with the feeling of tension between freedom and equality and put both together into a theory he called ‘justice as fairness’.³²⁶

Rawls's relied on a thought experiment to develop his theory based on the original position. In this thought experiment, participants are required to make a choice of principles to govern their society in a given circumstance that is considered fair. That circumstance is from behind a veil of ignorance. Thus, the participants will be stripped of their personal attributes - age, gender, race, nationality, etc and will be unaware of when and how the rules or principles they choose will be

³²⁵ Rawls (n 7).

³²⁶ *ibid*.

applied to their community, including themselves. Whatever decision the participants in the experiment come to is deemed as ‘just’ and hence ‘fair.’³²⁷

Rawls contends that the ‘original position’ should produce two principles: the ‘liberty principle’ and the ‘equality principle.’ The liberty principle will establish equal basic liberties for each member of the community, while the equality principle, would ensure that each person is entitled to rights and freedoms that cover real options for all.³²⁸ According to Rawls, this will make it possible for persons whose talents are more or less the same to be exposed to almost the same opportunities and challenges. At the same time, differences in what persons are entitled to and can secure would be resolved in such a manner that it will be to ‘the benefit of the least advantaged (the difference principle)’.³²⁹ These principles provide philosophical and contextual basis for the development and application of the rules against discrimination in the 1992 Constitution of Ghana. How does the Rawlsian theory of justice ensure fairness and procedural justice in Ghana? This is the background against which the secondary rules of adjudication at the High Court in Ghana, CI 47 are examined.

In Rawls’s justice as fairness theory, the application of the rules must be fair. The application is fair when the will to dominate, arrogance and intimidation are taken away from the stronger party in the distribution of resources.³³⁰ This thesis therefore borrows from Rawl’s justice as

³²⁷ *ibid* at 11.

³²⁸ *ibid* at 53.

³²⁹ *ibid*.

³³⁰ John Rawls, *Justice as Fairness A Re-Statement*, (Erin Kelly ed, The Belknap Press of Harvard University Press, Cambridge) 2001 at 131.

fairness theory, particularly, relying on the ‘original position’ theory in the determination of fair procedural rules. The idea is to subject the application of procedural rules of Ghana as reflected in CI 47 to critical analysis relying also on Hart’s distinctive contribution of secondary rules shaping social life under law.³³¹ Can law be developed and applied from the ‘original position’? The answer to this question will be evident when one runs through all the different stages of the original position.

C. STAGES OF THE ORIGINAL POSITION

In John Rawls’s theory of ‘justice as fairness’, there are four stages where the principles to govern the society in his thought experiment may be developed.³³² Throughout these stages, the participants in the experiment would be operating from behind the veil of ignorance.³³³ Stage one is considered to be the *social theory stage*,³³⁴ where participants in the thought experiment may be exposed to general social theory which may help determine the applicable principles for their intended society. This stage is abstract, idealistic and possibly utopian. But the social theories available to the participants can help decide whether the participants aim for a society which is more individualistic as opposed to being communitarian or even relational. Do the participants aim for a liberal democratic state or a state in which the power gap or relations between the governed and the government is wide and unrestrained. Stage two is the *Constitution* stage where the relevant principles to inform the constitutional order that the participants aspire to may be

³³¹ Robert S. Summers, ‘Professor H.L.A. Hart’s Concept of Law’, (1963) Duke Law Journal 629 at 640.

³³² Rawls (n 7) 171-176.

³³³ *ibid* at 11.

³³⁴ *ibid* 171-176.

fashioned out.³³⁵ The third stage is *Legislative*.³³⁶ Here, law making is done. Legislative principles are relied upon to decide the laws to govern this imaginary society. These laws will include Civil Procedure Rules. The fourth and final stage is *Judicial*.³³⁷ This is where adjudication by ‘judges’ takes place. In other words, even in Rawls’s theory, adjudication can be done from the original position. This means that, as adjudication cannot occur without procedural rules, the development and application of the rules must take place within the context of the original position. Procedural decisions can only be fair if judges put themselves in the original position at stage four while at the same time reflecting on background information provided in stages one to three.³³⁸ As deliberations proceed in the original position, behind the veil of ignorance, stages two to four must take account of certain minimum irreducible values to promote harmony and de-colonise. These values must aim at stripping any possible results (the principles) off any tendencies of inconsideration, intimidation and deprivation of democratic participation (de-colonisation), and ensure harmony is promoted taking into account customary values of relationality (harmony and communion as the aims of relationality). Where promoting relationality will lead to intimidation, the committee must be free to dispense with relationship. Where results of the application of any rule of procedure leads to deprivation of liberty and other rights, the judge is colonised and therefore requires de-colonisation.

³³⁵ Rawls (n 7) 171-176.

³³⁶ *ibid.*

³³⁷ *ibid.*

³³⁸ Rawls (n 7) 171-176.

When the principles are chosen and adjudicated upon even in the original position, it is still possible that taking into account the enduring effects of colonisation, the reality that rational human beings will always like to free-ride and shirk responsibilities, there will be the need to conceptually de-colonise the chosen principles, where necessary. It is admitted here that the possibility that the chosen principles will not require de-colonising is also real. But the process progresses from this point with the assumption that conceptual de-colonisation is required. What has conceptual de-colonisation got to do with MART justice? Which principles of de-colonisation will MART justice rely on?

D. MART JUSTICE AND CONCEPTUAL DE-COLONISATION

As observed earlier, procedural rules in Ghana reflect the colonial past of these rules, several years after attaining independence.³³⁹ Procedural law like any other aspects of law are heavily rooted in the colonial history. Most of the common law world trace the history of their laws back to some English legislation passed during the colonial period or one case law or the other.³⁴⁰ Often, first year law students in Ghana will start legal studies with cases such as the celebrated *Carlill v. Carbolic Smokeball Co*³⁴¹ on offer as a topic in the Law of Contract, when the question is what does an offer mean in Ghana?

Yet, what is distinct about the colonial enterprise is the real reason behind the laws. Often, these laws were designed to ensure domination by the stronger and more economically wealthy

³³⁹ Atuguba (n 11).

³⁴⁰ *ibid.*

³⁴¹ (1892) 2 QB 484 or (1893) 1 QB 256.

persons and to ensure the exploitation of the resources of the colony.³⁴² What is more is that the colony does not have to be physical and perpetuated by external forces. In other words, colonies can be created by persons of the same kind. Yet, the struggle for independence was not merely an attempt to dislodge colonialism from the physical land boundaries of colonised States. At the heart of the independence struggle was the crucial demand for freedom to express and apply Ghanaian culture and tradition. Ideally, such a freedom should provide the space to ensure that legal principles, theories, values and concepts are developed, interpreted and applied from a standpoint that reflects the culture and traditions of the people of Ghana. In sum, to conceptually de-colonise, the de-coloniser has to look out for signs of domination, intimation, deprivation of basic liberties, discrimination and general perversion.

A critical voice in conceptual de-colonisation space is Kwasi Wiredu. Wiredu defines conceptual de-colonisation as an ‘activity in which Africans divest themselves of undue colonial influences.’³⁴³ After this, indigenous ideas which support the de-coloniser’s objectives will have to be deployed for conceptual re-orientation. For Wiredu, de-colonisation is about undoing the colonial structures (negative aspect) and recreating the structures with indigenous or other ideas which work for the de-coloniser (positive aspect).³⁴⁴ This is the case though some scholars hold the view that Wiredu’s exposition of his position does not quite favour the point of Africans

³⁴² Atuguba (n 11).

³⁴³ Kwasi Wiredu, ‘*Teaching and Research in African Philosophy: Some Suggestions*’ n *Teaching and Research in Philosophy: Africa*. Paris: UNESCO (1984), 31 - 54 at 35. See also Kwasi Wiredu, ‘Toward Decolonizing African Philosophy and Religion,’ (1998) 1(4) *African Studies Quarterly* 17 - 46 at 17, available at https://asq.africa.ufl.edu/wiredu_98/. See also Kwasi Wiredu, ‘Conceptual Decolonization as an Imperative in Contemporary African Philosophy: Some Personal Reflections,’ (2002) *Rue Descartes* 36 (2), 53 - 64. See also Kwasi Wiredu, ‘Introduction: African Philosophy in Our Time’ in K. Wiredu (ed.), *A Companion to African Philosophy*, Malden, MA: Wiley-Blackwell (2004), 1-27 at 15.

³⁴⁴ Kwasi Wiredu, *Conceptual Decolonization as an Imperative in Contemporary African Philosophy* (n 322).

divesting themselves of the colonial baggage.³⁴⁵ The point Wiredu makes is about dealing with the enduring effects of the ideas introduced by the colonial enterprise, when they do not suit the desired circumstances of the colonised. Colonisation is seen as a form of intellectual alienation resulting in a 'colonial mentality'.³⁴⁶ According to Wiredu, colonised minds are those that 'think about and expound their own culture in terms of categories of a colonial origin without any qualms as to any possible conceptual incongruities'.³⁴⁷ Such incongruities are mis-alignments which deprive the people of their true identities.

Unlike other forms of expressions such as language, through which colonial ideas may be assimilated, the law is very intrusive by nature as a result of the compulsion it carries and the potential for the infliction of pain for disobedience. Hence, the single most important area where conceptual de-colonisation must take place is the law, both substantive and procedural laws. There is a yawning gap in this area of research to fill. Again, by de-colonisation, Wiredu means the process of the reversal of colonisation and its alienation of Africans from their own concepts and ideas, thereby leading the individual to self knowledge, knowing what one thinks and why.³⁴⁸ For Wiredu, decolonising reversal is about Africans freeing ourselves of ideas which have persisted and shaped the way of thought of the African since the time of colonialism. The focus is on ideas which do not work for the developmental aspirations of the African. It is also about doing away with ways of thinking from the colonial period which have remained very

³⁴⁵ DB Futter, 'Wiredu on Conceptual Decolonisation' (2023) 70 (2) *Theoria* Issue 175, 24-41 at 25.

³⁴⁶ *ibid* at 25 citing Wiredu (1998) (n 343) at 20-21.

³⁴⁷ Wiredu (n 343) (1998) at 20.

³⁴⁸ Wiredu (n 343) (2002), 60-61.

active and operating on the minds of the African though physical colonisation has come to an end.³⁴⁹ De-colonisation appears to me like a re-birth of Africans with the consciousness of the African circumstances and a nuanced conceptualisation of the desired solutions, critically reflecting on our own circumstances.

If one takes it for granted that de-colonisation brings benefits to the de-colonised people, the questions often asked is, which conceptualisations should the purging target? Which ones should be the subject of the reversal? Futter holds the view that one answer to this question is all of the ideas.³⁵⁰ This view is also shared by writers such as Taiwo.³⁵¹ The other writers who share the view that the reversal must be complete and cover the full gamut of all concepts include Frantz Fanon,³⁵² and Ngugi wa Thiong'o,³⁵³ who is seen as 'hostile to anything of foreign provenance'. Emmanuel³⁵⁴ aligns with this viewpoint as well. So too is Suren Pillay.³⁵⁵ Pillay takes the view that all modes of thought from the global north should be breached and dismantled.³⁵⁶ However, for Wiredu, de-colonisation does not mean the elimination of every western idea. For him, de-

³⁴⁹ Futter (n 345) at 27.

³⁵⁰ *ibid.*

³⁵¹ O Taiwo, Rethinking the Decolonization Trope in Philosophy, (2019) 57 (S1) Southern Journal of Philosophy, 135-159 at 137.

³⁵² Frantz Fanon, 2008. *Black Skin, White Masks*. Trans. R. Philcox. New York: Grove Press.

³⁵³ Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (1986), Nairobi, East African Educational Publishers.

³⁵⁴ AO Emmanuel, *Defending the Decolonization Trope in Philosophy: A Reply to Olufemi Taiwo*, (2019) 60 (2) Southern Journal of Philosophy 304-319 at 314.

³⁵⁵ S Pillay, Decolonizing the University, Alice News, 7 June 2015, available at <<https://africasacountry.com/2015/06/decolonizing-theuniversity/>> (last accessed 26 July 2025).

³⁵⁶ *ibid.*

colonisation is about divesting oneself of all colonial influences that are undue as “no specific idea falls within the scope of the decolonising reversal purely on account of its provenance or facts about how it was introduced.”³⁵⁷ This is profound as there are western ideas, products, services, institutions which may help to advance African goals. After all, there is wisdom in the African proverb that knowledge is like a baobab tree, no one individual can embrace it all. This is why the ideas of a western legal philosopher such as John Rawls regarding the principle of the original position, should not be relegated to the background or discarded simply because of its origins. If a western concept does not withstand scrutiny, then it should be eliminated with speed in favour of an indigenous point of view. But, if it does, then it should be absorbed into the conceptual matrix and the ancestral point of view adjusted or extended where necessary.³⁵⁸ Therefore, a libertarian principle can be domesticated. Fetter agrees with Wiredu that a benefit can be achieved through domestication. Domestication is a matter of absorbing foreign learning in order to fashion African traditions of enquiry along similar lines. This would not be a mechanical repetition but the use of a pattern or guideline to creatively extend and develop the philosophical resources contained within the indigenous point of view.³⁵⁹ Here, it is not the messenger who matters. It is the message which must justify its existence, assimilation or rejection as the case may be.

Finally, to appropriately de-colonise, one has to identify the source of the principle being implemented and answer the question *what makes it colonial? How may it be de-colonised?* This

³⁵⁷ Fetter (n 345) at 28.

³⁵⁸ Wiredu (n 343) (2002) at 158.

³⁵⁹ Fetter (n 345) at 30.

is because a western world thought may be a de-colonised idea and sit well in harmony with the African desired perspective. At least, that is what the renowned Professor Kwasi Wiredu believed.³⁶⁰

E. MART JUSTICE AND RELATIONALITY

A key building block of MART Justice is that it must promote relationality as a value in African societies. It has been argued that the African is inherently a communitarian. In its simplest meaning, the African community takes precedence over the individual in the determination of moral behaviour or what is wrong or right. This means that ontologically, the community comes before the individual.³⁶¹ Yet, some avowed communitarians such as Gyekye does not agree with the moral subordination of the individual to the community.³⁶² Gyekye describes his position as *moderate communitarianism*. Gyekye's *moderate communitarianism* was a response to what he calls *radical communitarianism* as espoused by Menkiti.³⁶³ Moderate communitarianism according to Adeate, 'is a reaction to the primacy of duties over rights in the duty - based account of Afro-communitarianism presented by Menkiti.'³⁶⁴ Menkiti notes that no one is born with personhood acquired.³⁶⁵ For him, it must be attained. The first thing to attaining personhood

³⁶⁰ Wiredu (n 343) (2002).

³⁶¹ Gyekye (n 323).

³⁶² Kibujjo M Kalumba, 'A Defense of Kwame Gyekye's Moderate Communitarianism' (2020) *Philosophical Papers*, 49(1), 137–158. <https://doi.org/10.1080/05568641.2019.1684840>, available at <https://www.tandfonline.com/doi/full/10.1080/05568641.2019.1684840> (last accessed 22 May 2025)

³⁶³ Ifeanyi Menkiti, 'Person and Community in African Traditional Thought' In *African Philosophy: An Introduction*, Wright (ed) 1984, R.171–181, University Press of America: Lanham.

³⁶⁴ Tosin Adeate, *Moderate Communitarianism: A Conceptual Interpretation*, *Phronimon*, vol 24 (2023), available at <https://unisapressjournals.co.za/index.php/Phronimon/article/view/12556/7308> (last accessed 30 April 2025).

³⁶⁵ Menkiti (n 363).

is that the individual will have to be socialised through the performance of some rites.³⁶⁶ Secondly, the individual gains his standing in the community proportionally in accordance with the performance of his duties to the community.³⁶⁷ It is the responsibility of the individual to seek out his duties and perform them creditably, eliminating all hindrances to the performance of his duties to the best of his abilities.³⁶⁸ This is the reason Menkiti took the position that from the African perspective, more recognition is afforded to the obligations of the individual to the group or community, and enjoyment of rights is a second level priority.³⁶⁹ This in Gyekye's view is radical communitarianism as the community holds primacy over the individual with the potential for the infractions of the individual rights. Thus, Gyekye insists on ascribing to the individual and the community, the status of equal moral standing.³⁷⁰ Obviously, this idea helps to avoid the extremes of individualism and communitarianism, with neither trumping the other but rather working complementarily. The benefit of this theory for ordering the lives of the community is not far fetched. Neither is it difficult to appreciate. The community spirit is required to keep the individual afloat and the individual needs the community not only for identity but for protection, companionship, and a strong sense of belonging. This is plainly symbiotic.

With moderate communitarianism, Gyekye challenged conventional western notions of personhood advocating for a more holistic understanding rooted in African cultural traditions.

According to him, personhood in African thought is not solely defined by individual autonomy

³⁶⁶ *ibid* at 174.

³⁶⁷ *ibid* at 176.

³⁶⁸ Adeate (n 364) at 3.

³⁶⁹ Menkiti (n 363) at 180.

³⁷⁰ Gyekye (n 323) at 41.

but is in fact, deeply interconnected with community, ancestry and spiritual dimensions. This perspective offers valuable insights into how one conceptualises human dignity and rights in diverse cultural contexts. Moral reasoning must be grounded in applicable and contextually relevant cultural values and norms. This is the case though it is acknowledged that universal principles can and do underpin ethical behaviour, particularly in an era where the world is said to be a global village. In this global village, where ethical dilemmas abound, Gyekye's insights into personhood offer guidance on how to reconcile cultural diversity and shared moral principles to foster a more just and harmonious society. How do these views affect and / or apply to determinations of procedural fairness in the courtroom?

For a legal system which aspires to develop, interpret and apply law as a mechanism for the development and welfare of the actors in the legal system, the cultural values of the society cannot be disregarded. This is why it has been observed that at the very least, judges cannot avoid the methodology of interpretation that will allow Ghana to see law in its best moral light.³⁷¹ Even the strict literalists would agree that law has a certain internal moral sense.³⁷² In that light, law should not be conceived, interpreted and applied as though the moral circumstances of society and needs of the people do not matter. What the law is understood to be must reflect the cultural nuances of the people or a desire to move away from same, as the case may be. So, no methodology of legal interpretation by the courts should fail to bring the law to the service of society, taking into account the aspirations of the society. Hence, the application of

³⁷¹ Views expressed by Justice Yonny Kulendi at the Prof. Kwame Gyekye Memorial Lectures organised at the University of Ghana on 17th April 2024, available at <<https://www.youtube.com/watch?v=HmuP7X4Ir-k>>, last accessed 26 May 2025.

³⁷² *ibid*

procedural rules by the courts must take account of the African's peculiar understanding of who he or she is - an inherently communal people. Thaddeus Metz refers to this kind of communal relationship, which 'is morally worth pursuing for its own sake,'³⁷³ as *Afro-communitarianism*,³⁷⁴ building on Gyekye's moderate communitarianism.

Afro-communitarianism is said to differ from the kinds of communitarianism 'in the contemporary western tradition, mainly in that it focuses more on a certain kind of *relationship* as the normative ground of political choice and less on a group.'³⁷⁵ According to Metz, this theory 'provides an interesting, relational contrast to the Hobbesian, Millian, Lockean and Kantian traditions, which are all individualist.'³⁷⁶ Metz began his theory by 'distinguishing theories of social justice according to whether they are individualist, corporatist or relational, so as to make it clear how the latter category is under-developed'³⁷⁷ and perhaps unappreciated. He believes that 'most theories can be classified as individualist, corporatist or relational' taking into account where the moral status is located.³⁷⁸ Metz advanced a 'relational principle grounded on sub-Saharan ideas of community'³⁷⁹ that he believes forms the basis for a basic moral theory. According to Metz, relationality is about 'a certain way of relating to persons'³⁸⁰ in order to

³⁷³ Metz (n 15) at 171.

