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A REVIEW OF DEFENCE PRETRIAL DISCLOSURES WITHIN THE CASE MANAGEMENT THEORY OF CRIMINAL PROCEEDINGS IN GHANA

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Abstract: This article examines the concept of defense disclosures within the theory of managerialism in criminal proceedings in Ghana. Through a doctrinal and comparative legal analysis with the English jurisdiction, it finds that in substance, the requirement of defense disclosure seeks to move the criminal process from its core protectionist ideology that insulates the accused from matters of proof toward a managerial process informed by objectives of truth-finding, trial efficiency and case management. Ironically, this new direction in the criminal trial process is in practice denounced as being at odds with the procedural due process values that shield the accused from matters of proof and pretrial disclosures. The problem is that unlike in England where the move towards defense disclosures is informed by a clear policy change, the managerial policy introduced by the Judiciary in Ghana is not grounded in any articulated theory or policy direction. While pursuing a path of ensuring effective criminal adjudication through mutual disclosures by the parties, it is important to find a proper balance between the denounced but yet adopted procedural concept of defense disclosures and the highly valued protectionist rights of the accused.

Keywords: criminal prosecution; disclosures; adversarial; pretrial; managerialism.

1. Introduction

The adjudicatory landscape of criminal prosecutions in Ghana is changing. In 2018, the Judiciary introduced a practice direction which for the first time instituted a case management practice and pretrial disclosure by accused persons for the purpose of achieving trial efficiency (Judiciary, 2018) [1]. On broad philosophical grounds, this intervention introduced a novel procedural paradigm that heightens the role of the accused in developing the facts and evidence of the case by saddling him with

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disclosure obligations [2]. The very simplicity of this procedural adjustment however conceals a range of complex issues. Primarily, the originally detached position of the accused from matters of proof of guilt which is ingrained in the non-participatory rights of the accused at trial including the rights to silence and to be presumed innocent, the privilege against self-incrimination and the prosecutorial burden of proving guilt beyond a reasonable doubt, has now assumed a new normative dimension towards a more active participation of the accused in matters of proof [3]. Worryingly, this fundamental change in trial philosophy from a core adversarial regime to a managerial practice in criminal proceedings has no basis in any articulated policy.

This article examines the concept of defense disclosures within the broad theory of managerialism in criminal proceedings in Ghana. After this introduction, part 2 discusses the normative theory of the criminal adjudicatory process and the general disclosure obligations within the Ghanaian adversarial criminal trial and under the international human rights framework. Part 3 examines the introduction of managerialism and defense disclosure in criminal proceedings in Ghana. It presents a critical analysis of the defense disclosure policy in Ghana and a specific focus on the English jurisdiction from a comparative perspective, the latter having singularly influenced the current reform in Ghana. Part 4 presents an insight into the theoretical void underlying the adoption of defense disclosures in criminal proceedings in Ghana while Part 5 presents an outlook of a strategy for a more effective implementation of the managerial reforms and defense disclosures in Ghana. Part 6 is a conclusion and presents a summary of the arguments.

2. Normative theory of the Ghanaian criminal adjudicatory process and prosecution disclosure in the adversarial theoretical context and under international law

Ghana operates an adversarial system of criminal adjudication (Republic v. Adu Boahen, 1993-94; Republic v. Mensah, 1989-90). Under this model of proof, the trial process assigns the control of proceedings to the Prosecution and the accused as parties to the trial. The judge is a neutral and relatively passive umpire as far as the investigation of facts and presentation of evidence in the case are concerned (Sasu v. Amuah-Sekyi, 1987-88). His role is to ensure that the rules governing the trial, procedural, evidentiary, and ethical, are complied with. Like other countries of the common law tradition, the standard adversarial system applicable in Ghana follows a due process model identified with a theory of political liberalism. Its model of proof places on the Prosecution, a duty to account for the conviction and punishment of the accused, contrary to the crime control ideology that calls on the accused person to account for his wrongful acts against the state (Duff et al., 2007). The underlying principle of liberalism is that freedom is a basic norm and the person who intends to

restrict or prohibit the exercise of liberty by another bears the burden to justify such deprivation. (Mills, 1963. pp. 262; Feinberg, 1984, pp. 9; Rawls, 2001). In that context, the trial process becomes not just a simplistic forum for determining guilt or otherwise of an accused person; it is mainly a process for the state, through evidence and reasoned arguments, to support its charges with facts and evidence, subject its case to challenge and scrutiny by the court and the defense (Ho, 2010, pp. 90) and to account for its decision to prosecute and subject the accused to punishment. Thus, so far as the criminal trial rides on the state or political authority to curtail the individual's freedom by imprisonment and in extreme cases by taking his life [4], the onus is on the state to justify such curtailment by proving all matters that establish the guilt of the accused (Mills, 1963, pp. 262; Ho, 2010, pp. 89; Philip Assibit Akpeena v. The Republic, 2020). The accused on his part remains largely insulated from any obligation to assist the state to prove its allegations or establish guilt (Barkow, 2006, pp. 995). His safeguards come from his due process rights as are constitutionally and statutorily guaranteed in criminal proceedings. It is this underlying normative theory of the criminal adjudicatory process that informs the standards relating to the burden of proof and disclosure obligations in criminal trials in Ghana.