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

³⁷⁶ *ibid* at 172-173.

³⁷⁷ *ibid.*

³⁷⁸ By moral status, Metz means 'what is entitled to moral treatment for its own sake, or what can be wronged.' See Metz (n 15) at 172.

³⁷⁹ *ibid.*

³⁸⁰ Metz (n 15) at 175 - 176.

promote harmony of the whole, thus, living in communion with others. It is about living communally or relating to others in a harmonious way. This is not necessarily corporatism. Relationality can manifest itself ‘where one considers oneself a part of the whole, enjoying close ties, sharing a way of life, community-belonging and experiencing oneself as bound up with others.’³⁸¹ Metz calls this ‘*identifying with others*’.³⁸² On the other hand, where the manifestation is in the nature of one achieving the good of all, being sympathetic, acting for the common good, serving others in the community, and being committed to the good of one’s society (or rather its members), Metz calls this ‘*exhibiting solidarity with others*’.³⁸³

How does the idea of relationship as identifying with others and exhibiting solidarity towards them apply in the context of civil procedure in an adversarial context? This question is even more pertinent when the rules do not clearly require judges within the adversarial context of civil procedure to take relationality into account in decision making in the civil litigation. To expect relationality in the civil courtroom is not far-fetched. To start with, judges who handle civil litigation can borrow ideas of reconciliation and relationship building from criminal procedure when some petty crimes are involved. In Ghana, the Courts Act, 1993 (Act 459)³⁸⁴ mandates judges to take into account the need for reconciliation when misdemeanour is committed. Again under the Children’s Act³⁸⁵ and the Juvenile Judges Act, diversion and reconciliation between the

³⁸¹ *ibid.*

³⁸² *ibid* at 177.

³⁸³ *ibid.*

³⁸⁴ Courts Act, 1993 (Act 459) section 72. For criminal cases involving children, see Children’s Act, 1998 (Act 560) section 32(2).

³⁸⁵ Children’s Act, 1998 (Act 560) section 31.

juvenile and the victim of a crime is an important goal.³⁸⁶ If reconciliation and relationship building is an important goal for some criminal cases, then it can be taken for granted that in all civil cases, the expectation will not be different. It is possible in the view of this thesis, that it is because the lawmaker takes it for granted that reconciliation and relationship building is an automatic goal of civil litigation that it is not prescribed in black and white. How relationality can be an integral part of civil litigation is demonstrated in chapter 5 of this thesis.

In summary, an important aspect of Metz's afro-communitarianism is that one is able to commune by 'identifying with' and or 'exhibiting solidarity' with others.³⁸⁷ Yet still, one can also commune 'by being identified with or exhibited solidarity towards.'³⁸⁸ Using the a human rights concept to drive home the point of the importance of harmony in afro-communitarianism, Metz holds the view that '[R]especting another's dignified capacity both to exhibit harmony and to be harmonised with means treating it as the most important value, and hence entails (in the case of innocents) not impairing their ability to be harmonious as well as not failing to be harmonious with them.'³⁸⁹ Metz's theory of social justice is 'Afro-communitarian relational' theory which aims to *harmonise* and avoid *discordance*. The question is, taking into account the important role procedural rules play in the realisation of substantive rights, should judges and other court actors not solidarise and be solidarised with? Should judges and court actors not incorporate these ideas

³⁸⁶ Juvenile Justice Act, 2003 (Act 653) section 25.

³⁸⁷ Metz (n 15) at 177.

³⁸⁸ *ibid*.

³⁸⁹ *ibid* at 180.

of solidarity and harmony in court decisions, particularly when it comes to the wrong choice of originating processes? If the answer is yes, then, how are judges to aim for relationality?

In spite of the laudable goals of this relationality theory of social justice, important actors within the justice sector may remain stuck in modes which have not been critically examined. Such modes may promote discordance, discrimination, deprivation of basic civil liberties and so forth. A possible explanation or understanding of why some justice sectors may be stuck in such modes is the effects of colonialism. The antidote then is engage in conceptual de-colonisation as advocated by theorists such as Kwasi Wiredu.

III. CONCLUSION

This chapter has laid out the theoretical framework for this thesis. This is an attempt to answer the question about an appropriate framework for the conceptualisation and application of laws to ensure fairness. To be fair, the conceptualisation and application of the laws must be MART compliant. This means that the application must occur from the *original position*, be *de-colonised*, must promote *relationality* within the context of afro-communitarianism. The thesis emphasises all these three building blocks of MART justice though one or the other may be capable of achieving the overall goal of MART. De-colonisation properly contextualised may take care of relationality. But there is a risk that critical ingredients of the building blocks may be lost if one is subsumed under the other. Hence, there is value in keeping and deploying MART Justice as theoretical framework for civil procedural justice analysis. What this thesis intends to demonstrate is that, if the application of procedural rules by the courts in Ghana were to be guided by MART Justice as a theoretical framework, courtroom procedures will more frequently

be fair and procedural justice often realised. As may be observed from the research problem of this thesis, this is not often the case. This is why in chapter 5 of this thesis, the application of MART is demonstrated. In sum, a rule of civil procedure is MART compliant if it is based on the original position, if it is decolonized, and aims to achieve relationality.



CHAPTER 4 : COMPARATIVE ANALYSIS OF PROCEDURAL JUSTICE

I. AN INTRODUCTION

In chapter 3, this thesis sets out MART Justice as an appropriate theoretical framework with which to assess the fairness of the application of civil procedure rules in Ghana. MART Justice requires that the application of the rules must be done from the original position, be de-colonised and must aim at relationality. How MART Justice works out practically is demonstrated in the next chapter of this thesis (chapter 5). To set the stage for the application of MART Justice, with the benefit of lessons from other jurisdictions, this chapter explores how other jurisdictions have dealt with or are dealing with concerns in relation to civil procedural justice. Hence, this chapter provides comparative perspectives of reform efforts in Australia and Ghana towards fairness in civil proceedings. As previously indicated in the explanation of the methodology for this research, there are good reasons for the choice of Australia as the country to learn lessons from. Australia shares a history of British colonialism with Ghana, and therefore operates the common law system of adjudication. More importantly, Australia is generally considered progressive and innovative in terms of procedure.³⁹⁰ A contrast, which also provides a learning opportunity for this thesis is the fact that Australia is a Federal State. Hence, there are different civil procedure rules for Federal and State Courts to learn from.³⁹¹ This chapter discusses areas of comparison such as dealing with jurisdictional errors; case initiation and originating processes; case management; and modernisation of courts.

³⁹⁰ Law Council of Australia / Federal Court of Australia CASE MANAGEMENT HANDBOOK (n 32) at 12.

³⁹¹ Federal Court Rules 2011 regulate proceedings at the Federal High Court of Australia. Each of the six State High Courts' proceedings are regulated by different Rules of Court as cited in this chapter under the Section on case initiation at the State High Courts in Australia.

II. DEALING WITH JURISDICTIONAL ERRORS

A. SAVING JURISDICTIONAL ERRORS

The main mandate of courts is to settle disputes, and in order to do so in an orderly manner, courts are clothed with powers and jurisdictions.³⁹² There are different categories of courts with different jurisdictions, which may be territorial, thematic or subject matter related.³⁹³ Usually, the structure of the court system is such that there are courts clothed with original authority, appellate and of review jurisdictions.³⁹⁴ Sometimes, courts have concurrent or cognate authority.³⁹⁵ Other times, the jurisdiction is reserved for a particular court.³⁹⁶ Within this context, the principle has been that if a dispute gets to the wrong forum, a forum which is not clothed with the authority to deal with that kind of case, then, anything carried out by that court with respect to that dispute will be null and of no effect.³⁹⁷ This is the case even in situations where litigants attempt in good faith to take their case to the appropriate forum and may even be of the honest belief that they have done so.³⁹⁸ Additionally, even where the judge is of the view that she

³⁹² Courts Act, 1993 (Act 459) section 15 gives the High Court of Ghana an original jurisdiction to hear all cases except those excluded. Section 58 of this Act gives the courts the power to summon witnesses to give evidence or produce any document, either *mero motu* or upon an application by any of the parties to a suit. As an additional example, article 99(1)(a) of the 1992 Constitution gives the High Court the exclusive original jurisdiction to decide cases relating to the election of a member of parliament. See also the case of *Yeboah v. JH Mensah* [1998-1999] SCGLR 492.

³⁹³ For instance, the High Court has jurisdiction to adjudicate maritime cases including a claim for damage to a ship on the high seas or within the territorial waters of Ghana. See section 20(c), Courts Act, 1993 (Act 459).

³⁹⁴ Edson R. Sunderland, Trends in Procedural Law, (1939) 1 La. L. Rev., 480 Available at: <<https://digitalcommons.lsu.edu/lalrev/vol1/iss3/2>> (last accessed 26 July 2025).

³⁹⁵ *ibid.*

³⁹⁶ *ibid.*

³⁹⁷ *Ahinakwa II (Substituted by) Ayikai v Okaidja III & Others* [2011] 1 SCGLR 20.

³⁹⁸ Sunderland (n 394) at 480-481.

or he is authorised to proceed with the case, that cannot save the situation.³⁹⁹ Meanwhile, the reality is that even with great care, the most experienced diligent legal practitioners commit jurisdictional errors.⁴⁰⁰ When that happens and the rules are strictly applied, errors in invoking the jurisdiction of the courts will often have dire consequences for the litigants.⁴⁰¹ In Ghana, for instance, the mistake will more often than not render the processes a nullity.⁴⁰² Concerns about the effects of jurisdictional errors are as age-old as they are contemporary.⁴⁰³ Expressing his worry about this situation in 1939, Sunderland asserted that instead of errors leading to catastrophic consequences for the litigants, the case should just be forwarded to the appropriate forum, for instance, for same to be dealt with on the merits.⁴⁰⁴ Sunderland advocated that this approach for ‘saving jurisdiction would prevent many accidental miscarriages of justice and reduce the risk which now makes litigation one of the most dangerous areas of professional practice.’⁴⁰⁵ The concerns of the difficult consequences of jurisdictional errors have compelled different countries to seek appropriate ways to deal with jurisdictional errors. How does Australia deal with jurisdictional errors? Australia relies on the materiality test to decide which cases can be saved even if they have fallen into jurisdictional errors as discussed in the next section.

³⁹⁹ *ibid* at 481.

⁴⁰⁰ *ibid*.

⁴⁰¹ *ibid*.

⁴⁰² *Nana Ampaa-Andoh VIII v Paramount Stool of Breman Essiam* J4/47/2017 dated 13/06/2018 also held per Pwamang JSC that where a law makes provision for a certain process for adjudication, the court has to use that process and that process alone.

⁴⁰³ Sunderland (n 394).

⁴⁰⁴ *ibid*.

⁴⁰⁵ *ibid*.

B. MATERIALITY TEST FOR JURISDICTIONAL ERRORS IN AUSTRALIA

In Australia, the case of *LPDT v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* provides guidance on how to deal with jurisdictional errors.⁴⁰⁶ The High Court of Australia laid out a *materiality* test to deploy in order to establish whether a jurisdictional error has occurred and the effect of such an error, if any at all.⁴⁰⁷ There are two steps to take to deal with jurisdictional problems. The first step is to confirm that an error did occur.⁴⁰⁸ Then, materiality of the error would have to be established.⁴⁰⁹ Materiality here means that, the verdict affected by error ‘could realistically have been different if there was no error.’⁴¹⁰ This means that, in order to establish *materiality*, it is not necessary to show that if the error was not made, a different decision *would* have been reached.⁴¹¹ Instead, the test is whether a different verdict *could realistically* have been reached.⁴¹² The High Court of Australia observed that “*realistic*” is used to distinguish a possible different outcome from an outcome that is ‘fanciful or improbable.’⁴¹³ The overriding idea is that no case should be terminated finally simply because of a jurisdictional error, if that error would not have realistically led the appropriate court to a different decision.⁴¹⁴ In *Kwatra v. Minister for Immigration, Citizenship and Multicultural*

⁴⁰⁶ [2024] HCA 12.

⁴⁰⁷ *ibid.*

⁴⁰⁸ *LPDT v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at 30 and 32.

⁴⁰⁹ *ibid.*

⁴¹⁰ *ibid.*

⁴¹¹ *ibid.*

⁴¹² *ibid.*

⁴¹³ *ibid* at 7 and 14.

⁴¹⁴ *ibid.*

Affairs, for instance, the court took the view that even if there had been a failure to accord procedural fairness in not considering certain components of the applicant's submissions on a relevant factor, that breach was immaterial. The Tribunal took the view that the factor was established by other parts of the submission and weighed heavily in the 'applicant's favour as a primary consideration in the decision, even if that factor was ultimately outweighed by other considerations.⁴¹⁵ In addition to relying on the materiality test used by the Australians to determine the effects of jurisdictional errors, there are good examples around the globe from which Ghana can learn lessons regarding saving jurisdictional errors. For example, it has been said that the English were the pacesetters in dealing with the problems associated with jurisdictional failures.⁴¹⁶ Very early, their solution was to put all the superior courts as divisions under one court and where a case was originated in a wrong forum, it was simply transferred to the appropriate division.⁴¹⁷ These courts were expected to simply move the necessary records to the appropriate forum so the case could continue as if it commenced in this new forum.⁴¹⁸ This appears to be a simple, cheap and reasonable way of dealing with jurisdictional problems.

C. WAIVER OF NON-COMPLIANCE IN GHANA

The situation in relation to adhering to the rules on jurisdiction in Ghana today are the same as what worried Sunderland in 1939. In Ghana, it is often said that the authority of a court to handle

⁴¹⁵ *Kwatra v. Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCAFC 194. This view was expressed HWL Ebsworth Lawyers available at <<https://hwlebsworth.com.au/jurisdictional-error-and-materiality-recent-cases/>> (last accessed 20 July 2025).

⁴¹⁶ Sunderland (n 394) at 481, available at <<https://digitalcommons.law.lsu.edu/lalrev/vol1/iss3/2>> (last accessed at 26 July 2025).

⁴¹⁷ *ibid.*

⁴¹⁸ *ibid.*

cases should be specifically provided for in a law, which law can be a statute or a constitution.⁴¹⁹ Further, it is settled in Ghana that where a specific method is laid out by statute for the vindication of a certain right, it is only that method which must be used.⁴²⁰ Any other method will amount to a jurisdictional infraction. In *Jonah v Kulendi & Kulendi*,⁴²¹ the court took the view that as a primary law, the Legal Profession Act, 1960 (Act 32) regulates how plaintiffs are to start a case against a lawyer and a law firm. As a result, the apex court of Ghana did not see the use of any other method as appropriate.⁴²² One key effort by the Ghanaian legislature to deal with the jurisdictional errors is through the application of Order 81 of CI 47. The original Order 81(1) of CI 47 provides that ...if in an attempt to start a case, a party fails to comply with the Rules of Court, the failure should not be treated as an irregularity only.⁴²³ The apex court in *Republic v. High Court, Accra, ex parte Allgate Co. Ltd*⁴²⁴ held that the word ‘not’ which appeared before the ‘be treated as an irregularity’ should be deleted.⁴²⁵ In other words, the failure to comply with the requirements of the Rules shall be treated as an irregularity. This amendment should properly be understood within the context of what Order 81 is intended to achieve, taking into account the Rule that Order 81 replaced. Prior to Order 81 taking effect, an equivalent provision in the repealed LN 140A was Order 70, rule 1. Order 70, rule 1 provided that except

⁴¹⁹ *Mosi v. Bagyina* [1963] 1 GLR 337.

⁴²⁰ *Nana Ampaa-Andoh VIII v Paramount Stool of Breman Essiam* J4/47/2017 dated 13/06/2018 also held per Pwamang JSC that where a law makes provision for a certain process for adjudication, the court has to use that process and that process alone.

⁴²¹ *Jonah v. Kulendi & Kulendi* [2013-2014] 1 SCGLR 272.

⁴²² [2013-2014] 1 SCGLR 272 at 275. See also *Copyright Society of Ghana v. Afreh* [1999-2000] 1 GLR 135.

⁴²³ Order 81, rule 1 CI 47.

⁴²⁴ [2007-2008] SCGLR 1041.

⁴²⁵ *ibid.*

where the court so decides, failure to comply with the rules should not make the court processes void though the court may set the proceedings aside on such terms as court deemed appropriate.

What Order 70 literally meant was that when a party did not comply with any of the Rules of Court or practice, the court was clothed with the authority to declare such non-compliance as void. The court could treat the non-compliance as an irregularity and make an order for the proceedings to be amended or dealt with in any manner the judge thought appropriate. But before the judge makes a decision on the non-compliance, the parties would not treat the proceedings as void, and act accordingly. The courts have interpreted the provisions of Order 70 to mean that there are two effects of non-compliance with the Rules of Court, thus, the proceedings may either be deemed void or irregular.⁴²⁶ In *Amoakoh v. Hansen*, the court noted that ... 'If however, it is an irregularity that goes to the root of the trial and fouls the springs of the judicial process and thus disabling the machinery of law from advancing the course of justice, then the whole proceeding is void and a nullity.'⁴²⁷ In other words, some irregularities would lend themselves to remedial measures such as an amendment, while others would render the entire proceedings void. If an infraction is deemed to go to the root of the case, the jurisdiction of the court, it will be deemed to be a nullity and the jurisdiction cannot be saved.⁴²⁸

⁴²⁶ *Amoakoh v. Hansen* [1987-1988] 2 GLR 26 at 37 where the court found that not complying with the process for application for directions made the trial null as it is a fundamental stage of a case and if it is not conformed to, it renders the proceedings void. See also *Bonsu v. Eyifah* [2001-2002] 1GLR 9 at 16-17.

⁴²⁷ *ibid.*

⁴²⁸ *ibid.*

In Ghana, cases may also be dismissed for lack of jurisdiction for non-fulfilment of conditions precedent such as the payment of security for cost.⁴²⁹ For example, section 18 of the Representation of the Peoples Law, 1992 (PNDCL 284) requires the petitioner in an election case to make as security for cost the payment of an amount to be determined by the High Court within 21 days from the date of the publication in the gazette of the result of the election against which a petition is filed.⁴³⁰ In the absence of the payment of security for cost, the filing of the election petition is not valid, and the jurisdiction of the court would not have been properly invoked.⁴³¹ The non-payment of security for cost has led to dismissal of election petitions.⁴³² Why will an election petition filed within 21 days of the publication of the results in the gazette fail because the petitioner did not make payment as security for cost within the mandated 21 days period? It has been pointed out that rationale for the stringent rules and application of same is that it is vital to know the final decision of the court regarding results of a disputed election within a reasonably short time, hence the need to compel the parties, particularly the petitioner to act with despatch.⁴³³ In this instance, regarding initiating a petition, and payment of security for cost within 21 days, the law demands the pursuit of expedition, which is normatively, an aspect of fairness within the context of this thesis. What is problematic however, is the insistence on the *form* of the originating process - a petition. This is particularly the case when neither CI 47 nor

⁴²⁹ Representation of the Peoples Law, 1992 (PNDCL 284) section 18.

⁴³⁰ *ibid* section 18(2).

⁴³¹ *ibid*.

⁴³² *The Republic v. Electoral Commission; Ex parte Amoo* [1997-1998] 1 GLR 938 at 939.

⁴³³ Judicial Service of Ghana, Election Manual (designed and printed by Bestas Limited), November 2020 at 34, available at <https://judicial.gov.gh/jsfiles/edition_5_volume_3.pdf> (last accessed 20 July 2025).

PNDCL 284 stipulate the contents of the petition.⁴³⁴ The courts would not save any jurisdiction for an election redress unless a petition and no other originating process is used as held in *In re Parliamentary Elections for Wulensi Constituency: Zakaria v. Nyimakan*.⁴³⁵ This is the posture of the courts though it is acknowledged that there is the need to move away from a mechanical application of technical rules of procedure in the face of the need to do substantial justice as the rules of procedure are considered to be a ‘handmaiden rather than a mistress.’⁴³⁶

It has been indicated that where not following the rules is not fundamental to amount to denial of the adjudicating authority the mandate to hear the case, the non-compliance could be waived.⁴³⁷ For instance, in *Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd. (Amalgamated Bank Interested Party)*, the Supreme Court refused to set aside the decision of the High Court, Accra because the defendant took part in the case though he was given a notice of three days for an application for summary judgment contrary to Order 14 of CI 47 under which he was entitled to 4 clear days of notice.⁴³⁸ A similar situation arose in *Friesland Frico Domo v Dachel Co Ltd*,⁴³⁹ where the apex court took the position that a party who participated in a hearing could not be

⁴³⁴ *ibid* at 29.

⁴³⁵ *In re Parliamentary Elections for Wulensi Constituency: Zakaria v. Nyimakan* [2003-2004] 1 SCGLR 1.

⁴³⁶ This was stated in the case *Republic v High Court Koforidua; Ex Parte Eastern Regional Development Corporation* [2003-2004] SCGLR 21. See also the case *GPHA v Ossoufou* (1993-94) 1 GLR 24 at 33-34; the Supreme Court through Aikins JSC stated that the courts have a responsibility to render justice in all suits and that duty should not be defeated through technical rules.

⁴³⁷ *The Republic v High Court, Ex Parte All Gate Ltd (Amalgamated Bank Interested Party)* [2007-2008] SCGLR 1041; *Boakye v Tutuyehene* [2007-2008] SCGLR 970; *Opoku & Anor v Axes Co Ltd* [2012] SCGLR 1214; *Luke Mensah v The Attorney General* [2003-2004] SCGLR 122.

⁴³⁸ *Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd. (Amalgamated Bank) Interested Party* [2007-2008] SCGLR 1041.

⁴³⁹ *Friesland Frico Domo v Dachel Co Ltd* [2012] 1 SCGLR 41.

allowed to have the proceedings set aside because leave was not obtained before a writ of summons was issued a notice of it served on the defendant outside the country in violation of Order 8 of CI 47. So, it appears in some circumstances, the courts treat non-compliance with the Rules as mere irregularities which do not have a nullity effect. This is the case so long as the non-compliance is not so fundamental as to go to jurisdiction, or which is in breach of a statute other than CI 47; breach of the constitution; or the breach of the rules of natural justice.⁴⁴⁰ In spite of this, the complications and the denial of a hearing as a result of jurisdictional errors persist in Ghana. The complications that these seemingly innocuous principles bring about for the effective functioning and efficiency of the legal system have far reaching consequences and deserve a thorough scrutiny and reflection.

D. SIMILARITIES AND DIFFERENCES IN DEALING WITH JURISDICTIONAL ERRORS IN AUSTRALIA AND GHANA

Both Australia and Ghana have devised mechanisms to deal with jurisdictional errors when they occur. The Australian materiality test focuses on the realistic difference that the error would make. If the error would make a realistic difference, the court which has handled the case would not be deemed to have appropriately exercised jurisdiction. This appears like treating the non-compliance in the Australian situation as an irregularity unless it is so fundamental to deprive the court of jurisdiction. Both Australian and Ghanaian approaches recognise and attempt to provide formal procedural justice by seeking to give less effect to non-compliance with procedural rules as may be observed from intention behind Order 81 of CI 47 and the materiality test for Australia.

⁴⁴⁰ *Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd. (Amalgamated Bank) Interested Party* [2007-2008] SCGLR 1041.

The Australian and Ghanaian approaches differ to the extent that the materiality test in Australia can still save some jurisdictional infractions while jurisdictional infractions always render null any exercise of jurisdiction in Ghana. Further, normatively, the Australian approach has created a certain sense of fairness to litigants where though a court may not have jurisdiction from a technical point of view, the parties may confer jurisdiction by submitting themselves. Once the parties have submitted themselves to the jurisdiction, unless a different decision would have been realistically reached, it would not matter which court adjudicated the case. This recognises voice as an essential principle of procedural justice.

In addition to eliminating jurisdictional errors as the basis for the loss of cases, legal education and scholarship in Ghana should be re-oriented towards emphasising the irrelevance of such jurisdictional errors as the basis for the loss of cases in litigation. The legal culture relative to the perspectives of lawyers and more particularly judges as far as jurisdictional errors are concerned should change in order to do away with heavy reliance on technicalities. It appears that there is a misconception in legal practice in Ghana that the more technicalities one can deploy to outwit an opponent, the better that lawyer is considered to be. This is patently contrary to the rudiments of the calling of the legal profession. When ordinary citizens go to court, they legitimately expect that their substantive disputes are resolved.

It is posited that there are other options to competently deal with these jurisdictional concerns. For example, from a structural point of view, aside the transfer of the suit to the correct division

in the judge's view, the case could also be transferred to the most superior court or to the court with final authority to decide cases, where the jurisdictional matter can be finally settled. Normatively, this will promote expedition of cases as no suspicions will linger on regarding which court has the mandate to deal decisively with the case. Alternatively, as and when jurisdictional concerns are rampant, a specific court may be designated to conclusively decide on the jurisdictional matters. These new options advanced herein may come at some cost to the State. However, the benefits in the expedition of cases far outweigh the potential costs.

III. CASE INITIATION AND ORIGINATING PROCESSES

A. PRE-ORIGINATING PROCESSES IN AUSTRALIA - GENUINE STEPS STATEMENTS

An interesting feature of the Australian federal civil procedure is the requirement for the claimant to file a document in court indicating in good faith, efforts made to resolve the dispute (Genuine Steps Statements - GSS).⁴⁴¹ This document must be filed before the claimant commences civil proceedings.⁴⁴² The requirement is that litigants make efforts to resolve their dispute through whichever means they honestly think is reasonable to them.⁴⁴³ In view of this, it is the prerogative of the parties to decide what they consider to be 'genuine steps'.⁴⁴⁴ What matters in

⁴⁴¹ Civil Dispute Resolution Act 17 of 2011 (Australia) section 6 (Applicant's Genuine Steps Statement) and section 7 (Respondent's Genuine Steps Statement), available at https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/num_act/cdra2011296/. See also Federal Court Rules 2011, Select Legislative Instrument 2011 No. 134, Division 8.02 (Applicant's Genuine Steps Statement) and Division 5.03 (Respondent's Genuine Steps Statement), available at <https://www.legislation.gov.au/F2011L01551/asmade/text>.> (last accessed 19 July 2025).

⁴⁴² *ibid*.

⁴⁴³ *ibid*.

⁴⁴⁴ *ibid* section 4(1A). These steps can include, but is not limited to, notifying the opposing party timeously of the nature of the dispute; response to this notification; providing the relevant documentation to the opposing party and the consideration of Alternative Dispute Resolution steps, Civil Dispute Resolution Act 17 of 2011, Section 4(1) and 4(2) (Australia).

this situation is that the parties make a sincere and genuine attempt at solving the problem.⁴⁴⁵ If these efforts are unsuccessful in the sense that they do not resolve the problem at hand, the claimant is obligated to file ‘Genuine Steps Statement’, indicating the efforts made to deal with the conflict.⁴⁴⁶ In case the claimant did not take any steps at all, he or she must provide reasonable grounds for not taking any steps.⁴⁴⁷ The respondent when served with the Genuine Steps Statement is also under an obligation, before the court attempts to hear the matter, to state whether he or she agrees with the Genuine Steps Statement filed.⁴⁴⁸ If the respondent does not agree with the statement filed by the claimant, the respondent must indicate the reasons for his or her disagreement with the statement.⁴⁴⁹ This requirement of a Genuine Steps Statement is an attempt to compel the parties to resort to alternative dispute resolution mechanisms such as negotiations or mediation, even before they invoke the jurisdiction of the courts.⁴⁵⁰ This pre-action approach creates the opportunity for the parties to resolve their disagreement in the absence of adjudicators and possibly lawyers. The potential for this approach to reduce the cost of litigation is enormous. It has been noted that pre-action requirements in Australia have encouraged lawyers to work in a collaborative way and possibly shortened the time for redress.⁴⁵¹ This approach is worth exploring though a similar method in use in Ghana is

⁴⁴⁵ *ibid.*

⁴⁴⁶ *ibid.*

⁴⁴⁷ *ibid* section 6(1).

⁴⁴⁸ *ibid* section 7.

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid.*

⁴⁵¹ Tania Sourdin, et al, The Evaluation of Specific Pre-Action Processes in South Australia (October 1, 2018), available at <https://ssrn.com/abstract=3269693> or <http://dx.doi.org/10.2139/ssrn.3269693> (last accessed 19 July 2025).

alternative dispute resolution for commercial cases prior to trial.⁴⁵² Genuine Steps Statements can be introduced across board for all cases in Ghana as a first attempt at settlement even before resort to court if necessary. It will help with early settlement of all disputes, including commercial ones.

B. PRE-ORIGINATING PROCESSES IN GHANA - ADR MECHANISMS

One Ghanaian effort similar to the requirement to file Genuine Steps Statements in Australia is the introduction of reforms that would help speed up the process and to achieve speedy justice through alternative dispute resolution mechanisms (ADR).⁴⁵³ CI 133 allows parties to a suit to request settlement of the dispute by ADR at the application for directions stage.⁴⁵⁴ Under CI 133, Order 58, rule 4 was inserted into CI 47 as a new rule and places a burden on the courts and parties to ensure amicable settlement of cases related to commerce and early settlement of all disputes. Under Order 58, rule 5 introduced by CI 133 (formerly rule 4 under CI 47), the court Registrar would allocate the suit to a judge for pre-trial action seven days after the reply has been filed by the plaintiff. The rule further provides for a pre-trial conference review within fourteen days after the case has been assigned the judge. The judge is mandated by the rules to enquire of the parties if they wish to resolve the matter by mediation, arbitration, or any of the other ADR form. The court can make an order for any of the modes of ADR (negotiation, mediation,

⁴⁵² Civil Dispute Resolution Act 17 of 2011, section 7.

⁴⁵³ In Ghana, generally, ADR is specifically encouraged as a mode of dispute resolution under the Alternative Resolution Act, 2010 (Act 798). Under section 1 of Act 798, in exception of matters related to national or public interest; the environment; the interpretation and enforcement of the 1992 Constitution of Ghana and any other case which by law cannot be settled by ADR, parties in litigation or potential litigation can use any form of ADR to settle their cases. In addition, where a case is pending before a court which is of the opinion that the case may be settled by arbitration, the court may with the agreement of the parties refer the matter to arbitration even in the absence of any prior arbitration agreement between the parties. See Alternative Resolution Act, 2010 (Act 798) section 7.

⁴⁵⁴ CI 133, rules 1A to 1F.

arbitration, etc) to be used.⁴⁵⁵ The use of ADR (in the case of Ghana) and Genuine Steps Statements (in the case of Australia) share similarities in the terms of purpose of the rules and practice. This is further discussed under the similarities and differences in the originating proceedings of Australia and Ghana later in this section.

C. ORIGINATING PROCESSES AT THE FEDERAL COURT OF AUSTRALIA

Closely connected with jurisdictional errors discussed above is the multiple originating processes and the effects of a wrong choice. Such originating processes include issuing a writ of summons, filing an application or filing a petition as the case may be. The originating processes in the Federal Court of Australia filing originating applications.⁴⁵⁶ Rule 8.01 of the Federal Court of Australia Rules requires that ‘A person who wants to start a proceeding in the Court's original jurisdiction must file an originating application in accordance with Form 15’.⁴⁵⁷ This is the sole originating process for the Federal Court of Australia. In view of this, there is no possibility of making a wrong choice of originating process.

The Australian legislative reforms in 2011 with originating processes may have benefitted from the reform efforts of England and Wales in the 1990s. In England and Wales, concerns of undue delay, high cost and excessive technicalities led to the appointment of Lord Harry Woolf in 1994 to examine existing civil procedure rules. After an extensive work, Lord Woolf presented an

⁴⁵⁵ CI 133, Order 58, rule 5.

⁴⁵⁶ Federal Court Rules, 2011, rule 8.02 (Australia), available at https://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_reg/fcr2011186/s8.01.html (last accessed 20 July 2025).

⁴⁵⁷ *ibid.*

interim report in June 1995⁴⁵⁸ and a final report in July 1996.⁴⁵⁹ A general theme of the reports is that there were compelling reasons to deal with the problems with the adversarial system of justice administration so as to improve civil litigation by making the rules less technical.⁴⁶⁰ Lord Woolf sought to advance a simpler and more economical approach to the rules of civil procedure.⁴⁶¹ What reform ethos was Lord Woolf generally guided by in his work culminating in his reports? A summary of the Interim Report indicates that a civil justice system must produce justice and fairness for court users at a cost which is not excessive, without unnecessary delay and should be comprehensible to all actors.⁴⁶² These are the ideals that a workable civil procedural system must aspire to. But, what were the problems for which these reform ethos could provide the required answers? At the time, Lord Woolf was of the view that the civil procedure system was too unequal in the sense that it lacked equality between the powerful, wealthy litigant and the under-resourced litigant, as well as too expensive as the costs often exceeded the value of claims.⁴⁶³ Importantly, the system was not fast in finally determining cases.⁴⁶⁴ Indeed, many court users found it difficult to understand the law and the procedure the courts were adopting.⁴⁶⁵ Finally, the system was too adversarial as cases were run by the parties,

⁴⁵⁸ Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellors Dept 1995), available at <https://webarchive.nationalarchives.gov.uk/ukgwa/20060213222829/http://www.dca.gov.uk/civil/interfr.htm> (last accessed on 30 April 2025).

⁴⁵⁹ *ibid.*.

⁴⁶⁰ *ibid.*.

⁴⁶¹ *ibid.*

⁴⁶² *ibid.*

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*

⁴⁶⁵ *ibid.*

and not by the courts.⁴⁶⁶ Although these were the problems identified between 1994 and 1996 for the English courts, they are very present today in Ghanaian courts, making it imperative to, at least review the proposed solutions by Lord Woolf for possible contextualisation, adaptation and adoption, where necessary. To deal with the problems identified by Lord Woolf, there were several reform options proposed for specific aspects of civil procedure. On the initiation of suits, Lord Woolf observed that the courts have several different ways of starting proceedings and proposed that all claims and appeals should be started on a single claim form with appropriate variations.⁴⁶⁷ This applied not only to fact-based disputes brought by writ or summons but also to claims involving construction of documents brought by originating summons and to claims for remedies in public law.⁴⁶⁸ This is a *composite originating process*.⁴⁶⁹ The general objective of this composite originating process is to enable the court to deal with cases justly, which includes considerations of expense and delay. These reforms adopted in England and Wales resonated with the Australians.

⁴⁶⁶ *ibid.*.

⁴⁶⁷ *ibid.*.

⁴⁶⁸ See the Departmental for Constitutional Affairs website archived by the National Archives on 13 February, 2006 and available at <https://webarchive.nationalarchives.gov.uk/ukgwa/20060214041328/http://www.dca.gov.uk/civil/final/sec3a.htm#c9> (last accessed on 30 April 2025).

⁴⁶⁹ This reform option dealt with the problem of challenging the mode of initiation of suits for a long period of time, sometimes covering years of litigation through the court system to the neglect of the substantive matter before the courts. This is exactly the situation in Ghana at the moment.

D. ORIGINATING PROCESSES AT THE STATE COURTS IN AUSTRALIA

(i) Tasmania

The Civil Procedure Rules for the state of Tasmania are contained in the Tasmanian Supreme Court Rules, 2000.⁴⁷⁰ There are two main originating processes for the State of Tasmania. These are writ of summons and applications.⁴⁷¹ Rule 88 provides a long list of cases which must be commenced by a writ of summons including actions for debt recovery, recovery of wages and compensations, and recovery of money due for necessaries supplied. According to Rule 89, actions which should be commenced by an application include cases for the constructions of questions under a document including statutes, compensation for land compulsorily acquired and cases for the administration of an estate.

Generally, failure to comply with procedural rules do not invalidate the steps taken.⁴⁷² Rule 13 provides that if a party does not comply with the rules of court, the default will not render any steps taken a nullity.⁴⁷³ However, the court has a discretion to exercise in deciding whether such a default should have any effect at all, including rendering the process void.⁴⁷⁴ In other words, although the default position of the law is that the non-compliance should not render a process void, it is possible, taking into account the peculiarities of the case for the court to so declare.⁴⁷⁵ In accordance with the Rules, it is possible to set aside a proceeding but the application must be

⁴⁷⁰ Tasmanian Supreme Court Rules, 2000, No. 8, available at <https://www.austlii.edu.au/au/legis/tas/consol_reg/scr2000232.pdf> (last accessed 1 July 2025).

⁴⁷¹ *ibid*, rules 88 (writ of summons) and 89 (applications).

⁴⁷² *ibid* rule 13.

⁴⁷³ *ibid*.

⁴⁷⁴ *ibid*.

⁴⁷⁵ *ibid*.

timeous and no fresh steps should have been taken.⁴⁷⁶ With specific reference to originating processes, a case cannot set aside because of the use of the wrong originating process.⁴⁷⁷ The import of this rule is that a wrong originating process cannot be the only reason for a case to be treated as null. The difference between Rules 14 and 15 is that while Rule 14 deals with all steps to be taken in a case and protects a defaulting party from losing on ground of that faulty step, Rule 15 deals specifically with originating proceedings. This suggests that Tasmanians attach importance to the need for originating processes not to have any effect even if chosen wrongly. Further, unlike under Rule 14, the courts do not have any discretion whether a wrong originating process will render the process void or not. The law is definite that such a wrong originating process will not have a nullity effect.⁴⁷⁸ Normatively, this will ensure fairness as cases are decided on the basis of the merits, and not prematurely truncated because of a procedural defect. The ‘no-nullity’ effect of wrong originating processes can be understood as part of the processes to ensure ‘formal’ procedural justice in Tasmania.

(ii) Victoria

In the State of Victoria, the 2015 Civil Procedure Rules regulates civil proceedings.⁴⁷⁹ By Order 4.01, there are two main originating processes. These are writ of summons and originating motions. An originating motion is used when there is no defendant to the case. By Order 2.02, a

⁴⁷⁶ *ibid*, rule 14.

⁴⁷⁷ *ibid* rule 15.

⁴⁷⁸ *ibid*.

⁴⁷⁹ State of Victoria, the 2015 Civil Procedure Rules, available at <https://classic.austlii.edu.au/au/legis/vic/num_reg/sccpr2015n103o2015514/> (last accessed 20 July 2025).

Court cannot set aside an originating process used to wrongly commence a case.⁴⁸⁰ It is observed that this is similar to the position of the law in Tasmania regarding faulty originating processes. Case law in Victoria also shows that the non-supply of certain details such as full residential address of the plaintiff will not have a nullity effect of the case.⁴⁸¹ In *Sheen v Burke*, the court took the view that the plaintiff ought to have provided his residential address on the originating process and providing only the plaintiff's lawyer's address did not comply with the Rules.⁴⁸² However, the court held that the failure of the plaintiff to provide his residential address was not fatal to the originating process.⁴⁸³ The non-compliance was an irregularity which could be rectified.⁴⁸⁴ This demonstrates that the courts were not overly technical and were mindful to consider the claims of the plaintiff on its merits, taking into account that the non-compliance would not occasion any untold hardship on the defendant. In Victoria, even where there was a more fundamental problem of a lawyer commencing an action without the consent of the plaintiff, it was held that such an action would be void but could be validated by the plaintiff if he ratifies the lawyer's actions.⁴⁸⁵ This demonstrates flexibility of the application of the Rules and the desire to give voice to the plaintiff if the plaintiff so desires.

⁴⁸⁰ *ibid*, Order 2.02.