2.1 Theoretical foundations of the prosecution's duty to account in the adversarial criminal trial

A number of factors lie at the heart of the Prosecution's duty to account for the conviction and punishment of the accused, especially as a theory underlying Ghana's adversarial criminal trial. First, the seeming arduous duty of the Prosecution is primarily a fundamental feature of the modern adversarial criminal trial, and a product of centuries of refinement of judicial policies and ideologies that marked the developmental trajectory of the adversarial criminal trial in English legal history (Langbein, 2003). In the early stages of the development of the common law jury trials (Landsman, 1983, pp. 717) [5], the criminal trial operated a procedure that subjected the accused to the disclosure of all information to the Prosecution along with a 'truth-discovery' ideology and used the accused person as an 'informational resource' for the court (Langbein, 2003, pp. 65). The strategy was to exert pressure on the accused person, in order to induce the disclosure of facts within his personal knowledge (Langbein, 2003, pp. 35-36) [6]. The conventional wisdom of the time was to the effect that making a defense in criminal proceedings involved a rather simple and ordinary act of disclosure of facts that are materially known to the accused. Consequently, the task of defending oneself was considered an effortless exercise of merely disclosing the bare truth "without any [d]ilatories, [a]rts or [e]vasions." (Langbein, 2003, pp. 34). However, the final stage of development of the adversarial criminal trial in the 19th and 20th centuries turned the trial process

from a philosophy that compelled the accused to disclose facts, to an ideology that burdened the state with a substantive obligation to independently account for the charge, prosecution and conviction of the accused. This development was the catalyst for the extinction of the role of the accused person as an informational resource for the court, and his insulation from the establishment of facts and guilt. The criminal trial consequently became a forum where the defense and the court simply probe and test the case of the prosecution (Langbein, 2003, pp. 269, 271).

The second factor resides in the operational structure of the adversarial criminal process itself. The modern theory of the adversarial criminal trial pitches up the state against the individual accused person in an assumed 'battle of equals' (Damaska, 1997; McEwan, 2011). Inarguably, marked disparities in terms of resources, skills and power exist between the two parties, which expose the uniquely powerful and reinforced position of the Prosecution and consequently disrupt this inceptive premise of party equality in the adversarial trial procedure (Barrettt, 2012, pp. 995). The concern to raise a more equitable procedure resulted in the adoption of a mechanism that infuses the trial procedure with a sense of fairness to both the accused person and the state Prosecution. Most practically, this has taken the form of an upward adjustment of the relatively disadvantaged position of the accused person through the enactment of a set of trial rights (Goodpaster, 1987-88). This rights regime which is today guaranteed under all the major international and regional human rights instruments, and ratified by the constitutions of several states purposefully seeks to rub out the inherent prosecutorial imbalance by way of "[offsetting] the natural resource and public support advantage of the prosecutor" (Goodpaster, 1987-1988). Here, such protectionist rights as the right to silence, the right against self-incrimination, the right to unilateral discovery from prosecution, the burden of proof beyond reasonable doubt and the right to presumption of innocence among others underlie such need for balance (Jackson, 2005, pp. 743). These rights inherently shield the accused from matters of proof and remain a cornerstone of the modern adversarial criminal trial.

2.2 Prosecutorial disclosure obligations under international law

The adversarial character of the modern criminal trial broadly embraces the notion that an accused person cannot be required to cooperate in the building up of case against him (White, 2002). Therefore, among the due process protectionist rights of the accused, the conventional concept of pretrial disclosures is primarily one-sided against the state and suggests prosecution disclosures to the accused. Intrinsically and in the nature of the adversarial criminal trial, disclosure simply denotes an accused person's right to know beforehand the evidence, materials and facts that will be put against him and to adequately prepare for the trial (Juma v. Attorney-General, 2003). This obligation in turn feeds into the right of the accused person to be given

adequate facilities for the preparation of his defense (United Nations, 1996 [7]; United Nations, 2003 [8]) as well as his right to examine prosecution witnesses, both guaranteed under the international and regional human rights instruments [9]. The two rights support the accused's right to a fair trial and hearing by ensuring that prior to the trial, he is informed of the evidence being marshalled against him by the prosecution (United Nations, 2007: paras 32, 33 &39) [10]; Monaghan, 2015, pp. 436). This meaning is adopted by the African Commission on Human Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission, 2003) which guarantees for each accused, a right to the necessary facilities to assist him in the preparation of his defense as well as a right to all relevant information in the possession of the Prosecution but which could help exonerate him (African Commission, 2003 [11]; United Nations, 2007 [12]; Lawyers Committee for Human Rights, 2000 [13]).