⁴⁸¹ *Sheen v Burke* [1993] 1 VR 584.

⁴⁸² *ibid*.

⁴⁸³ *ibid*.

⁴⁸⁴ *ibid*.

⁴⁸⁵ *Victoria Teachers Credit Union Ltd v KPMG* (2000) 1 VR 654.

(iii) Western Australia

Western Australian Supreme Court Rules, 1971 regulates civil proceedings in Western Australia.⁴⁸⁶ There are three originating processes. These are writ of summons (Order 4, R 1); originating summons (Order 58); and originating motion (Order 54). By Order 2(1), a court cannot set aside a case commenced with the wrong originating process.⁴⁸⁷ The Western Australian originating processes look much like the Ghanaian original processes under LN 140A as previously discussed. The difference though is that it is clear in the Western Australian Rules of Court that a faulty originating process cannot be fatal for the defaulting party.

(iv) Queensland

In the State of Queensland, the Queensland Uniform Civil Procedure Rules, 1999 regulates civil proceedings.⁴⁸⁸ From Part 8(2) of the Rules, the originating processes include filing a claim, an application, a notice of appeal, notice of appeal subject to leave.⁴⁸⁹ Generally, notices of appeal either as of right or with the permission of the court are not considered as originating processes in Ghana, as a common law country. In Queensland, by virtue of Rule 16 of the Uniform Civil Procedure Rules, a court may set aside an originating process for want of jurisdiction or the case not being properly started.⁴⁹⁰ A search on the repository of Queensland case law shows that the

⁴⁸⁶ Western Australian Supreme Court Rules, 1971 is available at <https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_2029_homepage.html> (last accessed 1 July 2025).

⁴⁸⁷ *ibid*, Order 2(1).

⁴⁸⁸ Queensland Uniform Civil Procedure Rules, 1999, available at <<https://www.legislation.qld.gov.au/view/pdf/inforce/current/sl-1999-0111>> (last accessed 1 July 2025).

⁴⁸⁹ *ibid*, Part 8(2).

⁴⁹⁰ *ibid*, rules 16(a) & 373.

meaning of rule 373 (incorrect originating proceedings) has not been considered by the courts in Queensland.⁴⁹¹

(v) New South Wales

In the State of New South Wales, the New South Wales Civil Procedure Rules, 2005 regulates civil proceedings.⁴⁹² By Rule 6.35, the originating processes are a writ of summons and an application.⁴⁹³ By Division 4, rule 12.11, an originating process can be set aside. Unlike Tasmania, Victoria and Western Australia, a faulty originating process can be set aside.⁴⁹⁴ This was an issue in *Durrington v SAS Trustee Corporation*.⁴⁹⁵ In this case, on 15 November 2000, an application sought a ‘review of an existing award’ although there was no ‘existing award’ and on the face of the record, the appeal appeared statute-barred. The appellant led evidence that a form of application was forwarded to the court under cover of letter of 16 October 2000 and received 17 October 2000, and that if that document had passed under the seal of the Court, the current appeal would not be statute-barred. The question was whether the document received by the court on 17 October 2000 ought to have passed under the seal of the Court on that day. It was held that a wrong form was used to commence the action but the substance of the dispute between the parties was clearly disclosed in the form received. Hence, the form received on 17

⁴⁹¹ See Queensland Judgements in the Queensland Supreme Court Library available at <<https://www.queenslandjudgments.com.au/ucpr/qpi-content?id=10000#10011>> (last accessed 20 July 2025).

⁴⁹² Uniform Civil Procedure Rules (New South Wales), 2005, available <<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0418>> (last accessed 1 July 2025).

⁴⁹³ *ibid*, rule 6.35, and Supreme Court (Corporations) Rules 1999, Division 2, Rule 2.2, available at < <https://legislation.nsw.gov.au/view/html/inforce/current/sl-1999-0703>> (last accessed 1 July 2025).

⁴⁹⁴ *ibid*, Part 12, Division 4, rule 12.11.

⁴⁹⁵ *Durrington v SAS Trustee Corporation* [2001] NSWCC 165, available at <https://www.caselaw.nsw.gov.au/decision/549f6fab3004262463a6ac07> (last accessed 20 July 2025).

October 2000 ought to have passed under the seal of the Court on that day. If it had, there could be no argument that the current appeal was statute-barred. In the interests of justice, and the quick and cheap resolution of the issues between the parties, the court deemed the document received by the court on 17 October 2000 to have passed under the seal of the Court thereby commencing the appeal within the time prescribed. This case shows flexibility in the application of the rules on originating processes in New South Wales even when there is a clear provision that the process could be set aside.

(vi) Southern Australia

In Southern Australia, the Uniform Civil Procedure Rules, 2020 in Part 3, Section 43.1 provide for a claim and originating applications as the originating processes.⁴⁹⁶ There is no provision on the effect of non-compliance with the rules in the choice on originating processes though a claim may be set aside for irregularity defined to include non-service of a claim, obtaining judgment by misrepresentation and so forth.

E. ORIGINATING PROCESSES IN GHANA

Under CI 47, there are multiple originating processes. These are *writs of summons* (for all civil matters except those for which other modes have been prescribed);⁴⁹⁷ filing of *applications* (for human rights redress);⁴⁹⁸ filing of *petitions* (matrimonial causes);⁴⁹⁹ and *originating notice of*

⁴⁹⁶ Uniform Civil Procedure Rules, 2020 (Southern Australia), available at <[https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager-files/court-rules/08-uniform-civil-rules/Uniform Civil Rules 2020.pdf](https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager-files/court-rules/08-uniform-civil-rules/Uniform%20Civil%20Rules%202020.pdf) > (last accessed 1 July 2025).

⁴⁹⁷ CI 47, Order 2, rule 2.

⁴⁹⁸ *ibid*, Order 67, rule 1.

⁴⁹⁹ *ibid*, Order 65, rule 2.

motions (for judicial review for prerogative writs).⁵⁰⁰ Under the last colonial civil procedure law (LN 140A of 1954) which was in force in Ghana until 2004, originating summons were an additional mode for the invocation of the jurisdiction of the courts if there was little dispute about the facts of the case and witnesses were not required to testify.⁵⁰¹ This was removed under CI 47. For all these originating processes under CI 47, the type of information provided to give all actors involved in the case, sufficient information to be adequately informed about the case of the plaintiff or applicant or petitioner as the case may, is essentially the same. The details are information on the parties, details about the case showing that a recognisable case can be maintained and the grounds upon which the action is mounted (the statement of claim, statement of case, affidavit in support, etc), and the reliefs being sought from the court. Obviously, all these can be composed into a composite single mode for the invocation of the jurisdiction of the court, like in the Federal Court of Australia. The advantage of a simple single mode for originating processes is that no one will be compelled to spend years justifying whether the appropriate originating process has been used. This proposal can benefit from the single originating process for the courts in jurisdictions such as England and Wales.⁵⁰² Netherlands has two ways of initiating a case: a writ of summons and an application, also sometimes referred to as a petition.⁵⁰³ For India, since the promulgation of its Civil Procedure Code in 1908, there has always been a single mode, thus, the use of a plaint on a standard template, for the invocation of

⁵⁰⁰ *ibid*, Order 55, rule 1 (judicial review) and Order 56, Rule 1 (for habeas corpus).

⁵⁰¹ LN 140A, Order 54 and 54A.

⁵⁰² Civil Procedure Rules 1998 (No. 3132), Rule 7.2, available at < <https://www.legislation.gov.uk/uksi/1998/3132/part/7>> (last accessed 20 July 2025).

⁵⁰³ For the Netherlands, see <<http://www.dutchcivillaw.com/jurisdiction/legalsystem011.htm>> (last accessed 20 July 2025)

the civil jurisdiction of the courts.⁵⁰⁴ When the plaint is submitted, it is the responsibility of the court administration to issue the summons to the other party named to respond in order to defend the case.⁵⁰⁵ The case in favour of a single mode of case initiation is that what is expected of the courts in all cases is conceptually the same. Thus, courts are expected to deliver judgment on a dispute, irrespective of the difference in the facts, contexts and the law. This is unlike execution which can rely on different methods because of the different ways by which a judgment debt, for example, may be made good. A judgement debt can be satisfied by the issuance of the writ of sequestration or garnisheeing accounts of the judgment debtor. These are all different ways to reach the objective of the judgment creditor. One or the other may be more appropriate because of the peculiar circumstances of the judgment creditor. He may have goods but not cash to make good the judgment debt. If this is the case, seizure of the goods works well for the judgement creditor. These differences are not relevant relative to the initiation of civil cases.

F. SIMILARITIES AND DIFFERENCES IN ORIGINATING PROCESSES IN AUSTRALIA AND GHANA

All State Courts of Australia examined in this thesis have multiple originating processes such as issuing of a writ of summons; filing an application; or filing a petition as the case may be. These are not remarkably different from the originating processes in Ghana. These multiple originating processes mean that it is possible for the parties to make a wrong choice in initiating cases. The important question therefore is what effect a wrong choice will have on the invocation of the jurisdiction of the court and the trial process as a whole? While some Australian State courts

⁵⁰⁴ Civil Procedure Code, 1908, Order IV (1), available at <https://www.indiacode.nic.in/bitstream/123456789/11087/1/the_code_of_civil_procedure_1908.pdf> (last accessed 20 July 2025).

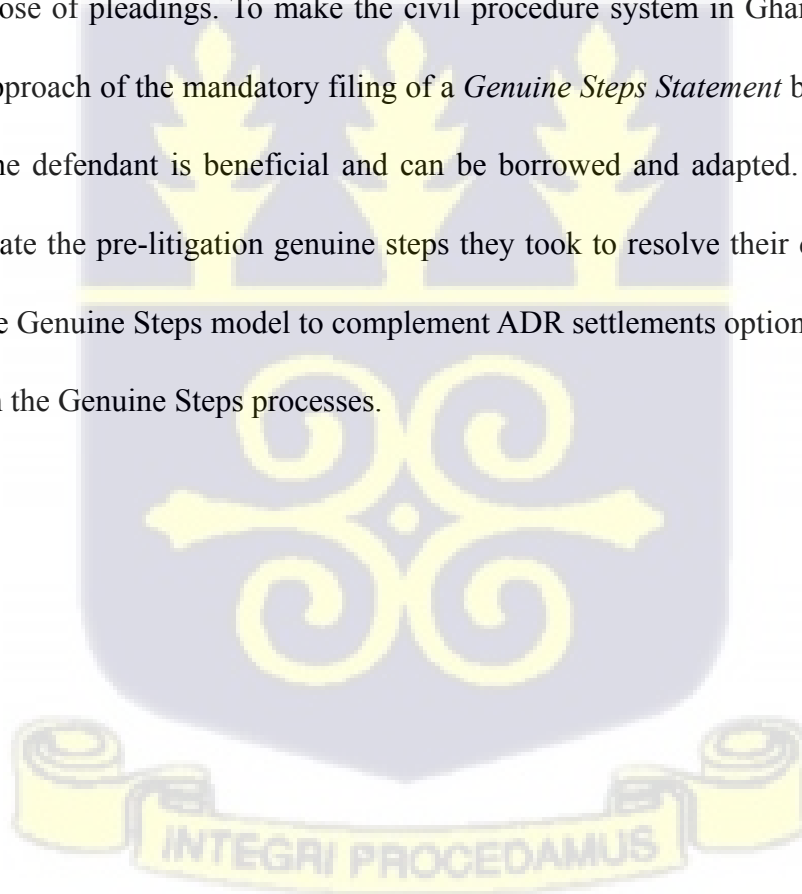
⁵⁰⁵ *ibid*, Order IV(2).

Rules (for instance Tasmania, Victoria and Western Australia) are clear that a faulty originating process cannot be the sole purpose to set aside the process, the Ghanaian position requires a nuanced interpretation of Order 81. The situation in the Federal Court of Australia is different. There is only one originating process in the Federal Court of Australia. This is an originating application. Hence, there cannot be any question as to the effect of a wrong choice of an original process. This is unlike Ghana where case law has demonstrated that such wrong choices can terminate the case, even if temporarily. This is where the two jurisdictions differ significantly in practice. In Ghana, civil procedure reform is crucial because even though the Rules of Procedure do not override substantive law in the event of conflict, nonetheless, depending on the nature of the procedure at stake, it may lead to the collapse of a case before the court. The Ghanaian law has not departed from the common law position that the rules of procedure do not override substantive law. Lord Denning amplifies the common law perspective in *Ward v James* that “[W]here a civil procedure rule contravenes a substantive law, the latter gains precedence over the former”.⁵⁰⁶ Yet, often, the concern is not even about conflict. Rather, it is about deciphering which procedure is most appropriate to deploy at any point in time. The clarity in the Australian Rules that the choice of a wrong originating process (where there are multiple originating processes) cannot be the sole ground to set aside that process is something Ghana can borrow. This way, it is clear that faulty originating processes will not lead to disastrous outcomes for clients when their legal advisors falter, sometimes, even through no fault of theirs.

Further, the requirement for the parties in Australia to make a genuine step statement prior to invoking the jurisdiction of the court does not have an exact equivalence in the Ghanaian civil

⁵⁰⁶ *Ward v. James* (1966) 1 QB 273.

justice process. What is close to the genuine steps statements requirement is the use of ADR to settle cases. But, this happens after the plaintiff has invoked the jurisdiction of the court. The use of ADR at the application for directions stage or immediately after reply has been filed (in the case of Ghana) and the Genuine Steps decision share some similarity in the sense that these matters come up when the parties first appear before a judge for the first time in Australia and in Ghana. However, the difference between these two efforts is that the focus of the Genuine Steps requirement is on actions that the parties took prior to invoking the jurisdiction of the court. The Ghanaian model is to allow the parties to attempt settlement after they have come to court or at least after the close of pleadings. To make the civil procedure system in Ghana more effective, the Australian approach of the mandatory filing of a *Genuine Steps Statement* by the plaintiff and a response by the defendant is beneficial and can be borrowed and adapted. This will compel litigants to indicate the pre-litigation genuine steps they took to resolve their difficulties. It will be helpful for the Genuine Steps model to complement ADR settlements options if the case is not resolved through the Genuine Steps processes.



IV. CASE MANAGEMENT

A. CASE MANAGEMENT IN AUSTRALIA

(i) The overarching idea of case management in Australia - Improving judge control

One way to improve efficiency in how cases are handled through the court process is case management.⁵⁰⁷ For Australia,⁵⁰⁸ the overarching purpose of case management is for the courts to resolve cases expeditiously, cheaply if possible and through the most effective manner.⁵⁰⁹ High expenditure and prolonged periods cases take to resolve are expected to come down when the adjudicating authority acts fast and monitors the follow through process with a view to excluding gamesmanship which the common law is accustomed to.⁵¹⁰ With tactful case management, the adversarial judge takes control of the case. The judge becomes more empowered and more accountable. This is because the main objective of ‘*case management* or *managerial judging*’ or ‘*case flow management*’ is to ensure that litigants are no longer the main actors in control of the speed at which the adjudication proceeds.⁵¹¹ To this effect, Australian Federal Court Act, 1976 requires that the adjudicator provides a clear idea to the parties about how the various steps in the

⁵⁰⁷ Several countries are investing in case management processes to improve procedural justice. For example, one of the main outcomes of Lord Woolf’s reports was the introduction of case management principles into English civil procedure. See Carolynn Louise Markram, ‘Case management in the context of identifying and reforming undue delay in South Africa civil procedural law’, University of Pretoria (South Africa) Thesis (2016), available at <<https://repository.up.ac.za/items/53dc3fac-f273-4a95-b813-c06896757d73>> (last accessed 26 May 2025).

⁵⁰⁸ The discussions here focus on case management at the Federal Court of Australia, and not other courts within the Federal Court Structure or State Courts as analysis of case management in all the courts is deemed too expansive and extensive for the purpose of this study.

⁵⁰⁹ Federal Court of Australia Act, 1976 section 37 M(1), 37 N(1) & (2).

⁵¹⁰ John Sheahan, Case Management Handbook: Some general considerations, available at <https://lawcouncil.au/publicassets/2a7b4c07-0f36-ec11-9443-005056be13b5/Case_Management_Handbook_Updated_Version_2021.pdf> (last accessed 26 May 2025).

⁵¹¹ Erasmus “Civil Procedural Reform – Modern Trends” STELL LR 1999(1): 9.11 quoting the American Bar Association’s Standards Relating to Trial Courts which state that: “The court should supervise and control the movement of all cases on its docket from time of filing through [to] final dispensation”. See also Markram (n 507).

case will unfold.⁵¹² The judge is at liberty to ask the parties to perform certain tasks, and give clear timeframe within which he expects actions to be taken.⁵¹³ It is the prerogative of the judge to take decisions on the numbers of witnesses to allow to testify.⁵¹⁴ These are very far reaching and extensive powers granted the courts to ensure effective case management for speedy and cost effective resolution of disputes. These make it possible for the court to control how cases progress from the point of initiation to conclusion. This has been an essential feature of the civil law way of doing things for a long time. Inquisitorial adjudication puts the judge in the lead and mandates him or her with enough authority to manage the trajectory of the case. The ideas behind case management will require that judges adopt a posture different from the usual way the common law judge is expected to act, as a neutral umpire.

(ii) The Individual case track

Australians run two different systems for the allocation of cases for hearing, thus the *Individual Case Track* and the *Fast Track*. The individual case track means that when a case is filed, it is assigned at random to a specific judge who will handle the case until its termination.⁵¹⁵ Where

⁵¹² Section 37P (2) and (3) of the Federal Court of Australia Act 156 of 1976, as amended. Case management can be carried out with ‘a *comprehensive approach or active case management*. An example of this comprehensive approach is the type of case management implemented by England and Wales after the 1998 new CPR came into effect. On the other hand, a *selective* approach can be adopted for the management of cases. Australia provides an example of the deployment of selective case management.

⁵¹³ Federal Court of Australia Act 156 of 1976 section 37P(3)(b).

⁵¹⁴ *ibid* section 37P(3)(c).

⁵¹⁵ In situations which require a specific expertise, case may be assigned to a judge who is a member of a specialist panel. This information is available at <www.fedcourt.gov.au/case-management-services/case-allocation/individual-docket-system> (last accessed 20 July 2025). This means that docket will normally be with the assigned judge until the case is decided. This approach is seen to vary from other approaches of case management in Australian Supreme Courts, as the emphasis is on court control of procedure from the inception of the action. In other words, this is considered to be a comprehensive case management approach as opposed to a selective one. *See* John Sheahan ‘Case Management Handbook: Mechanics of Case Management’ 18 at par 4.4, available at <www.fedcourt.gov.au/case-management-services/case-allocation/individual-docket-system> (last accessed 20 July 2025).

the situation demands, the proceedings may also be assigned to a Case Management Judge and/or a Class Actions Registrar.⁵¹⁶ The Judge manages how the proceedings unfold up to the point a verdict is rendered by the court. Practically, the Registrar sets the first direction hearing once the originating process is filed.⁵¹⁷ In order for the cases to be quickly handled, the court is authorised to allow parties to participate from afar and for decisions to be taken even when the parties are not physically present in the courtroom with the judge.⁵¹⁸ The judge is at liberty to make decisions on the basis of the documents furnished the court by the parties.⁵¹⁹ Judges are also authorised to use online processes including virtual courts to expedite proceedings.⁵²⁰ The potential for e-courts to bridge the infrastructure and resource gap between parties and therefore facilitate equitable resolution of cases is evident.

(iii) Fast Track case allocations

In order for a case to be put on the Fast Track route, specific categories of cases may qualify. Some suits are easily amenable to be treated for quick adjudication on this route. By the Rules, these include cases related to commerce and trade commercial; private liquidation proceedings; intellectual property rights cases except those related to patents and other cases for which the hearing can be handled within a period of 5 days.⁵²¹ The clarity in terms of which cases qualify

⁵¹⁶ See Allocation of Judicial Proceedings under the National Court Framework, available on the website of the Federal Court of Australia, at <https://www.fedcourt.gov.au/about/national-court-framework/allocations#allocation> (last accessed 30 April 2025).