The importance of Prosecution disclosure lies in the fact that the institution works with state investigative agencies and is endowed with state resources to investigate and obtain the needed information and evidence for the trial. From its common law roots, the accused's right to prosecution disclosures is seen as a vital element of his right to a fair trial, for as it is said, "if [an accused] is to have a fair trial, he must have adequate notice of the case which is to be made against him" (Republic v. DPP, 1999) [14]. It is ingrained in the revered common law principle that "the fruits of the investigation which are in the possession of the prosecution counsel are not the property of the Prosecution for use in securing conviction: it is a property of the public to be used to ensure that justice is done."(Juma v. Attorney-General, 2003; Republic v. Stinchcombe, 1991). Where the investigated information is not shared with the accused, the trial remains at best an ambush process and a potential source of injustice. This is because the accused would be deprived of the right of equality of arms and disadvantaged in making his defense. Without knowledge of the case he has to defend, he remains inefficient in testing the Prosecution's case, in putting up a defense and developing the theory of his own case. Consequently, the law imposes on the Prosecution, a firm duty to provide to accused persons and their lawyers, access to appropriate information, files and documents in their possession or control, at the earliest opportune time to enable defense lawyers to provide effective legal assistance to the accused (African Commission, 2003) [15]. The content of the disclosure includes all documents, evidence and materials that the prosecution intends to use against the accused at trial, whether inculpatory or exculpatory, including any information or evidence that could assist the accused in his defense, subject to any limitations that the law may allow.

2.3 Prosecution disclosure in criminal proceedings in Ghana

Ghana has ratified and constitutionalized the international standards of due process rights of accused persons under the Constitution, 1992. Prosecution disclosure takes center-stage in the proceedings as the constitutionalized fair trial regime fully domesticates not only the accused person's right to adequate facilities for the preparation of his defense (Ghana, 1992) [16] but also his right to be afforded facilities to examine witnesses called by the prosecution (Ghana, 1992) [17]. Ironically, no practical effect or the judicial value was given to these rights. Certain statutory prescriptions were rather made under the criminal procedural rules that not only limited the scope of disclosures to the accused person in indictment proceedings but also deprived the accused of his right to pretrial disclosures in summary trials (Ghana, 1960) [18]. In indictment trials, the Prosecution was enjoined to disclose to the accused only a bill of indictment [19] and summary of evidence of witnesses as well as the list of documents the Prosecution intended to rely on at trial [20]. Accused persons in summary trials had no right to disclosure whatsoever and the trial as far as its conduct was concerned remained an ambush exercise and an enterprise shrouded in surprises (Republic v. Baffoe-Bonnie et al., 2018).

The Supreme Court decision in the Baffoe-Bonnie case (supra) marked the watershed in the country's attempt to align its practice with the standards of prosecution disclosure established under international law. For the first time, the Supreme Court gave due recognition to the value of prosecution disclosures where it emphatically held as follows:

> *A trial cannot be fair, just and balanced if the Prosecution is allowed to keep relevant materials to its chest and thereby hope to spring a surprise on the defense for purposes of securing a conviction. This would place the accused at a disadvantage in relation to the prosecution. Such a disadvantage in our view does not accord with the tenor and spirit of equality before the law as enshrined in the Constitution (Republic v. Baffoe Bonnie et al., 2018, pp. 344).*

Today in Ghana, all accused persons in both indictment and summary trials are guaranteed a right to pretrial disclosure by the Prosecution (Republic v. Baffoe Bonnie et al, 2018: 339). The Judiciary has in a proactive move towards enforcement of the right issued a Practice Direction (Judiciary, 2018) which prescribes the modalities for its implementation in criminal proceedings. It mandates the Prosecution to serve the accused or his lawyer before the first appearance in court with the charge sheet or bill of indictment, and also a narration of the facts of the case (Judiciary, 2018) [21]. All other documents and evidence in the possession and knowledge of the prosecution which are material to the case are to be disclosed to the accused and the court at least two days before the date fixed for case management conference, and thus before trial (Judiciary, 2018) [22]. The act of disclosure is not

a descriptive gesture of formality but a thorough analytical process based on the concept of relevance and materiality (Republic v. Baffoe Bonnie et al., 2018). All documents, facts, statements, documents, objects or materials in the possession of the police or other law enforcement or investigative agencies that are relevant and material to the trial are to be disclosed by the Prosecution [23]. This obligation is enforceable at the instance of the court suo motu or upon the application by the accused person in all situations where the Prosecution fails to disclose within the prescribed timelines (Judiciary, 2018) [24]. The disclosure obligation of the Prosecution is a continuing one and is to be made at all stages of the proceedings until the final judgment on appeal. This disclosure obligation is however not absolute and available for the benefit of the accused at all times. The right to disclosure is subject to such limitations justified by public interest, public interest, public safety and natural security (Ghana, 1992 [25]; Raphael Cubagee v. Michael Yeboah et al., 2017-2020).