⁵¹⁷ Sheahan (n 32) 12 at par 2.2.

⁵¹⁸ Federal Court Rules, Rules 1.36; 39.2 and 39.1; Sheahan “Mechanics of Case Management” (n 515) at par 4.13.

⁵¹⁹ *ibid.*

⁵²⁰ Sheahan, Mechanics of Case Management (n 515) 20 at par 4.16.

⁵²¹ This is available at www.fedcourt.gov.au/case-management-services/case-allocation/fast-track-system (last accessed 30 April 2025).

for Fast Track adjudication helps to avoid clogging this track so as to enable it serve its purpose. It is posited that even the adversarial judges now have very extensive powers to allow them to manage the cases efficiently. In spite of this, in the view of Hazel Genn, the problem with civil justice reviews is that they were not conducted with the benefit of research and empirical data on delay, cost and the complexity of litigation.⁵²²

B. CASE MANAGEMENT IN GHANA

(i) The law on case management

Order 32, rule 7A of High Court (Civil Procedure)(Amendment) Rules, 2014 (CI 87) deals with case management.⁵²³ This Order provides that at the time the court is called upon to provide indications to the parties as to how the case will be handled, the court is mandated to appoint a time and a place for a case management conference. Within at least 4 days prior to this conference, the litigants are expected to deposit with the Registrar of the court, a pre-trial check-list providing indications regarding witnesses they intend to call and how much time the judge should reasonably allocate for each aspect of the case. From the above provisions, the case management conference can be treated as a continuation of the application for directions stage and as the last preparatory stage for the trial. In the course of case management, the judge may do any of the following: give further directions where necessary to ensure speedy trial, ensure that all orders made at the directions stage, such as discovery, interrogatories, filing and service of witness statements and filing of pre-trial check list have been complied with, the court and parties may settle on the number and types of witnesses for the trial and also if an interpreter

⁵²² Genn (n 85) at 64.

⁵²³ High Court (Civil Procedure)(Amendment) Rules, 2014 (CI 87) Order 32 rule 7A.

would be required. The case management conference is also the place where the parties disclose the documents they intend to use at the trial.

(ii) Witness statements as evidence-in-chief

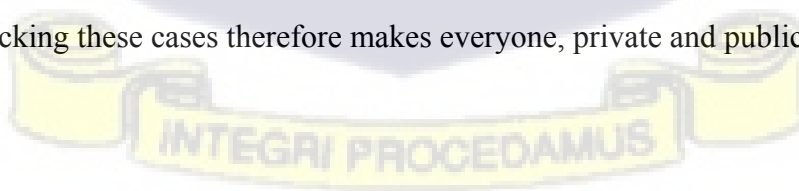
One action which is helping with the expedition of cases is the enactment of High Court (Civil Procedure)(Amendment) Rules, CI 87 of 2014. CI 87 deals with the filing of witness statements, case management and other related evidentiary reforms. With the enactment of CI 87 of 2014, civil trials in Ghana have taken a new shape, principally with the introduction of witness statements, taking the place of *viva voce* evidence in chief and the conduct of Case Management Conference before the commencement of trials. Order 38 rule 3B (1) of CI 87 defines a witness statement to mean any written word under the hand of the author containing the statements the author would have made orally when the matter goes on trial. Order 38 rule 3B (2) enjoins the judge to compel the litigants to deposit their witness statements in court in order to be sent to the other party at the time of application for directions. Order 38 rule 3E (2) of CI 87, also states that where a person is to give parole testimony, under sub rule (1), the person's witness statement will be taken as his main testimony, unless the judge decides otherwise. These provisions of CI 87 clearly show that the witness statement filed by a party can only be used at the trial.

C. SIMILARITIES AND DIFFERENCES IN CASE MANAGEMENT IN GHANA AND AUSTRALIA

As Australia is a Federal State with both federal and state courts, there may be some differences between case management for federal courts and the state courts. The comparison here is restricted to the Federal Court of Australia case management. Case management in both Australia and Ghana has the main objective of empowering the adversarial judge to take more control of

the proceedings in order to avoid undue delay, reduce cost and cut out complexities as much as possible. In both jurisdictions, the judge is at liberty to require the parties and their lawyers to perform certain acts within defined timeframes to ensure expedition of the trial. The judges in Australia and Ghana decide on the number of witnesses to call and how much time would be spent in examining the witnesses. In both jurisdictions, the parties may participate in the case management processes remotely, with the need for leave to do so in the case of Ghana to be complied with.

The difference between the case management systems run by Australia and Ghana is that while Australia runs a dual track (individual and fast track) case management system, Ghana runs a uni-track system where the docket judge typically performs all case management functions to prepare the case for hearing. As the Fast Track case management is dedicated to commercial matters; private liquidation proceedings; intellectual property rights cases except those related to patents and other cases for which the hearing can be handled within a period of 5 days, these cases can be even specially expedited. This however raises a concern as to why within a regime of improving expedition through case management, there should be fast-tracking of some other cases. It appears the understanding for the Task Track route of case management is that these cases are by nature complicated and have high stake interests for private and public wealth creation. Fast tracking these cases therefore makes everyone, private and public better-off.



V. MODERNISATION OF CIVIL PROCEDURE

A. PRINCIPLES OF MODERNISATION

Part of the solutions to these frustrations is to “modernise” the courts. Modernisation efforts are targeted at removing barriers to accessing meaningful justice.⁵²⁴ For instance, Pew’s work demonstrates that modern courts rely on user-friendly systems which emphasise open, effective and fair adjudication.⁵²⁵ Efforts to modernise courts must be guided by fundamental principles *openness, effectiveness, and equity*.⁵²⁶ The principle of *openness* deals with aggregating data and consciously working to improve transparent, effective, and equitable justice delivery system.⁵²⁷ On *effectiveness*, the focus should be on how a civil court optimises resources to improve how litigants engage with and navigate their cases, with a priority on using data to inform their decisions and on meeting court users’ needs.⁵²⁸ For example, many modern courts track how long a case takes from initial filing to the judge’s ruling, typically with the cost-focused assumption that faster is better. Court user surveys about their experiences are crucial. How easily court users find information about courthouse hours, locations, and how to get to court, and civil legal information (e.g., phone, court website, external partners) are crucial for effectiveness. *Equity* focuses on the individual user, recognising that diverse users interact with the courts in different ways.⁵²⁹ An equitable court ensures that individual litigants, witnesses, and

⁵²⁴ PEW Charitable Trust Report, Modern Courts - How to Make Civil Courts More Open, Effective, and Equitable, September 2023 at 2, available at <https://www.pewtrusts.org/-/media/assets/2023/12/civilcourtsmustbecomemoreopen_report_v4.pdf> (Last accessed 26 May 2025).

⁵²⁵ *ibid.*

⁵²⁶ *ibid.*

⁵²⁷ *ibid.*

⁵²⁸ *ibid.*

⁵²⁹ *ibid.*

others have access to the resources, tools, and support they need. Such facilities may include language translation services and court websites that are compatible with screen readers - to fully participate in the civil legal system. These basic translation services are a big hurdle for the courts in Ghana. It has been observed that the lack of translation services has often led to misunderstanding of the concerns of persons with disability in the courts in Ghana.

B. MODERNISATION IN AUSTRALIA

Australian courts are empowered through legislation to use electronic tools to advance justice delivery. In Australia, the Federal Court of Australia Act gives the Court broad powers, for the purposes of any civil proceeding, to direct appearances, submissions, and testimony to be given by way of video link, audio link or other appropriate means.⁵³⁰ Telephone services and videoconferencing have been utilised as an adjunct to traditional interactions for sufficient time that they are now regarded as tried and tested technologies in the Court. Similarly, under Rule 87C of the Tasmanian Supreme Court Rules, electronic signatures are recognised for the purpose of documents which are emailed and required to be signed. Rule 87D also recognises electronic seals for documents which are required to be sealed. Electronic filing (Rule 87E), electronic service (Rule 87F). Affidavits can be lodged at the court via email (Rule 87G).

C. MODERNISATION IN GHANA

Civil justice administration has also been improved with reforms leading to use of video link for testimony of witnesses. Under the Courts Act, 1993, taking evidence by a means other than the presence of the witness in the court room required the specific permission of the Chief Justice.⁵³¹

⁵³⁰ Federal Court of Australia Act sections 47, 47A, 47B, 47C and 47D.

⁵³¹ Courts Act, 1993 section 69(1).

Rule 3A of Order 38 of CI 47 as amended by CI 87 permits the courts to take evidence by electronic or any other appropriate medium. Rule 3A gives the court authority to allow a witness to give testimony to the court via electronic means. The rules have therefore made it possible for the courts to take evidence through other means without the permission of the Chief Justice. This power of the Court is discretionary. Therefore, a formal application must be made to the Court to seek leave to testify via an electronic medium.

It is also possible for court to deliver judgments via an electronic means pursuant to Rule 2A of Order 41 of CI 47 as amended by CI 87.⁵³² Rule 2A provides that the judge is at liberty to give his or her verdict via an electronic means. The use of video-link either for testimony or the delivery of judgment is very important as it affords the opportunity for highly sought after experts who may hitherto have found it very difficult by reason of their schedules to be physically present in the court to give their testimony from their offices anywhere around the globe. This is particularly important where a party does not reside within Ghana but wishes to partake in the proceedings. The availability and reliability of quality internet services not just for the courts but all other persons who need to participate in the proceedings virtually is a challenge. Even with this, video-link presents a cheap opportunity to participate in court proceedings. Taking into account the realities of limited available resources for less economically developed countries such as Ghana, modernisation of courts should be of high priority. Part of the online infrastructure is the use of videoconferencing facilities. The challenge with these facilities is the required quality level of video and audio communication, which can provide

⁵³² Rule 2A of Order 41 of CI 47 as amended by CI 87.

assurances to the litigants that the systems will not compromise any information and will deliver the required level of quality to enable them communicate their side of the issues to the court.

D. SIMILARITIES AND DIFFERENCES IN MODERNISATION IN GHANA AND AUSTRALIA

Both Australian and Ghanaian courts are empowered through legislation to use electronic tools to advance justice delivery. In Australia, the Federal Court of Australia Act gives the Court broad powers, for the purposes of any civil proceeding, to direct appearances, submissions, and testimony to be given by way of video link, audio link or other appropriate means.⁵³³ Telephone services and video-conferencing have been utilised as an adjunct to traditional interactions for sufficient time that they are now regarded as tried and tested technologies in the Court. Similarly, under Rule 87C of the Tasmanian Supreme Court Rules, electronic signatures are recognised for the purpose of documents which are emailed and required to be signed. Rule 87D also recognises electronic seals for documents which are required to be sealed. Electronic filing (Rule 87E), electronic service (Rule 87F). Affidavits can be lodged at the court via email (Rule 87G). For Ghana, CI 87 provides for the possibility of the use of electronic means to initiate cases, take evidence and render judgments, though these are not very functional yet.

VI. CONCLUSION

This chapter lays out the results of a comparative study of procedural justice between Ghana and Australia. Pre-trial efforts such as the requirement in Australia to file Genuine Steps Statements and Ghana's efforts to settle cases through ADR were compared. Undoubtedly, the requirement to file Genuine Steps Statements in Australia is a useful procedural step for Ghana to adopt as it

⁵³³ Federal Court of Australia Act sections 47, 47A, 47B, 47C and 47D.

gives the parties opportunities to settle differences between them even before they approach the court. Comparisons have been done in the areas of how both countries deal with jurisdictional errors, noting the materiality test in Australia as compared to the waiver of non-compliance approach in Ghana. The chapter also compared the originating processes of both countries. The single original process (original application) of the Federal Court of Australia stands out as a good model. It is noted that at the State Courts in Australia, where there are multiple originating processes, in most cases, there is an explicit provision in the law indicating that a wrong choice of an originating process will not be the sole basis to set aside the original process. Tasmania, Victoria and Western Australia provide good examples of this approach. Further, comparison was also done on the basis of the case management regimes in both countries. Significantly, both countries have empowered their adversarial judges to take on the role of managers of cases and to use case management as a tool for expeditious handling of cases. Whiles Ghana runs a uni-track case management regime, Australia runs a double track system (Individual and Fast Track). In Australia, case management begins even before the case gets to the directions stage, with a view to making efforts to settle the case before it reaches the stage for directions. Finally, in an electronic world, courts of both Australia and Ghana are making efforts to modernise and rely on the internet to aid speedy trials. The use of witness statements and video conference are prominent features of modern adjudication. The next chapter of this thesis demonstrates how MART Justice as the theoretical framework for this thesis can be practically applied by the courts in Ghana.

CHAPTER 5 : APPLICATION OF MART JUSTICE

I. AN INTRODUCTION TO THE APPLICATION OF MART

In the previous chapter of this thesis, the results of a comparative approach to achieving procedural justice were presented. Comparison of procedures between Australia and Ghana was conducted along the lines of jurisdictional errors and initiation of cases, how legislation and the courts treat wrong originating processes, case management and modernisation of courts. In chapter 4, it was observed that Australia has some legislative interventions at the Federal Court of Australia and some State Courts such as Tasmania, Victoria and Western Australia to ensure that a wrong choice of originating processes does not lead to treating the proceedings as a nullity. This legislative intervention is one approach to deal with the nullity effect of wrong originating processes. But, in the absence of a clear legislative approach, a judicial avenue through an appropriate theoretical lens can yield a desired result in favour of procedural justice. This is why in chapter 3 of this thesis, MART Justice as the preferred theoretical framework of this thesis was espoused. In this chapter, how MART Justice can be applied in Ghanaian courts is demonstrated. This is important because even after CI 47 came into effect in 2004, the wrong choice of originating processes has been treated by the courts as a fundamental error which renders the attendant proceedings null and void. This thesis posits that MART Justice can be applied at all levels of the hierarchy of the courts in Ghana for the purpose of achieving fairness and justice between the parties.

The demonstration of the application of MART Justice in this chapter has been done through the review of three cases, which originated from the High Court but ended up in the Supreme Court

either through appeals or by the invocation of the supervisory jurisdiction of the court.⁵³⁴ The cases under scrutiny are *The Republic v. High Court, Ho, Ex parte Attorney General, (Electoral Commission - Interested Party)*;⁵³⁵ *Ahinakwa II and another v. Okaidja III and others*;⁵³⁶ and *Jonah v. Aggrey, Kulendi and Kulendi*.⁵³⁷ For each of these cases, the application of MART Justice will be aided by questions along the lines of the ORDER of MART. The questions are:

- (i) For *Originality* - what would have been the rule on the initiation of cases at the original position? It is noted that different rules or principles are possible at the original position.
- (ii) For *De-colonisation* - Is there any colonial influence on the rules even at the original position? If so, how can de-colonisation be achieved?
- (iii) For *Relationality* - How can *relationality* be achieved with the application of the rules? Is there any indication of *identification* and *solidarity* in the application of the rules?

These questions are intended to help ascertain whether the application of the rules of civil procedure are MART compliant or not on basis of ‘ORDER’ as the building blocks of MART Justice. This is because in order to be MART compliant, ‘ORDER’ requires that the rules must be applied from the *original position*, necessitating that the judge puts him or herself behind a veil of ignorance. Then, whatever decision is reached at the original position must be **de**-colonised.

This means that where there are some colonial influences still lingering on even at the original

⁵³⁴ The supervisory jurisdiction of the Supreme Court may be invoked against a decision of the High Court or the Court of Appeal under article 132 of the 1992 Constitution in cases where there is a manifestly plain and obvious errors of law on the face of the record which either goes to the jurisdiction or makes the impugned decision a nullity. It has been said by the Supreme Court that the errors which will be appropriate for the exercise of the supervisory jurisdiction of the court must be fundamental or so serious that it goes to the root of the matter. See *The Republic v. Court of Appeal, Ex parte Tsatsu Tsikata* (2005-2006) SCGLR 612.

⁵³⁵ *The Republic v. High Court, Ho, Ex parte Attorney General, Electoral Commission (Interested Party)*, Civil Motion No. J5/21/2021 dated 5th January 2021.

⁵³⁶ [2011] 1 SCGLR 205.

⁵³⁷ [2013-2014] 1 SCGLR 272.

position, efforts must be made to divest the rules of such tendencies. Finally, the judge must aim at the application of the rules to achieve *relationality*. This requires that the judge must aim at *identifying* and *solidarising* with the parties to the case and all others reasonably connected to them as a community. At the end of the application of MART Justice to these cases, a conclusion is reached as to whether the decision of the Supreme Court is MART compliant or not. The decisions of the Supreme Court are not considered fair or just if they are not MART compliant. This thesis now proceeds to demonstrate the application of MART Justice with decided cases.

II. CASE ONE - *THE REPUBLIC V. HIGH COURT, HO EX PARTE ATTORNEY GENERAL, ELECTORAL COMMISSION (INTERESTED PARTY)*

A. BACKGROUND TO THIS CASE

The case titled *The Republic v. High Court, Ho, Ex parte Attorney General, Electoral Commission (Interested Party)*⁵³⁸ (hereinafter referred to as the “SALL case”) is an offshoot of Suit Number E12/40/2021 titled *Professor Margaret Kweku and four others v. The Electoral Commission (1st Respondent), Wisdom Kofi Akpakli (2nd Respondent), John Peter Amewu (3rd Respondent) and the Attorney General (4th Respondent)* (hereinafter referred to as the ‘Kweku application’).⁵³⁹

In the Kweku application, the facts presented to the court indicated that the 1st Applicant and the 3rd Respondent (hereinafter referred to as ‘Amewu’) contested parliamentary elections held by

⁵³⁸ *The Republic v. High Court, Ho, Ex parte Attorney General, Electoral Commission (Interested Party)*, Civil Motion No. J5/21/2021 dated 5th January 2021.

⁵³⁹ Suit Number E12/40/2021 titled *Professor Margaret Kweku and four others v. The Electoral Commission (1st Respondent), Wisdom Kofi Akpakli (2nd Respondent), John Peter Amewu (3rd Respondent) and the Attorney General (4th Respondent)* commenced at the High Court, Ho.

the 1st Respondent on 7th December 2020 to represent the people of Hohoe as their member of parliament (MP). The main controversy in this case related to where voters in four traditional communities in the Hohoe constituency were to cast their parliamentary ballots.⁵⁴⁰ This was because, after the creation of six new regions including Oti, four communities - *Santrokofi, Akpafu, Likpe and Lolobi* (popularly referred to as “SALL”) which were previously under the Hohoe constituency, fell under Oti region and no longer under Hohoe constituency.⁵⁴¹ Until the creation of Oti region, the affected communities cast their parliamentary ballots in the Hohoe constituency. On the eve of the elections, late on 6th December, 2020, the Electoral Commission issued a Press Release to the people of SALL to participate only in the presidential elections in Hohoe constituency but not to vote in the parliamentary elections.⁵⁴² It was within this context that Amewu was elected as the MP for Hohoe. The applicants felt disenfranchised and therefore claimed that the 3rd Respondent could not be validly chosen as an MP for Hohoe.

B. THE NATURE OF THE APPLICATION AT THE HIGH COURT

The Kweku Application was commenced as an originating application to enforce fundamental human rights and freedoms of the applicants.⁵⁴³ How to commence a human rights action is

⁵⁴⁰ Civil Motion No. J5/21/2021 dated 5th January 2021 at page 7.

⁵⁴¹ The Oti Region Instrument, 2019 (CI 112).