2.4 Pre-2018 Defence disclosure obligations in criminal proceedings in Ghana

The pre-2018 Ghanaian criminal process followed a prosecutorial regime of proof where ambush defense took center stage. The procedural regime shielded the accused from all obligations to disclose. As earlier argued, this was informed by the theory that the accused had no obligation to assist the Prosecution in proving his guilt (Patterson Ahenkang et al. v. The Republic, 2014 [26]; Republic v. Appiah Yaw al., 2012; Asamoah v. The Republic, 2017 [27]). This scheme was justified by a protectionist regime against defense pretrial disclosures and enshrined in a number of evidentiary and procedural rights. The first lies in the right to the presumption of innocence [28] which lies at the foundation of the common law adversarial proceedings as applicable in Ghana (Republic v. Adu Boahen, 1993-94; Republic v. Mensah, 1989-90). As an inherent part of the rule of law, the presumption stands for the view that "the state may not allow its citizens to suffer if it has not demonstrated its right to do so by law" (Sliedregt, 2009). It primarily places the burden of proving the guilt of the accused person on the Prosecution (Commissioner of Police v. Antwi, 1961) [29]. It has today assumed a human rights dimension that guarantees a standard of fairness in the state's dealings with an individual in an inherently imbalanced prosecutorial regime of proof (Ho, 2012; Ashworth, 2006). Within the regime of due process rights relating to proof, the presumption operates alongside a second procedural right expressed in the privilege against self-incrimination as well as the right not to disclose any information that one does not wish or consent to disclose (Edmund Addo v. Attorney-General, 2017). This right reinforces the criminal justice system's aversion to processes that either expressly or insidiously compel suspects and accused persons to "condemn themselves out of their own mouths" (Edmund Addo v. Attorney-General, 2017) and serves as a distancing

mechanism, which allows suspects and accused persons to disassociate themselves from the Prosecution (Amissah, 1982; Redmayne, 2007). The accused enjoys a substantive right, at any stage of any proceedings, to refuse to disclose a matter or to produce any object or writing which will incriminate him in any offense (Redmayne, 2007) [30]. He cannot be required by state prosecutorial and investigative authorities to provide information that might be used against him in a criminal trial (Ashworth and Redmayne, 2010). He has no legal duty to answer any interrogatories or give any statement to the police, or make any statement in court, whether incriminating or not (Amissah, 1969). It is not for him to assist the Prosecution to prove its case by filling in the missing gaps in the evidence of the prosecution (Republic v. Dennis Kwantreng, 2011; Republic v. Baffoe-Bonnie, 2018).

In some exceptional circumstances, the trial regime assigns matters of proof to the accused and charges him to account for a primary fact or act by making limited disclosures to the Prosecution. The first relates to cases where the accused pleads alibi as a defense and assumes the obligation to disclose to the accused and the court, information as to his whereabouts at the time of the commission of the offense and the list of witnesses by whom he intends to prove the defense [31]. The second disclosure duty of accused persons applies in committal proceedings in indictment trials. Here, accused persons in the course of a committal hearing are required to give their version of the case charged against them. A refusal to give a statement to the court may attract an adverse inference against them during a trial [32]. In addition, accused persons committed to stand trial in indictment proceedings are required to provide the names, addresses and other necessary particulars of the individual witness they intend to call and seek the assistance of the court to secure their attendance at the trial [33]. Generally, these disclosures seek to enable subpoenas to be issued on behalf of the accused. Of course, the information disclosed does not extend to revealing the nature of evidence the witness is to give, nor does it include giving statements or evidence to the Prosecution beyond the mere descriptive piece of information required for the stated statutory purpose (Republic v. Baffoe Bonnie, 2018). In that regard, despite this narrow departure, the criminal trial process does not deviate from its core theory of proof which ultimately charges the Prosecution with the overall burden of proving and persuading the court of the guilt of the accused (Phillip Assibit Akpeena v. The Republic, 2020).

3. Managerialism and defense disclosure obligations in Ghana

The criminal procedural model in several adversarial jurisdictions is making way for a new paradigm of adjudication that depicts a mutation towards a more heightened participation of the accused in matters of proof, particularly through a policy of managerialism [34]. Ghana officially joined the league of these jurisdictions primarily led by England with the adoption of the Practice Direction (Disclosures

and Case Management in Criminal Proceedings) in 2018. This procedural innovation cannot go without saying that Ghana followed in the steps of her colonial master whose legal system provided the common law and adversarial roots of the Ghanaian criminal justice system.

In the domain of courts, managerialism leans towards an administrative or a management philosophy that involves the adoption of new procedural strategies to deal with a large number of criminals or suspects of crime in a manner most efficient and expeditious to the court and the parties (Browne, 1998; Bridges, 2020; McEwan 2011, pp. 522). It focuses on the administrative arrangements of courts to affect the way courts conduct their affairs (Freiberg, 2005, pp. 18) [35]. In more practical terms, managerialism manifests in the form of an administrative process that balances the interests of criminal law enforcement agencies with the rights of the accused in criminal adjudication (Freiberg, 2005, pp. 24). Its priority in the criminal trial is efficiency, which is to be achieved through court supervision of cases, judicial case management and judicial assumption of leadership in the development and control of the facts and evidence in the case (McEwan, 2011). Managerialism has certain inquisitorial tendencies which contrary to the adversarial mode of proof and system empowers agents of the state to search for the facts of the case. It attempts to exclusively ensure fairness through judicial supervision and a review of the process of gathering the facts (McEwan, 2011).

In the archetypical adversarial system of adjudication, the adoption of managerialism is linked to a number of fundamental factors including excessive delays, long and unnecessary adjournments and the growing complexity and volume of cases confronting the criminal justice administration (Freiberg, 2005) [36]. The reason for these lapses which appear to be common to countries adherent to the adversarial system is not farfetched. In the majority of cases, the adversarial feature of partisan control of the trial process which reduces the role of the judge to a neutral umpire guiding the application of the rules of evidence and procedure at trial gives the parties wide control over the progress of the case. As a result, the ability of the adversarial regime to achieve speedy, economic, effective and efficient resolution of disputes has been lax through lack of central control and supervision (Freiberg, 2005). Consequently, attenuating the structural importance of the adversarial feature of partisan control has been seen as one of the surest ways to increase efficiency and reduce delays and the length of the trial.

In Ghana, the 2018 Practice Direction particularly introduced a judicial case management system to achieve timely and just disposal of cases (Judiciary, 2018, pp. 5). It gives judges and magistrates control over the management and administration of the time and processes involved in the criminal adjudicatory process and entrusts them with a more managerial role in ensuring a just, fair, efficient and expeditious delivery of justice. Consequently, both the prosecution and

the defense have a duty to prepare and conduct criminal cases in accordance with the overriding objectives of the criminal trial (Judiciary, 2018, pp. 5). More so, trial disclosures in Ghana have been rationalized in the language of managerialism rather than any other legal theory. The Practice Direction in that regard aims to expedite the resolution of cases through a series of pretrial disclosures and a more active involvement of the judge in managing the pretrial stage of the proceedings. Thus, rather than absolutely saddling the Prosecution with the burden to disclose to the accused, the accused is drawn to participate in the construction of the case against him and promote the wider goal of efficiency. For, where the issues are identified in advance through disclosures, it is easier to manage the length of the trial and cut down and avoid adjournments. In that regard, it is argued that the purpose of the trial is shifting from a core adversarial stance toward a truth-finding and inquisitorial purpose. Consequently, the presumption of the adversarial trial that the defense should be able to take the Prosecution by surprise in matters of defense, even to the extent that the accuracy of facts and evidence is undermined, is no longer acceptable. It is in that regard admitted that pretrial disclosures by both the Prosecution and the defense substantially move the trial process to accurate fact-finding as one of the objectives of the adversarial trial. Consequently, the accused can no longer "keep his case close to his chest" in an exercise that seeks to expeditiously settle the issues and search for the truth (Auld LJ, 2001, pp. 113).

With this structural arrangement of the trial comes a duty of the accused to make certain reciprocal pretrial disclosures to the Prosecution in a manner that dims the effect of the conventional protection rights of the accused at trial. First, the accused person is enjoined to disclose before the commencement of the trial, material information about the witnesses he intends to call. These include for the purposes of case management the names and addresses of the witnesses. This is a mere preemptive exercise with the aim to put the court in readiness to proceed with the trial at any time, should the court call upon the accused to open his defense at the close of the prosecution's case (Judiciary, 2018) [37]. Second, in all cases where the accused pleads alibi in defense of an offense charged, he is required to disclose details of the defense to the Prosecution, including particulars as to the time and place where the accused was, and information about the witnesses by whom he intends to prove his alibi (Judiciary, 2018) [38]. The accused person technically loses and stands to be convicted of the offenses charged if he fails to disclose the required particulars to the prosecution. Finally, an overriding legal obligation attaches to the accused person's decision to open his defense at the trial. Except in cases where the accused desires to exercise his right to silence and not to call a witness, he is enjoined to file his witness statements and disclose all documents or materials in his possession and knowledge that he intends to use for his defense. Disclosure in respect of the defense is to be made and served on the Prosecution

before the commencement of trial, two clear days before the date fixed for the case management conference (Judiciary, 2018, pp. 6). This disclosure process seeks to provide access to relevant information by both parties to the trial. The instrumentalism of the case management conference in that regard moves the trial towards a more inquisitorial approach informed by truth-finding objectives. In that context, the insistence on mutual discovery merely targets the elimination of the element of surprise in criminal proceedings and the possibility that one party might lose his case as a result of being ambushed by the testimony of a witness or party. All courts across the country have been mandated by the Chief Justice of the Republic of Ghana under whose hands this direction is issued, to duly comply with the Practice Direction (Judiciary, 2018).