⁵⁴² Electoral Commission of Ghana, ‘Conduct of Presidential and Parliamentary Elections in the Buem Constituency’ (Press Release, 6 December 2020) published at 12.07 am on the website of the Electoral Commission on 7 December 2020, available at <<https://ec.gov.gh/conduct-of-presidential-and-parliamentary-elections-in-the-buem-constituency/>> (last accessed 22 July 2025).

⁵⁴³ Suit Number E12/40/2021 titled *Professor Margaret Kweku and four others v. The Electoral Commission (1st Respondent), Wisdom Kofi Akpakli (2nd Respondent), John Peter Amewu (3rd Respondent) and the Attorney General (4th Respondent)* commenced at the High Court, Ho.

catered for by article 33 of the 1992 Constitution, to be read together with Order 67 of CI 47.⁵⁴⁴ The applicants sought to restrain the Electoral Commission from publishing in the gazette that the 3rd Respondent was validly elected MP for Hohoe. The applicants also sought from the court a decision to stop the 1st and 2nd Respondents from presenting the 3rd respondent to parliament to be sworn in. Finally, the Applicants also sought an order to restrain the 3rd Respondent from making himself available to take the oath of an MP or carry himself as a validly elected MP.⁵⁴⁵ On 23rd December 2020, the High Court granted these requests. Aggrieved by this order of the High Court, the Attorney General triggered the supervisory jurisdiction of the apex court for its intervention to quash the decision of the court based on the view that the High Court did not have the authority to make the orders.

C. THE SUIT AT THE SUPREME COURT

On 29th December 2020, the Attorney General filed Suit number J5/21/2021 (the SALL case) to trigger the authority of the Supreme Court to supervise all other courts in compliance with article 132 of the 1992 Constitution.⁵⁴⁶ This Notice of Motion at the instance of the Attorney General specifically asked for reliefs which included an order by the apex court that the orders made by

⁵⁴⁴ Article 33(1) of the 1992 Constitution provides that ‘[W]here a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may *apply* to the High Court for redress.’ Emphasis mine.

⁵⁴⁵ Suit Number E12/40/2021 titled *Professor Margaret Kweku and four others v. The Electoral Commission (1st Respondent), Wisdom Kofi Akpakli (2nd Respondent), John Peter Amewu (3rd Respondent) and the Attorney General (4th Respondent)* commenced at the High Court, Ho.

⁵⁴⁶ Article 132 of the Constitution provides that ... “The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power.” Further, Order 67 of CI 47 provides that “A person who seeks redress in respect of the enforcement of any fundamental human right in relation to the person under article 33 (1) of the Constitution shall submit an *application* to the High Court.” Emphasis mine.

the High Court should be brought to the Supreme Court to be rendered null and void.⁵⁴⁷ Further, the Attorney General requested the Supreme Court to make a decision to restrain the High Court, Ho from further hearing the case originated by Margaret Kweku and others.

The applicants stated three grounds for the application. Only the first ground is considered relevant for the purpose of this thesis. The first ground is that the High Court has no mandate under article 33 (1) of the 1992 Constitution, to accept to hear a case related to elections and give orders thereon unless the case was initiated on the authority of article 99 of the 1992 Constitution and section 16 of the Representation of the People's Law, 1992 (PNDCL 284).⁵⁴⁸ In other words, the view of the Attorney General was that the reliefs sought in the Kweku Application under article 33 of the 1992 Constitution were only available for parties who initiated their actions by petition to deal with an election controversy. Those reliefs were not available when a case is commenced by an application for a human rights violations.

D. THE SUPREME COURT VERDICT

The main issue before the Supreme Court was whether as the Applicants were seeking to trigger the authority of the High Court via an article 33 route, the High Court had jurisdiction to give any order which could affect an electoral outcome? The Attorney General's argument was that the High Court did not have such a jurisdiction. Kweku and others disagreed.

⁵⁴⁷ *The Republic v. High Court, Ho, Ex parte Attorney General, Electoral Commission (Interested Party)*, Civil Motion No. J5/21/2021 dated 5th January 2021.

⁵⁴⁸ Representation of the People's Law, 1992 [PNDCL 284], section 16. Article 99(1)(a) of the 1992 Constitution provides that [T]he High Court shall have jurisdiction to hear and determine any question whether - (a) a person has been validly elected as a member of Parliament or the seat of a member has become vacant'.

The Supreme Court in a judgment dated 5th January 2021 agreed with the Attorney General and relied on its supervisory authority to render the orders of the High Court null and void. The Supreme Court, however, did not restrain the High Court from going ahead to hear the human rights matter if the applicants were desirous of pursuing that case. The court reasoned that the law did not allow the applicants at the High Court to add reliefs related to the validity of the election of Amewu to their reliefs as their case was clearly a human rights enforcement suit. The court acknowledged that the 1992 Constitution through article 33(1), makes the High Court the only forum to decide human rights cases. At the same time, the same Constitution via article 99 and section 16 of PNDCL 284, gives only the High Court the jurisdiction to decide the validity of parliamentary elections when a petition is filed.⁵⁴⁹ In this regard, no one can bypass the laid down originating process of a *petition* and start a case under any of the other mandates of the High Court and ask for reliefs which question the validity of a parliamentary election. In the view of the court, in substance, the authority of the High Court via article 99 of the 1992 Constitution in addition to section 16 of PNDCL 284, to decide the valid election of an MP is essentially different from the jurisdiction to decide on a human right redress brought to court via article 33(1) of the 1992 Constitution. In effect, the High Court, Ho has authority to decide whether the 3rd Respondent was duly elected as an MP. But, the Attorney General's plaint was that as the Applicants were seeking to trigger the authority of the High Court via an article 33 route, the High Court did not have jurisdiction to give any order which could affect an electoral outcome.

⁵⁴⁹ Emphasis mine.

Interestingly, the Representation of the People's Law, 1992 (PNDCL 284) requires the procedure for electoral matters to be the same as the procedure for other civil matters before the court.⁵⁵⁰

What then distinguishes commencing a case by *petition* from starting a case by an *application*?

E. THE DIFFERENCE BETWEEN AN ELECTION PETITION AND A HUMAN RIGHTS APPLICATION

(i) Human Rights Application

Order 67 of CI 47 regulates how an application for human rights redress can be made to the High Court. Order 67 requires that the application be brought by a motion supported by an affidavit signed by the applicant or his or her counsel indicating details such as the names and addresses of the applicant and counsel; the facts of the case; the reliefs the applicant seeks; and the names and address of anyone directly affected by the application.⁵⁵¹ The application must be made within 6 months after the occurrence of the event complained about or within 3 months of the applicant knowing that the event is occurring.⁵⁵² The Attorney General and any other person on whom the application is served is entitled to 21 days to respond. Then, within 21 days after a reply to the application is served, the cause must be set by the applicant for hearing.

(ii) Election Petition

PNDCL 284 regulates the filing of parliamentary election petitions at the High Court.⁵⁵³ A parliamentary election dispute must be initiated by petition within 21 days after the gazette

⁵⁵⁰ Representation of the People's Law, 1992 (PNDCL 284) section 26(1).

⁵⁵¹ Order 67, rule 2.

⁵⁵² *ibid*, rule 3.

⁵⁵³ Representation of the People's Law, 1992 (PNDCL 284) section 26(1).

publication of the results.⁵⁵⁴ PNDCL 284 does not provide detailed guidance on the contents of the petition. However, as decided in the Wulensi case, it must be a document in writing filed in court, requesting for some orders be made.⁵⁵⁵ It must be titled ‘in the matter of ... (a person, company, etc) to which the order the petitioner seeks relates, and of the Act of Parliament which gives the court the authority to hear the petition.⁵⁵⁶ The petition must disclose the names and addresses of the petitioner, the respondent and their lawyers, if any; and contain a writing like a statement of claim, the nature and extent of the reliefs the petitioner seeks and the ground on which the reliefs are sought.⁵⁵⁷ Crucially, an election petitioner must make payment as security for cost as decided by the High Court within 21 days of the publication of the results of the election.⁵⁵⁸ This is intended to ensure speedy resolution of the case. The need for speedy resolution of the case is buttressed by the law taking away any discretion of the court to extend time within which to file the petition or pay the security for cost.⁵⁵⁹ With this background, the SALL case will be subjected to MART Justice commencing with the *Original Position* analysis.

F. ORIGINALITY OF THE DECISION

(i) The questions for the original position

Would it have made any difference if the Supreme Court Justices had tried to understand the rules on the relevant originating processes (human rights applications and electoral petitions)

⁵⁵⁴ PNDCL 284 section 16(1)(2).

⁵⁵⁵ *In re Parliamentary Elections for Wulensi Constituency: Zakaria v. Nyimakan* [2003-2004] 1 SCGLR 1.

⁵⁵⁶ *ibid.*

⁵⁵⁷ Judicial Service of Ghana Elections Manual (n 433).

⁵⁵⁸ PNDCL 284 section 18(2).

⁵⁵⁹ PNDCL 284 section 18(3).

from the ‘original position’?⁵⁶⁰ What would have been the rule on the initiation of cases at the original position? If one needs to institute a case on the basis of facts which occurred in an election but may implicate human rights at a court which has jurisdiction to try both human rights and elections matters, which originating process should guide the initiation process? These questions will help to subject the rules on the initiation of cases as far as human rights and electoral matters are concerned to scrutiny, from the original position. This will be done in a Rawlsian thought experiment fashion.

According to Rawls, in the thought experiment, determining the applicable principles from the original position will have to take place at four different stages such as the *Social Theory*, *Constitution*, *Legislative* and *Judicial* Stages.⁵⁶¹ This aspect of MART Justice flows from Rawls’ theory of ‘justice as fairness’.⁵⁶² The assumption here is that the persons constituted to choose the principles for the running of a society will choose those principles which are fair only in an environment where only the appropriate moral and practical reasons influence their choices, thus behind a veil of ignorance.⁵⁶³ To apply the original position theory to the SALL case at the Supreme Court, one has to constitute the committee which will make the choices of the fair principles. In this thesis, the committee in this thought experiment will be composed of all the Supreme Court panel members who participated in the hearing of the SALL case.

⁵⁶⁰ Rawls (n 7).

⁵⁶¹ *ibid.*

⁵⁶² *ibid.*

⁵⁶³ *ibid* at 11.

(ii) Putting the Supreme Court Judges behind the veil of ignorance

In this Rawlsian model thought experiment, this thesis relies on the idea of a contract made between rational beings for the determination of the principles from behind the ‘veil of ignorance.’⁵⁶⁴ The thesis will constitute the Supreme Court justices into the committee to determine the relevant principles of justice from behind the veil of ignorance. Why put judges behind the veil of ignorance? Why not rather put legislators in the original position? The assumption is that anyone at all (judge or layman) can be put in the original position. But, putting judges in the original position gives them context regarding the choice of principles. What this means is that the participants (Supreme Court Judges) have no knowledge of who they might be in society. They are not aware that they are Supreme Court Judges or people who understand the law at all. Neither are they aware of their economic or social status, gender or religious beliefs. They do not know their private personal circumstances. They are simply judges in conclave, behind a thick veil of ignorance.

(iii) Stage one - Introduce the broad social theory to the conclave of judges

To help the conclave of judges to commence deliberations towards the selection of the appropriate principles relative to the choice of originating processes, the conclave is exposed to some broad social theories for the ideal society. Some of these broad social theory ideas are that their ideal society expects a system of laws which will guide and regulate their affairs. The primary objective is to address fundamental social problems like conflict resolution, resource allocation, and the maintenance of social order in a fair manner. The society wants to resolve

⁵⁶⁴ *ibid.*

conflicts in an efficient manner. Further, all members of the society are rational and want more primary goods because this improves chances of realising their life aspirations. Additionally, members of the society want their way of life to be reflected in the laws so they are not divorced from their practices, though outside influences can help them to refine these values, beliefs and power dynamics they hold dear, for the better.

Additional general social theories of the prospective community to be communicated to the judges in conclave is that their country is a constitutional democracy as Rawls envisaged, with a pluralism of laws co-existing securing basic liberties of the people.⁵⁶⁵ There is a social contract model of democratic practice with periodic elections. This society is not a kingdom and there are no divine rights of anyone to rule. There is equality before the law. There are no dictators. The citizens pay for the running of the state through their taxes. The taxes are a source of funding elections at all levels. No individual is paid back their share of contributions for the running of elections if they do not participate in the elections. There is no replacement method for selection of a member of parliament. This society has ever experienced colonialism, with laws which were affected by the colonial experience. Natural resources are available and the level of economic development of the state could be better.

After the introduction of the general social theory at this level, it is assumed that the conclave of judges will select Rawls's two basic principles for the constitutional stage.⁵⁶⁶ These are that each

⁵⁶⁵ Rawls (n 7) at 173.

⁵⁶⁶ *ibid* at 52-53.

person will be entitled to an equal right of the most extensive list of basic liberties compatible with a similar system of liberty for all; and that social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁵⁶⁷

(iv) Introduce the relevant constitutional principles to the conclave of judges

At the constitution stage, the conclave of judges will select relevant principles to inform the constitutional order that the participants aspire to fashion out. Here, the general aspiration is to obtain a ‘just political constitution that reflects the principles of justice agreed’ to at the general social theory stage of the original position. These may include the need for everyone to be treated fairly in terms of participation in the electoral process. This means that if there are problems which the Electoral Commission finds difficult to immediately resolve, all efforts shall be made for all to participate with all others. The constitution will underscore the principle of one man one vote to reinforce principles of equality before the law which may be manifested in universal adult suffrage. Treating people differently because of their sex, ethnic origin, religion, disability, etc is not to be permitted. There shall be no exclusions or even dictatorial tendencies. The diversity of issues to deal with and varied ways by which legal problems may be solved may require developments of procedural and substantive law at the legislative level, bearing in mind the need to be efficient.

⁵⁶⁷ *ibid.*

(v) Introduce the relevant legislative principles to the conclave of judges

At this stage of the conclave of judges, the constitutional stage decisions will have to be implemented. The conclave of judges act as legislators here to make and analyse legislation and policies vis-a-vis in the principles of justice agreed upon in the general theory and constitution stages. Substantive and procedural electoral and human rights laws will be promulgated here. These laws will include Civil Procedure Rules.

A key constitutional provision here should encourage simplicity, eschew technicalities and complexities in the promulgation and the application of laws. Procedural laws must be designed in such a way that the focus is on getting the main contention between the parties resolved. These laws must be in accordance with the understandings at the first and second stages to promote the availability of more primary goods (amenities of life that anyone wants more of irrespective of what the person's aspirations in life)⁵⁶⁸ such as healthcare, education, the right to vote and access to justice. Here naturally, the more flexible procedural options are, the better. According to Rawls, each member of the society will want more primary goods as that will help in their self actualisation.⁵⁶⁹ The last stage at the original position is for adjudication. As adjudication cannot occur without procedural rules, the development and application of the rules must take place at this legislative stage in readiness for application and to be implemented at the judicial stage, the next stage.

⁵⁶⁸ *ibid* at 54.

⁵⁶⁹ *ibid*.

(vi) The principles the judges will rely on for the adjudication

At this fourth and final stage at the original position, the conclave of judges will transform into a court to adjudicate for the appropriate laws for originating processes. In other words, even in Rawls's theory, adjudication can be done from the original position.⁵⁷⁰ Procedural decisions can only be fair if judges put themselves in the original position at stage four while at the same time reflecting on background information provided in stages one to three. At this stage, which originating process rules will the conclave of judges rely upon in the adjudication?

As this is a thought experiment, one has to rely on some proxies as the basis for the choices the conclave will make. These proxies can represent the ideal situations one aims for in the real world as option one. This is an option which is not expected to change, irrespective of the results of this thesis. Another proxy, can be the real situation that different countries studied within the context of this thesis practice or operate for comparative perspectives, good practice and lessons. An example here is the single originating process (originating applications) for all cases at the Federal Court of Australia. The third proxy can be the situation of the originating processes expected to change depending on the results of this experiment. This obviously is the Ghanaian position of procedural rules.

One option is that the conclave will decide on procedural laws which lead to the least cost, less delay, minimal complexities and little or no opportunities for gamesmanship. This option is *idealistic* but may not often be the most realistic in the real world. This ideal option can even at

⁵⁷⁰ *ibid* at 175.

this stage be MART compliant. For initiation of cases, this first option can be something like the use of a single composite mode of originating processes for all cases like the Federal Court of Australia example or the England and Wales originating claim process of initiating cases.

The second option provides for different originating processes for different types of cases but with a clear statutory provision that no case should be dismissed because of the wrong choice of an originating process. This is a *realistic* option. This option is quite common with different Australian States such as Tasmania, Victoria and Western Australia. In the scheme of things for this thesis, this option is subject to change and can aspire to be ideal.

The third option could be something akin to the present rules in Ghana for the initiation of cases. These are multiple originating processes for different cases. Failure to strictly comply with and choose the right originating process would spell doom for the substance of the case. This option prioritises *form* over substance. This option is *formalistic*. These rules produce excessive cost, cause undue delay and come with complexities. The procedural law may capture the essence of article 19(13) of the 1992 Constitution of Ghana; Order 1, rule 1(2) and Order 81 of CI 47. But these provisions, in keeping with the formalistic spirit, will be deemed to mean that if there are some missteps which are considered to be so fundamental to triggering the jurisdiction of the court, they will nonetheless be deemed to render everything null and void. This option is the reality in Ghana today as decided by the Supreme Court in the SALL Application. Where the wrong originating process is considered to be a jurisdictional error, a better way is the Tasmanian position where faulty originating processes will not have any effect. This Ghanaian option can

change depending on the quality of results of this thesis, availability of resources at the national level, will power for cultural change in legal practice, and so forth.

This third option needs to be conceptually de-colonised because with MART Justice, fairness does not necessarily end at the judicial stage of the original position though it can. Also, what can make adjudication stage at the original position fail to produce the desired principles is the reality that human beings even at the original position are rational and will take the most rational decision in that situation. Rationality comes with the tendency to take risks, free ride and shirk responsibilities.⁵⁷¹ This is why de-colonisation may be needed at this point.

G. CONCEPTUAL DE-COLONISATION OF THE SALL DECISION

As observed from the SALL Application, the Supreme Court expressly endorsed strictness in the application of the rules on originating processes regardless of whether this means shutting the door on the hearing of the substantive matter or not. The court's position has indications of inconsideration of the need to hear the substance of the case of the SALL people at a critical time, due to a procedural mis-step. This is a mindset associated with the strict application of the rules of the writ system in England.⁵⁷² This strictness mindset was inherited by Ghana through colonialism, particularly as an 'Order in Council' was made on 3rd September 1844 to mandate judges in the Gold Coast to take into account the practices and traditions of the local people to the extent that those customs conform with English laws and principles. Where the customs of

⁵⁷¹ Posner (n 116).

⁵⁷² Sheahan (n 32).

the colonised people were at variance with English laws and principles, English laws and principles were to trump the local customs. Obviously, this is one of the sources of colonial ideas in Ghanaian legislation. How then can the decisions of the courts be de-colonised? This can happen through conceptual de-colonising.⁵⁷³ As the first post-colonial civil procedural rules made by Ghana, CI 47 is distinctively Ghanaian. It is on the face of the Rules MART compliant, particularly taking into account the intended effect of Order 1, rule 1(2) and Order 81. The problem which then requires de-colonisation is that colonial ways of thinking have made the application of the rules on originating processes not MART compliant.

According to Wiredu, to conceptually de-colonise, there is the need to divest oneself of colonial tendencies.⁵⁷⁴ Thus, this thesis aims at stripping these case laws and principles of any tendencies of inconsideration and deprivation of democratic participation. It is not doubtful that multiple originating process and the nullity effect of the wrong choice has deep seated roots of domination and deprivation of basic liberties, discrimination and general perversion. The effect of the judgement of the Supreme Court in the SALL Application is a deprivation of the legitimate rights of the people of SALL to be heard in a timely fashion on the substantive claim. Hence, it does not matter that the applicants have had their day in court to determine the validity of the election of Amewu years after the SALL Application decision.

⁵⁷³ Wiredu (n 343).

⁵⁷⁴ *ibid.*

An important factor to consider in concluding that the application of the rules remains colonised is the quality of legal experts involved in the case who were unable to unravel the appropriate originating processes successfully. The SALL case emanated from an application to the High Court by one of the most revered lawyers in the history of Ghana. If he is unable to successfully choose an originating process, how can an ordinary person without legal training be expected to navigate these processes successfully? Whenever a lawyer with the basic understanding of the rules of civil procedure is unable to reach a decision as to which originating process to choose, that is a sign that the rules are colonised or the application of the rules is 'colonised'. This is the case though there are several factors, differences in the appreciation of legal rules and values that should underpin the legal system. The point is that whichever way all these factors and ways of appreciating legal rules indicate, the result should not be that one with the requisite legal training is unable to say with certainty how to commence a case successfully. This is a mindset problem, which problem in the words of Fanon is psychiatric and came with colonialism.⁵⁷⁵

H. RELATIONALITY OF THE DECISION

(i) Relationality in the SALL Application decision

Now, let us apply relationality as the last of the three building blocks of MART justice to the SALL Application decision. The SALL Application decision was an opportunity for the apex court to rely on Ghanaian culture to interpret and apply law on multiple originating processes and the nullity effect of a wrong choice. The question is whether there is anything in the laws or the rules of court which requires the court to take into account relationality in the interpretation

⁵⁷⁵ Fanon (n 13).

or understanding of the rules. On the face of the Rules, the obvious answer is in the negative. However, if it is taken for granted that Africans, Ghanaians and the SALL people are relational beings, then, it is appropriate to take into account relationality as a fundamental value which is an integral part of the identity of the African. If relationality is part of the identity of the African, then the courts must be encouraged to always imply relationality into the application of the rules. This can be done through a mechanism akin to ‘implied terms’ in the law of contract. This will be an implication in fact just as it is normally done in commercial contract situations where a term which may not be expressly stated in the contract may be implied to give the contract business efficacy.⁵⁷⁶ Without relationality, the rules will not represent the African, and will not make ‘business sense’, in terms of the norms, values and identity of the African. Does this mean that in *identifying* and *sympathising* with others, judges should have pity and or abandon legal and ethical requirements in adjudication? The idea is that appeal to pity, for example, within the context of MART, should be understood as part of the law, if the law is to represent Africans. Hence, if appeal to pity, as an example, leads to a decision to hear the substance of a case instead of setting it aside because of a procedural infraction, all the better for MART and the people. Legal and ethical principles do not need to be abandoned. They rather should be understood within the context of the need to be relational. If this leads to creating exceptions in the application of the law, that is fine and should be encouraged so as to achieve relationality as the ultimate goal.

⁵⁷⁶ *Hutton v Warren* [1836] Exch 61.

With this background and understanding of the place of relationality in the life of the African, the Supreme Court could have socially engineered the law for the welfare of the people of SALL. Doing so would have brought the law to a better moral light for the people. How could relationality have been achieved by the Supreme Court in the SALL Application decision? To start with, the Supreme Court could have reminded itself that the Ghanaian is a communitarian, be it *radical* (Menkiti) or *moderate* (Gyekye).⁵⁷⁷ Further, that underlying this communitarianism is *relationality* (Metz).⁵⁷⁸ The SALL people are relational beings. All the main parties in the Kweku case are all members of the same big community - SALL, irrespective of party political differences. This is why the Supreme Court ought to have been mindful about promoting the harmony of the whole, thus, living in communion with others, and eschewing discord. The court could have reminded itself that relationality in this case would only have been achieved by *identifying* with others and *solidarising* with the SALL people.

(ii) Identifying with the SALL people in the SALL Application

What should the judges of the apex court have done in order to be deemed to have identified themselves with the people of SALL in a situation where it was clear that the SALL people were being disenfranchised? Supreme Court judges could have considered themselves as part of the people of SALL. The judges should have considered themselves as part of the whole, enjoying close ties, sharing a way of life, community-belonging and experiencing themselves as bound up with the people of SALL. Would the SALL application decision have promoted community-

⁵⁷⁷ Menkiti (n 363) and Gyekye (n 323).

⁵⁷⁸ Metz (n 15).

belonging as citizens of Ghana? The most realistic answer is no. This means that with respect to identification with others as a key aspect of relationality, the Supreme Court failed. Hence, on this front, the decision of the Supreme Court was not MART compliant.

(iii) Acting in solidarity with the SALL people

How could the apex court have solidarised with the SALL people in the SALL Application decision? The court could have shown solidarity by being sympathetic and demonstrating sympathy towards the people of SALL. The court could have demonstrated through the decision that they were acting for the common good of the people of SALL, and the Ghanaian people as a whole. These were not evident in the verdict of the apex court. In that regard, the Supreme Court did not show solidarity towards the people of SALL. The court therefore failed to promote relationality through the SALL Application decision. The decision did not promote harmony in the Ghanaian society. Rather, it promoted discordance, discrimination and deprivation of basic civil liberties. At the end of the day, the Ghanaian people lost the benefit of a representative of SALL in parliament.

I. MART COMPLIANCE OF THE DECISION

Taking into account the historical background of the Rules on originating processes as applied in the SALL Application, the principles arrived at by the conclave of judges could be the same. This means, they required de-colonisation and applied in a manner to promote relationality. However, the Rule on originating processes as applied by the Supreme Court in the SALL Application remains conceptually colonised as the understanding and application of the rules reflected a

colonial mindset as the court did not depart from the colonial legal mindset of strictness with technicalities. Demonstrably, the application is anti-relationship as there is no identification with or solidarity towards the SALL people. Hence, over all, the decision is not MART compliant and cannot be considered as fair in this context.

III. CASE TWO - AHINAKWA II AND ANOTHER V. OKAIDJA III AND OTHERS

A. BACKGROUND TO THIS CASE

The second case for the application of MART Justice is *Ahinakwa II v. Okaidja III and others*.⁵⁷⁹

This is a case in which the appellants obtained judgement in a chieftaincy related cause. The case was decided by the judicial committee of the Greater Accra Regional House of Chiefs. Subsequent to that, the High Court granted the appellants leave to execute the judgment. This enabled the appellants to take possession of the Gbese palace. Following the execution, the respondents issued a writ to set aside the writ of possession granted. The respondents also requested the High Court for a perpetual injunction to restrain the appellants from having anything to do with the Gbese palace. The respondents' case was that, the leave granted the appellants to enforce the judgement was granted without notice to them as persons who were in actual possession of the Gbese palace contrary to Order 43 rule 3 of CI 47. The trial High Court granted the reliefs sought by the respondents. Dissatisfied by the judgement, the appellants appealed to the Appeals Court. They were unsuccessful. Consequently, the appellants further appealed to the apex court. The Supreme Court raised the question whether the action which was commenced in the trial court by a *writ* was competent. The respondents in response to the

⁵⁷⁹ *Ahinakwa II v. Okaidja III and others* [2011] 1 SCGLR 205.

question raised by the Supreme Court argued that they had earlier applied to set aside the grant of leave to issue a writ of possession. The High Court dismissed that application as they were deemed to be strangers to the case. The Supreme Court, with Atuguba JSC dissenting then held that an execution was irregular where any of the requirements of the rules of court had not been complied with and in such a case, the proceedings could be set aside or amended or otherwise dealt with in such a manner and upon such terms as the court deemed fit. Such non-compliance had to be treated as an irregularity and did not nullify the processes. It was noted that in the instant case, since the respondents' complaint was based mainly on the allegation that the writ of possession ought not to have issued without notice to them as provided for in Order 43 rule 3 (3) of CI 47, the order for leave granted the appellants to go into possession and the execution founded thereon, were irregular and not illegal.

That being the case, the court held that the respondents' remedy was to *apply* to the court that granted leave to issue the writ of possession, to have the entire process of execution set aside as provided for in Order 81 of CI 47. Accordingly, the respondents did not have a right as a result of default on the part of the appellant contrary to the requirements of Order 43 rule 3 (3), to issue out a new writ, as the case would have been if the said default had created a separate action and right in and for them. The court further held that Order 81 of CI 47 gives the court the liberty to correct any irregularities. However, the issuance of a writ instead of applying by motion to set aside the irregular execution was an error so basic and fundamentally essential in originating the jurisdiction of the court such that the court could not rectify it under the rule. It would be stretching the rule too far if one were to come to the view that the irregularity occasioned by the

issue of the writ was one that could be rectified in order to have the matter dealt with as though it was commenced by a motion. The court concluded that the defect brought about by proceeding by writ instead of motion, was so essential that the case was not appropriately initiated. As a result, the court held that there was no discretion in the court than to set aside the entire action.

In his dissenting opinion, Atuguba JSC reasoned that the most appropriate understanding of Order 81 of CI 47 is that it makes the distinction between procedural missteps which are fundamental and therefore a nullity and those resulting in mere irregularity under Order 70, rule 1 of LN 140A non-existent and inapplicable.⁵⁸⁰ For all these reasons, Atuguba JSC was of the view that the resort to a writ of summons in this case to impeach the writ of possession is *not a nullity*.⁵⁸¹ This thesis agrees with Atuguba JSC.

B. ORIGINALITY OF THE DECISION

The analysis here will recall the process with respect to the SALL Application decision above and proceed on the basis that the principles that will be chosen will be the present Rules of Court under CI 47 and the understanding provided by the Supreme Court. As may be recalled, those rules were deemed formalistic. Therefore, the analysis will continue on the basis that the application of the rules requires de-colonisation because the effect of the decision of the court in this instance is that someone who has not been heard has been condemned. This principle, irrespective of its provenance, is a colonised principle.

⁵⁸⁰ *ibid.*

⁵⁸¹ *ibid.*

C. DE-COLONISATION OF THE DECISION

Beyond inheriting the procedures applied to this case from the colonial past, several questions may be asked to enquire about the appropriate motivations and conceptual clarity regarding these procedures. Some of these questions are why should the decision of the Judicial Committee of the Greater Regional House of Chiefs be enforced with leave of the High Court? Why can't the Judicial Committee be empowered to enforce its own decisions just as how it managed to secure the attendance and participation of the parties leading to its decision in the case? This is because the hearing at the Judicial Committee is largely controlled by customary law and traditions of the chiefs and people over whom the Regional House of Chiefs has jurisdiction.⁵⁸² Hence, essentially, the processes at a 'chieftaincy court' commences with the traditional and customary ways of doing things but has to be validated or enforced only through the complicated procedure of the High Court, with its colonial antecedents. These are concerns and influences from which de-colonisation has to take place. The process has to be divested off colonial influences or mentality embedded in the processes necessitating execution only at the behest of the High Court.

Further questions include why the Supreme Court itself raised the issue as to how the proceedings to set aside the writ of possession was commenced? Was the Supreme Court not concerned about the need for redress relative to the substantive matter? Why is there a distinction between irregularity and nullity of the proceedings when there is non-compliance with the rules?

⁵⁸² Chieftaincy Act, 2008 (Act 759) section 26 provides that the Regional House of Chiefs (through its judicial committee) has jurisdiction to hear cases or matters relating to a paramount stool or skin. The Regional House of Chiefs also has appellate jurisdiction to hear appeals from Traditional Councils within the region in relation to chieftaincy matters. See Chieftaincy Act, 2008 (Act 759) section 27.

Further, why is non-compliance with an originating process considered so fundamental to nullify the proceedings? Even if raising the question of the propriety of the originating process was a valid jurisdictional point, that will be irrelevant in a de-colonised context as demonstrated in the Australian case of *Durrington v SAS Trustee Corporation*.⁵⁸³ In this case, even though the court acknowledged that a wrong form was used to initiate the case, the court focused on the substance of the matter.⁵⁸⁴ Also, setting aside a case because of a wrong originating process is no longer the situation in some common law jurisdictions such as Tasmania, Victoria and Western Australian States in Australia, though this was achieved through legislation. There are more questions which include why the Supreme Court raised the issue of defect in the originating process when it was not raised during the trial to enable the parties make amends if it was necessary to do so? Then, there is the question of who is being punished through the insistence on these technicalities - the client, the lawyer? Ultimately, clients bear the brunt of these complexities though they have no control over how the lawyer proceeds.

It appears that following the work which led to CI 47 being made, the Rules of Court Committee wanted to change the consequences of parties not complying with the rules. However, the implementers of the Rules, including the Supreme Court are stuck in the old mode. This leads the courts to invariably strike down all mis-steps as irregularities and therefore as null and void, except trivial mistakes which may not be deemed as fundamental to invoke the authority of the court. It is the colonial era orientation perpetuated through legal education and constant reference

⁵⁸³ *Durrington v SAS Trustee Corporation* (n 496).

⁵⁸⁴ *ibid*.

to decisions of other common law countries stuck in such colonial frame which is the major obstacle to the re-orientation required in the de-colonisation of the application of these Rules. Finally, it is a fundamental de-colonised principle that everyone must be heard before condemned.

D. RELATIONALITY OF THE DECISION

The starting idea is that this case is about a conflict resolution revolving around traditional authorities - the Gbese palace of the Ga State. In resolving such a conflict, relationality matters. After the conflict, the parties continue to be members of the same family, clan and community. In this case, not hearing the Respondent because he ought to have invoked the jurisdiction of the High Court by an application instead of issuing a writ of summons cannot contribute any identification with him, or create any sympathy for him even when he is at the losing end of the case. The understanding should be that even in situations of parties losing cases, with the right procedure and approach, harmony within the community can still be achieved. This is particularly the case for a situation where the parties are most likely members of the same family or clan as this emanates from a cause or matter affecting chieftaincy. For such a cause or matter affecting chieftaincy, relationship is very important as the processes of the resolution of disputes go to the root of the very essence of the existence of the family, clan and the community where the traditional authority maintains the sanctity of the values and traditions of the people. This is why in some African customs, even where one is at the losing end after the adjudication of a case, there are gestures to ensure that the final verdict does not mar the relationship, though there is a victor of the case. For instance, in Anlo tradition of the people of south-eastern Volta, a party

found liable in a case may be required to shake hands firmly with the opposing party and the adjudicators. In addition, the losing party may be required to pay a bottle of drink in which the losing party himself, the winning party and the adjudicating team partake in sharing. The losing party takes the first shot of the drink. This is all geared towards ensuring relationality. After all, procedural justice is not just about fair outcomes but also fair procedures, which should ideally consider the relationality between the parties.

E. MART COMPLIANCE OF THE DECISION

In this case, commencing adjudication of a chieftaincy matter in a traditional chieftaincy setting but subjecting the execution aspects of the process to the rules of CI 47 sends a signal that the customary dispute resolution processes do not have the capacity to ensure execution. This may be due to a lack of capacity of the houses of chiefs to ensure execution. This lack of capacity can be strengthened to maintain control on all aspects of adjudication of chieftaincy matters. The dissenting opinion of Atuguba JSC attempted a de-colonisation of the rules on originating processes at the High Court. However, the majority decision remained colonised as it perpetuated strict adherence to procedure to the detriment of substantive rights. Accordingly, the rules and the application are not MART compliant and therefore deemed unfair within this context.

IV. CASE THREE - *JONAH V. KULENDI AND KULENDI*

A. BACKGROUND OF THE DECISION

The third and final case for the analysis is *Jonah v. Aggrey, Kulendi and Kulendi*.⁵⁸⁵ In this case, the Plaintiff/Appellant/Appellant (herein referred to as ‘the Appellant’) issued a writ of summons

⁵⁸⁵ *Jonah v Kulendi & Kulendi* [2013-2014] 1 SCGLR 272.

pleading among other things that in May 1997 he entered into a Share Sale and Purchase Agreement with the first defendant one Richmond Aggrey. In that agreement, it was stated that Aggrey was the owner of 20% shares in Scancom Ghana Limited which was a registered mobile phone company operating in Ghana. It was stated in the statement of claim that Richmond Aggrey initiated a case against Investcom Scancom and others, asking the court for orders including restoring him as a shareholder and payment for his correct share of dividends for the financial years commencing from 2000 to 2005. The Appellant pleaded that the said Richmond Aggrey whilst prosecuting the action was in financial needs and took a loan of US\$1,000,000 for his upkeep and thereupon executed a support Agreement to repay the loan of US\$1,000,000 with interest at Libor plus 5%. Payment was to be made from the sums to be received from the suit against Investcom and others. Appellant claimed he also pre-financed part of Aggrey's legal fees at \$100,000 and that Aggrey agreed not to settle the suit for less than US\$200,000,000 without the prior written consent of the appellant. The appellant further contended that without recourse to him, the respondents and Richmond Aggrey agreed to full and final settlement of the suit for the sum of US\$54,000,000 which sum the respondents herein have received on behalf of the said Richmond Aggrey. The Appellant finally contended that he became aware that lawyers were entitled to 10% success fee which was neither negotiated with nor disclosed to him. The appellant claimed that for that reason, he was not bound by the success fee. He also claimed that he was entitled to demand that the Respondents deliver a bill of their fees to enable the Appellant apply for taxation under the Legal Profession Act, 1960 (Act 32), if the bill was found or considered to be excessive. Respondents filed an application motion requesting the trial judge to dismiss the action against them on several grounds including that plaintiff's suit discloses no

case against 2nd and 3rd defendants. The High Court granted the application and dismissed the action on grounds including that the action was jurisdictionally flawed for want of compliance with the procedure provided under Act 32 which required such actions to be commenced by *Applications*. The appellant appealed but was unsuccessful. It was however, decided at the concluding part of the judgment at the appeals court that regarding the originating process of writ of summons that the appellant used, the appeal was allowed. The appellant appealed to the Supreme Court. The respondents cross appealed arguing that the Court of Appeal was wrong when it said it was fine for the appellant to have commenced the case by writ of summons at the High Court. On this issue, the Supreme Court held that the appropriate originating process was an Application under section 41 of the Act 32. In a concurring judgement, Dotse JSC drew an analogy with the requirement to initiate electoral disputes by petition and justified that, the makers of the 1992 Constitution and PNDCL 284 had good reasons to indicate different originating process for election redress, which must commence by a petition and not a writ. Dotse JSC indicated that the reason was that the lawmaker wanted to give electoral matters a higher status than other cases because of the urgency that should be attached to resolving election disputes so the true winner can quickly assume his or her office. With these facts and background to this case, MART Justice shall be applied to assess the fairness or otherwise of the decision on the originating process.

B. ORIGINALITY OF THE DECISION

As with the *Ahinakwa* case above, the analysis here will rely on the original position discussions carried out in analysing the SALL Application decision. This thesis proceeds based on the

understanding that the principles the conclave of judges will adopt on originating processes at the High Court for a suit under the Legal Profession Act, 1960 (Act 32) is the use of an Application rather than a writ. This is the decision of the Supreme Court. With this in mind, and taking into account that well known and highly skilful practitioners and three Court of Appeal judges could not say for certain correctly (assuming that the Supreme Court was correct) what the originating process should be, there is a case of the colonisation of the Rules to unravel.