4. Conscious Policy or Uninformed Transplantation?

The insufficiencies of the Ghanaian criminal procedural regime have been severally noted. For the most part, it is the Judiciary that has led the reform crusade by recommending urgent changes to the Law Reform Commission and the Parliament of Ghana towards enhancing the operative procedural framework. Where legislative intervention has been slow, the role of the Judiciary in taking stopgap measures to address critical issues has been crucial. It is in that context that the Chief Justice of the Republic of Ghana, Her Ladyship Gloria Akuffo issued the 2018 Practice Direction on Disclosures and Case Management in Criminal Proceedings which was necessitated by a number of institutional objectives geared towards the need to enhance the ability of the criminal justice administration to conduct fair, just, efficient and expeditious trials through disclosures and efficient management of criminal cases. Ultimately, it was envisaged that such an approach would reduce the number of cases put on trial, and also minimize delays and miscarriage of justice (Judiciary, 2018).

It must however be noted that the implementation of the defense disclosure requirement under the Practice Direction has not been without controversy. While the move toward the accused's pretrial disclosure obligation essentially aligns with a policy change from a core adversarial and due process theory to a managerialist ideology, it is in practice denounced as being at odds with the procedural due process values that guarantee total insulation of the accused from matters of proof and pretrial disclosures. Many legal practitioners and members of the bench have pointed to the unconstitutionality of this new policy on the accused's pretrial disclosure obligations as cutting through the basic constitutional protection rights particularly the presumption of innocence and the burden of the Prosecution to prove the guilt of the accused beyond all reasonable doubt.

Again, it must be noted that despite the requirement for defense disclosure in Ghana, the general intendment of the procedural regime still remains heavily tilted towards

a due process regime that supports the Prosecution's duty to prove guilt with less enforcement of the defense disclosure duty. The focus of the Practice Direction leans more heavily in favor of prosecution disclosures to the accused than it does in respect of defense disclosures to the Prosecution. In fact, the Practice Direction makes no express provision regarding the right of the Prosecution to secure s disclosures from the accused. Before a trial, the trial judge or Magistrate is required to ascertain from the accused whether all the disclosures required of the Prosecution have been made and whether there are further prosecution disclosures that would be needed. No such power is vested in the court to seek the Prosecution's right to defense disclosures. On the contrary, the accused would be entitled to further disclosures from the Prosecution should he provide particulars of the required information and satisfy the court of their relevance at the trial (Judiciary, 2018, pp. 7).

The reason for this conundrum is not far-fetched. The new policy on the accused's disclosure was implanted in the Ghanaian criminal procedural regime without the necessary policy foundation. There have not been wide discussions on the reforms introduced by way of defense disclosures and no philosophical postulations have been made in that regard. Till date, there is no written text on the justification for the adoption of defense disclosures in Ghana. The country seems to have simply followed and replicated the English case management practice on defense disclosure without a clear understanding of its underlying policy. Unlike Ghana's ad hoc reform, a clear policy direction was articulated in Auld's LJ's Review of the Criminal Courts of England and Wales and the British government's white paper adopted in response thereto which justified recourse to defense disclosure and its promulgation by the Criminal Justice Act, 2003 [39]. Despite acknowledging that the earlier Criminal Procedure and Investigations Act, 1996 which did not require defense disclosure was logical in principle, Auld LJ argued that it "ha[d] not worked well." (Auld LJ, 2001). Generally considered, a number of factors galvanized the change of policy in England. These include the poor practice of pretrial disclosures which encouraged the defense to ambush the prosecution a trial; lack of trust between parties deepened by the sense of concealing facts and evidence as far as they are unattractive to a party's case, and the consequential lengthy and delayed trials arising from the partisan strategies to avoid an adverse determination against one's side (Monaghan, 2015, pp. 438) [40]. Again, Auld LJ advocated a change of policy from defense protection to a more participatory approach where due consideration is given to the participation and interest of victims of crime in the process of finding criminal justic [41] (Cape, 2006). A public interest argument weighed heavily in the configuration of the new purpose of the criminal trial where defense disclosure through service of a defense statement after being charged with a criminal offense was seen "as an aid to early identification of the issues and in consequence, an efficient process and one that is fair both to the defense and to the Prosecution as the representative of the