C. DE-COLONISATION OF THE DECISION

Knowing that this is a rule for the ordinary persons who may have engaged the services of lawyers to rely on for redress against lawyers, why should the law provide a different originating process for cases against lawyers? Why must a lay person who wants to take on a lawyer go to court by an Application and not the generally well known process of a writ of summons? Why must an aggrieved person in an election matter come to court necessarily by a petition or fail? This is just about being overly technical. As demonstrated in the attempt by Dotse JSC to show a difference between commencing a matter by writ and by petition, the need for speed in dealing with electoral matters cannot provide a good justification. If that were so, it should not be a problem commencing a human rights case by Petition instead of an Application because both cases deserve speedily resolution. Dotse JSC indicated that because of the special nature of election cases, parliament may have intended that such cases should be decided expeditiously. This reasoning is unsatisfactory as there is no greater urgency to deal with election cases than to deal with human rights cases. In any case, the processes for deciding election petitions and human rights cases by an application are closely similar if not the same except the different

timelines (parliamentary elections, for instance must be initiated within 21 days after publication of the result in the gazette but a human rights application must be made within 6 months of the violation occurring) and the need to pay an amount as security for cost in election petitions. There is no difference in substance between the two approaches. If there is no difference in substance, there should not be a drastic consequence if one fails to strictly comply. The bottom line is that the court is only perpetuating a colonial legacy of holding unto strict technicalities. A de-colonised process would have seen through this colonial baggage and not allow it to fester and administer injustice demonstrated through refusal to hear parties because of a wrong choice of originating processes.

D. RELATIONALITY OF THE DECISION

As research has revealed, procedural justice is not just about receiving favourable outcomes.⁵⁸⁶ It is also about the opportunity to be properly afforded the opportunity to be heard, irrespective of the outcome.⁵⁸⁷ When people are given the opportunity to be heard after which an unfavourable outcome is presented, the ends of procedural justice may have been served. This way, identification and solidarity can take place in spite of the unfavourable outcome that a party may receive. Relationality between parties and generally the Ghanaian society in this case is most likely to suffer because the appellants did not get the opportunity to be heard as a result of the application of a highly technical rule for the invocation of the jurisdiction of the courts.

⁵⁸⁶ Lind et al (n 131).

⁵⁸⁷ *ibid.*

E. MART COMPLIANCE OF THE DECISION

The decision of the Supreme Court that this case ought to have commenced by an application instead of the writ of summons used by the plaintiff puts the decision into the formalistic outcome at the original position. A de-colonisation could have yielded a less technical result. The verdict of the apex court in *Jonah v. Aggrey, Kulendi* with respect to the originating process for an action under the Legal Profession Act, 1960 (Act 32) was overly technical, colonised and did not promote relationality. The application of the rules in this case is hence non-compliant with MART Justice. This is because the invocation of the jurisdiction of the court by a writ of summons in this case could have been converted into an application once the papers filed at the court revealed the substance of the concerns of the plaintiff at the High Court.

V. CONCLUSION

In this chapter, I have shown how MART Justice can be applied to procedural rules so as to make the results more fair. To be fair, the conceptualisation and application of the laws must be MART compliant. This means that the application must occur from the *original position*, be *de-colonised*, must promote *relationality*. I demonstrated that if the application of procedural rules by the courts in Ghana were to be guided by MART Justice as a theoretical framework, courtroom procedures will more frequently be fair and procedural justice often realised. Three cases were relied on to demonstrate the application of MART Justice. At the original position, the application of MART resulted in three different types of rules - the idealistic, realistic and formalistic rules. The idealistic is the most MART compliant as it does not make room for the possibility of making a choice in originating process. An example of this is the single originating application for all cases at the Federal Court of Australia. Next, in terms of MART compliance is

the realistic form of rules. This provides different types of originating processes but indicates that a case cannot be set aside solely on the basis of the wrong choice of originating processes. Finally, the formalistic rules make room for multiple originating process which could be set aside for non-compliance with the rules of procedure. The *Republic v. High Court, Accra, Ex parte Attorney; Ahinakwa v. Okaidja*; and *Jonah v. Kulendi and Kulendi* as the cases relied on to demonstrate MART justice show that the application of the rules of procedure can occur at the original position, be de-colonised and ultimately achieve relationality. This is procedural justice which is fair. The next chapter of this thesis concludes the study.



CHAPTER 6 : CONCLUSION AND RECOMMENDATIONS

I. INTRODUCTION

Chapter 5 of this thesis demonstrates how MART Justice as a preferred theoretical framework for the analysis of the fairness of the application of procedural rules can be practically carried out. The chapter relies on three cases (the *Republic v. High Court, Ho, Ex parte Attorney General*;⁵⁸⁸ *Ahinakwa v. Okaidja*;⁵⁸⁹ and *Jonah v. Kulendi and Kulendi*⁵⁹⁰) to show that in order for the application of procedural rules to be fair, it must be done from the *original position* as the appropriate standpoint, be *de-colonised* and aim at promoting *relationality*. Of these three building blocks of MART Justice, relationality is at the core of the very existence and identity of the African. Yet, there is no express requirement in the laws that in the application of the rules of procedure, relationality should be given any consideration at all. So, how does MART Justice justify insistence on relationality as a critical building block requiring attention by the courts? MART relies on the commercial contract mechanism of implied terms, particularly, implication of terms in fact. If the African is relational, then the application of the rules will not make sense in that regard unless they are targeted at ensuring relationality. This final chapter draws down the curtain on this thesis with some concluding ideas.

As observed from previous chapters, discussions of procedural justice often involve reflection on principles such as *voice*, *trust*, *neutrality*, and *respect*. Mostly, adhering to these principles improve the chances of informal procedural justice. So also are Leventhal's ideas of bias

⁵⁸⁸ Civil Motion No. J5/21/2021 dated 5th January 2021.

⁵⁸⁹ [2011] 1 SCGLR 205.

⁵⁹⁰ [2013-2014] 1 SCGLR 272.

suppression, correctness, representativeness and ethicality. Yet, these do not furnish what is required for an African de-colonised theory of procedural justice. Hence, the need for MART Justice as developed by this thesis. MART Justice requires reform. As observed from the comparative portion of this thesis, reform can come from legislative sources. But, pending parliament taking steps to reform the laws for clarity, the courts can and should step in and show the way to achieve fairness with the rules as presently constituted. After all, part of the ideas shared in this thesis is that the rules are MART compliant *ex facie*. Hence, though parliament can intervene and bring some clarity, the main work which should engender the needed change in mindset and create a new culture of fairness in civil legal practice lies heavily with the courts and legal practitioners. MART Justice provides a normative framework through which this desired cultural change can be achieved.

II. SUMMARY OF CHAPTERS

A. INTRODUCTION AND BACKGROUND TO THE STUDY

Chapter 1 provided an introduction and a background to the study. The chapter identifies the problem of undue delay, excessive cost, technicalities and complexities plaguing civil justice in Ghana. Multiple originating processes contribute to these problems and impede civil procedural justice. A critical gap which militates against procedural justice is the lack of a thorough theoretical framework for courts to rely on in assessing the application of the rules of procedure when there are perceived fundamental irregularities in the invocation of the jurisdiction of the courts which can render such originating processes void and of no effect. Four sub-research questions were laid out and the doctrinal and qualitative research methodology of the study was

explained. The study is comparative as much as it is normative as well. In addition, chapter one sets out the key objectives of the thesis and briefly discusses the hypothesis, noting that the combined effect of article 19(13) of the 1992 Constitution, Order 1, rule 1(2) and Order 81 of CI 47 is to create a normative framework of fairness. Such a framework of fairness is unrealised and unutilised fully by the courts as a result of some strictness mindset which came with the common law through colonialism.

B. LITERATURE REVIEW OF PROCEDURAL JUSTICE

Chapter two reviews the existing literature on procedural justice generally and narrows it down to civil procedural justice in Ghana. It is observed that the bulk of the literature on procedural justice focuses very much on the criminal law aspects of justice. The focus is very much on the use of the police powers of the state and how citizens have redress when such coercive powers of the state are not appropriately used. It was not until 1974 that John Thibaut and Laurens Walker commenced work in relation to civil procedural justice, an angle other than criminal law and criminal procedure perspective. The major finding by the work of Thibaut and Walker is that disputants and uninvolved persons were equally as concerned with the fairness of the processes for adjudication as much as they were concerned about the fairness of the outcomes. The works of Thibaut and Walker, Neil Vidmar, E. Allan Lind and Tom Tyler (law as a natural arena for procedural justice assessments) and Nancy Welsh (conflict settlement as burdens and benefits distribution in a social contract situation) and Justice Tankebe and Anthony Bottoms (procedural justice as a normative concept) provided the basis for this study. More recently, the work of Grootelaar on factors which affect the meaning of procedural justice for different courtroom

actors such as litigants, judges and court administrative staff. Grootelaar found that perceptions of procedural justice may be affected by *what people have at stake* when they enter the courtroom. This means that when outcomes are considered to be more important, litigants will probably pay more attention to how fairly they have been treated by judges and other officials. This same reasoning holds true for judges. Thus, when judges consider outcomes to be more important for litigants, judges will probably pay more attention to how fair they treat these litigants. Grootelaar argues that how important litigants perceive their outcomes to be (*perceived outcome importance*) is related to how important judges perceive litigants' outcomes to be (*proactive outcome importance*). Grootelaar also draws a distinction between *reactive* (views of litigants and other court service users as a reaction to the work of judges) and *proactive* procedural justice (judges make a proactive reflection on the procedural justice aspects of their work) and urged for more proactive procedural justice as this is not the norm.

C. THEORETICAL FRAMEWORK OF THE STUDY

MART Justice as a theoretical framework is at the heart of this thesis. The framework commences with the identification of the rule of adjudication as one of the secondary rules required for an efficient management of a legal system. This is according to HLA Hart. With a focus on procedural rules (the rule of adjudication), the framework borrows from John Rawls's justice as fairness theory. For Rawls, the rules for the administration of a society can only be fair if and only if they are decided, from an appropriate standpoint, through a thought experiment of members of the group from behind a veil of ignorance. Rawls refers to this standpoint as the original position. At the original position, the veil of ignorance strips the participants of their

personal proclivities, making them unaware of their identities in the society in which the principles they are to select will be implemented. As rational decision-makers, the veil of ignorance forces the participants to make the most fair and therefore just decision regarding their choice of principles to govern their society. But Rawls's theory of justice as fairness has been justifiably criticised as having been built in a libertarian context, around the individual as the moral agent, hence may not be entirely appropriate for societies which are communitarian in nature. To take care of this critique, Rawls's original position is subjected to Thaddeus Metz's afro-communitarian relational theory of justice. Further, knowing the colonial antecedents of Ghanaian procedural rules, there may be the need for a de-colonisation of the rules. The combination of Rawls's original position, de-colonisation by Wiredu and Metz's afro-communitarian relational theory of justice create what this thesis refers to as the modified afro-communitarian theory (MART) of justice (herein referred to as 'MART Justice'). To be MART Justice compliant, the application of a rule must be from the **Original** position (John Rawls); be **De-colonised** (Kwasi Wiredu) and it must take into account **Relationality** (Thaddeus Metz). This is the ORDER of MART.

D. COMPARATIVE STUDY OF ORIGINATING PROCESSES

Chapter four presents the results of comparative study of the rules on originating processes between Ghana and Australia. This chapter considers how the examined jurisdictions fare in terms of originating processes and the lessons each country can learn from the others in comparison in this study. The chapter also explores and appraises the key similarities and differences observed from the countries under comparison. Comparison was carried out on the

initiation of cases and originating processes, noting important pre-litigation requirement of Genuine Steps Statements in Australia as a useful process for Ghana to consider to adopt and adapt. The second key area of comparison is the effect of wrong choice of originating process on the case. Hence, it is worth highlighting that in the Federal Court of Australia, there is only a single originating process (Originating Application). Hence, there is no danger of a wrong choice. At the State level in Australia, States such as Tasmania, Victoria and Western Australia have specific provisions in their procedural rules that a case cannot be set aside on the sole basis of a wrong choice of an originating process. Case Management is the third area of comparison. Here it is noted that though both jurisdictions rely on the adversarial mode of trials, judges have been mandated to take control of trials and ensure speedy resolution through effective case management by setting strict timelines and deciding the course of the trial instead of leaving it in the hands of litigants. Finally, courts in both Australia and Ghana are deploying technology to improve procedural justice. The courts are relying on videoconference facilities, written witness statements and online service of court process to improve procedural justice.

E. APPLICATION OF MART JUSTICE

In chapter 5, MART justice is applied to determine the fairness of the application of procedural rules. The thesis relies on three cases decided by the Supreme Court. These are *the Republic v. High Court, Ho, Ex parte Attorney General, (Electoral Commission - Interested Party)*; *Ahinakwa II and another v. Okaidja III and others*; and *Jonah v. Kulendi and Kulendi*. All these three cases deal with originating processes such as the issuance of a writ of summons, filing applications and filing petitions. However, these three cases cover three different thematic areas

of civil cases. *The Republic v. High Court, Ho, Ex parte Attorney General, (Electoral Commission - Interested Party)* deals with the enforcement of the right to vote as implicated in electoral processes. *Ahinakwa II and another v. Okaidja III and others* deals with enforcement of a decision of the traditional courts recognised under the 1992 Constitution. The third and final case *Jonah v. Aggrey, Kulendi and Kulendi* deals with disputes arising out of a “lawyer-client” relationship and how the jurisdiction of the High Court can be invoked in such a situation. All these three cases originated from the High Court but ultimately ended up at the highest court of the land. Being the apex court of Ghana, the decisions of the Supreme Court in these cases were subject to analysis and application of MART Justice as a theoretical framework. At the heart of MART Justice is that *form* should aid the delivery of substance.

III. CONCLUDING IDEAS

As observed in this thesis, article 19(13) of the 1992 Constitution, Orders 1(2) and 81 of CI 47 create a good normative framework of fairness to guide civil procedural justice in Ghana. Yet, problems of undue delay, excessive cost and complexities continue to negatively affect civil procedural justice, demonstrating that there is a problem with the full appreciation of this normative framework. Multiple originating processes and the nullity rule provide an avenue through which these problems fester. Part of the reasons why these problems persist is the legal tradition inherited from the colonial period. So, there is the need to move away from undue reliance on technicalities as part of legal practice, and to develop a legal culture of seeking justice on the basis of substance of cases. This means that lawyers and judges should take leading positions for an effective review of procedural laws, the legal culture and how the rules are applied.

Multiple originating processes may have a positive role to play in how the courts organise cases for the sake of efficiency. What is clear is that wrong originating processes are no longer fatal in many progressive jurisdictions. The problem for Ghana is that the application of the rules on originating processes are not MART compliant. The courts are not thinking about the rules from an *original position*. Further, the understanding of the rules is not aided by an effort to de-colonise them. Finally, the understanding and application of the rules are not aided by African indigenous values such as the need to promote harmony and to avoid discord. This is what sets MART Justice apart from other procedural justice theories. MART Justice reflects and represents the African through de-colonisation and ultimately aiming at relationality.

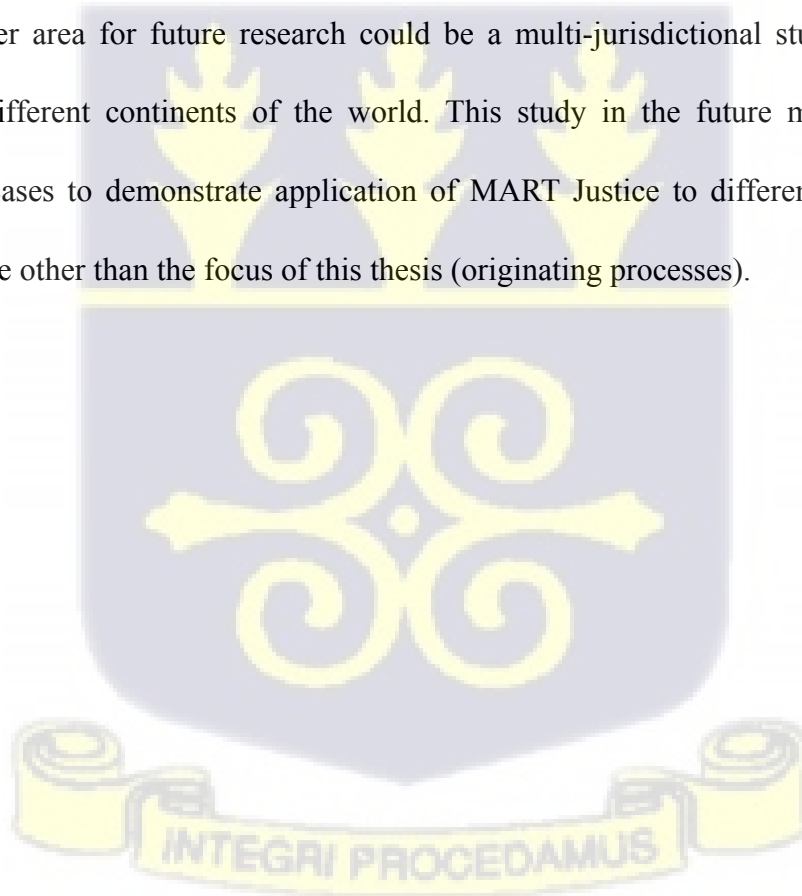
IV. RECOMMENDATIONS

1. Review the different originating processes (writs of summons, petitions, applications, originating motions) and replace them with a single composite originating processes like the originating application of the Australia Federal Court.
2. Pending implementation of Recommendation 1, amend CI 47 to make it clear that errors in originating processes cannot be a reason to set aside a case as null and void.
3. After more than 20 years of implementing CI 47, it is time for a comprehensive review to lay the foundation to create the appropriate legal culture for the application of all laws, to be MART compliant.
4. Case management reforms hold the key to successful civil proceedings and as such must be given appropriate attention. A new legal culture must emerge to shame reliance on technicalities for success in the courtroom.

5. The effort to modernise the courts must be further pursued to promote procedural justice.

V. AREAS FOR FUTURE RESEARCH

The research in this thesis has been exploratory. It has laid down some ideas to build on in the area of access to justice and legal theory in general and civil procedural justice in particular. The legal academy and the justice sector will benefit from future further research into the procedural justice in Ghanaian courts, deploying law in action or socio-legal methodologies to examine areas such as civil proactive procedural justice in Ghana. There is the need for empirical research on the effect of case management after operating the new case management regime for a couple of years. Another area for future research could be a multi-jurisdictional study of procedural justice across different continents of the world. This study in the future may rely on other supreme court cases to demonstrate application of MART Justice to different aspects of civil litigation practice other than the focus of this thesis (originating processes).



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11. In re Parliamentary Elections for Wulensi Constituency: Zakaria v. Nyimakan [2003-2004] 1 SCGLR 1.
12. Jonah v. Kulendi and Kulendi [2013-2014] 1 SCGLR 272.
13. Kwatra v. Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 194.
14. LPDT v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12 at 30 and 32.
15. Luke Mensah v The Attorney General [2003-2004] SCGLR 122.

16. Mosi v. Bagyina [1963] 1 GLR 337.
17. Nana Ampaa-Andoh VIII v Paramount Stool of Breman Essiam J4/47/2017 dated 13/06/2018.
18. Opoku & Anor v Axes Co Ltd [2012] SCGLR 1214;
19. Professor Margaret Kweku and four others v. The Electoral Commission (1st Respondent), Wisdom Kofi Akpakli (2nd Respondent), John Peter Amewu (3rd Respondent) and the Attorney General (4th Respondent) commenced at the High Court, Ho (Suit Number E12/40/2021).
20. Republic v. High Court, Accra, Ex Parte Allgate Co. Ltd. (Amalgamated Bank) Interested Party [2007-2008] SCGLR 1041.
21. Republic v High Court Koforidua; Ex Parte Eastern Regional Development Corporation [2003-2004] SCGLR 21.
22. Sheen v Burke [1993] 1 VR 584.
23. The Republic v. Court of Appeal, Ex parte Tsatsu Tsikata (2005-2006) SCGLR 612.
24. The Republic v. Electoral Commission; Ex parte Amoo [1997-1998] 1 GLR 938 at 939.
25. The Republic v. High Court, Ho, Ex parte Attorney General, Electoral Commission (Interested Party, Civil Motion No. J5/21/2021 dated 5th January 2021).
26. Victoria Teachers Credit Union Ltd v KPMG (2000) 1 VR 654.
27. Ward v. James (1966) 1 QB 273.