public interest" (Auld, 2001, pp. 156). Eventually, the Criminal Justice Act of 2003 incorporated these changes which rebalanced the trial in favor of the Prosecution against the defense by abolishing or severely diluting many of the traditional safeguards and procedural rights that hitherto insulated the accused from matters of proof and placed a detailed onus of disclosure on him (Monaghan, 2015, pp. 445). Accused persons who have been served with a copy of the indictment and documents containing evidence on which the prosecution intends to rely at trial are required to file a defense statement setting out in general terms, the nature of the defense as well as matters on which the accused takes issues with the prosecution and the reasons for taking such issue [42]. Ultimately, the intention is to create a level playing field to ensure that both sides set out their cases in advance through a case management process. (Jackson, 2003). Consequently, and as it currently applies in English criminal proceedings, the requirement placed on accused persons to make pretrial disclosures about their defense to the Prosecution has developed from a position where there was almost no obligation to do so. Currently, failure to disclose relevant information about the defense may lead to loss of defense or reinforce evidence of guilt (Jackson, 2001; Leng, 2001; Ashworth & Redmayne, 2005). Initially, such developments were justified by reference to the need to avoid ambush defenses and to enable the police to investigate defenses before trial (Cape, 2006). Today, the defense disclosure obligations have come to be justified by reference to the need for efficient trial management (Cape, 2006).

5. Outlook of a strategy for a more effective implementation of the accused's disclosure

Ensuring an effective procedural system of defense disclosure in criminal trials in Ghana must first begin with an examination of the reason for its integration as part of the case management procedure into the criminal adjudicatory system. This question is already answered in section 3 of this paper which highlights concerns about excessive delays and unwarranted adjournments that affect the efficiency and expeditiousness of the trial. In that context, defense disclosure has been considered an aspect of the overall theory of managerialism. But the bigger concern which constitutes the pith of the challenge to defense disclosure relates not to the relevance but to the process of its integration into the current operative system of criminal adjudication. Obviously, a procedural change of this nature cannot be done without a thorough assessment of its feasibility within the adversarial pillars of the Ghanaian system of criminal adjudication. This concern in turn draws with it the question as to what theoretical values this change seeks to introduce in the Ghanaian criminal trial to meet the exigencies of the modern adversarial criminal trial. Be it as it may, it is important to pay regard to the key issues embedded in the points discussed below:

(a) defense disclosure within the Ghanaian adversarial criminal adjudicatory system

Even though procedural measures to address the inefficiencies of the current trial system may be needed, this ought to be clearly formulated within the framework of adversarial protections of the accused. Thus, despite the good intentions of the Judiciary towards achieving trial efficiency, the absence of policy direction to guide the introduction of defense disclosure in the prevailing criminal procedural system creates a flawed and speculative appreciation of its feasibility within the governing adversarial framework. More particularly, a theoretical void arises from a lack of consideration of the issue of harmonization of due process rights insulating the accused from matters of proof and the new policy of defense disclosure and participation at trial. There is undeniably an underlying normative connection between the presumption of innocence, the privilege against self-incrimination, the right to silence and the requirement that the state makes its case without the active testimonial participation of the accused (Stewart, 2016). Diluting the right to silence and requiring the accused's participation through managerialism in an adversarial trial system moves the trial policy from a 'due process and proof' perspective that underlines the adversarial trial to a 'truth finding' policy that underlies the inquisitorial trial model. With this, the original framework of the adversarial structure of the criminal trial suffers major adjustments that must be taken into account for the purpose of designing what ought to be the new framework to properly accommodate the institution of case management and defense disclosure. One thing is sure, an adversarial trial cannot adopt a managerial system and a defense disclosure policy without first adopting certain inquisitorial features, particularly those relative to the structure of court-controlled evidence gathering and adjudication. The move towards a heightened participation and disclosure by the accused shakes the very foundations of the adversarial trial and gives a new meaning to the political theory of the criminal trial. A major structural and ideological change in the trial system is required to accommodate the novel implantation of defense disclosure (Moisidis, 2008).

(b) Protecting the fair trial rights of the accused

The state's overriding powers of investigation, prosecution and punishment must be exercised in a manner that pays due regard to the due process and fair trial rights of accused persons and preserves their autonomy and dignity. The various rights to the presumption of innocence, privilege against self-incrimination and burden of proof till date remain constitutionally guaranteed and still have the protection of the various instruments under international law. By them, a clear relationship is established between the prosecutorial powers of the state deployed to establish convictions through its own resources and the accused non-participatory rights in the criminal process earlier discussed in parts 2 and 3 which remain a fundamental

feature of the operative criminal adversarial model. Where the state compels the accused to actively participate in the process of establishing the facts and proving guilt through pretrial disclosures, in violation of the accused's non-participatory rights, the criminal process of establishing the adversarial truth is undermined and tilts the proceedings in favor of the prosecution. This is because defense pretrial disclosure amounts to compelling an accused to provide testimony against himself in respect of something that he does not have a legal obligation to answer. In any case, criminal law must be enforced and the criminal process should be conducted in a manner that gives full meaning to a fair trial and limits the potentially oppressive powers of the state. Thus, without a clear policy change providing a legitimate derogation, the introduction of the policy of managerialism including defense disclosure into the prevailing criminal justice system must be carefully gauged and applied in a manner that gives substantial effect to these rights.

(c) Improving the truth-seeking functions of the adversarial criminal adjudication system

With the passing of time comes changes and the desire to improve. The ability of the adversarial system to find the truth through a partisan control and manipulation of facts has at best been described as practically illusory and the desire to enhance the truth-finding ability of the adversarial criminal system calls for a reconsideration of the key pillars of the adversarial trial model (Findley, 2012). It has generally been argued that "pre-trial is vastly more important than trial" (Langbein, 1997) and aspects of criminal discovery such as the right to silence, and privilege against self-incrimination have become ongoing features of the law reform debate. In that regard, a reciprocal criminal discovery appears to be necessary in order to enhance the truth-seeking potential of the adversarial criminal trial. In so doing, the issue has been taken with traditional views of the adversarial criminal trial which focus on proof rather than truth. From a utilitarian point of view, the procedural rights must work to the benefit of the larger community, and the non-participatory rights of the accused cannot be unreasonably pursued to secure the limited interest of the accused to the total exclusion of the rest of society (Moisidis, 2008). At the same time, treating the right to silence as a strategic means of taking the Prosecution by surprise or ambush would be questioned because it would involve having regard for the liberty of the accused to the total exclusion of a like liberty on the part of the rest of the community (Moisidis, 2008). While seeking to maximize the truth-seeking potential of the adversarial trial, the trial itself must reconsider the approach to achieving this objective if pretrial defense disclosure is likely to affect the goals of convicting the guilty and acquitting the innocent are not compromised (Moisidis).

(d) Redefining the parameters of defense disclosure

The truth-seeking function of the trial will be enhanced if all evidence that will be presented at the trial is accessible at the pre-trial stage. Such evidence should be

subjected to reciprocal pre-trial discovery. Under the Practice Direction, defense disclosure is required if an affirmative defense is intended to be advanced at trial. There are currently no guidelines on the implementation of this requirement of defense disclosure. It may be important for the purpose of an efficient implementation of defense disclosure to first define this concept of an affirmative defense. It must relate to any defense whether arising under common law or statute which casts an evidential or legal burden of proof on an accused. In this case, defense disclosures need not refer to all types of defense except where the accused assumes the obligation to prove a particular fact under a reverse burden of proof (Ghana, 1992) [43]. If no affirmative defense is going to be advanced at trial, no defense disclosure should be available until the Prosecution has duly closed its case and the court finds a case to have been against the accused thus compelling him to open a defense. Therefore, it is argued that the core of the pretrial right to silence and the privilege against self-incrimination ought to be upheld with defense disclosure being required only in respect of affirmative defense (Moisidis, 2008).

6. Conclusions

The adversarial criminal trial in Ghana is in transition and the quest to enhance its truth-finding objective and improve its efficiency is at the foundation of the introduction of defense disclosure to even up the scale of the obligation of the parties as far as the development of the facts of the case is concerned. Thus, without a doubt, the 2018 Practice Direction on case management and disclosures presents a core value in the judicial agenda to address the concerns arising from the operational structure of criminal proceedings, particularly the partisan control of proceedings and truth-defeating strategies of ambush defense. However, for a legal system designed on the trappings of a core adversarial model, the introduction of defense disclosures requires a conscious policy objective to direct the needed change within a much broader ideological re-orientation. Sadly, this strategic step seems to have been neglected in the process leading to the introduction of defense disclosures in Ghana. The absence of a policy foundation, coupled with what appears to be a simple reliance on the English criminal reforms presents a failed justification for imposing pretrial disclosure obligations on accused persons. There is a need for a policy readjustment to accommodate the new concept of defense disclosures. Reliance on the English reform approach to enhancing criminal trial efficiency in Ghana may at first hand be necessary not in relation to the content of the English reforms but only in terms of the strategies adopted to reach the needed reforms. This step requires undertaking a prior structural and theoretical analysis of the existing procedural framework based on a clearly articulated policy change. The integration of defense disclosures in the Ghanaian criminal trial system necessarily requires key structural adjustments within its current operative adversarial framework that ideological

promotes a due process policy and reinforces ambush defense through a unilateral prosecution disclosure policy. So far as, the fundamental right to the presumption of innocence, the privilege against self-incrimination and the wide definitional scope of the burden of the prosecution to prove guilt beyond reasonable doubt firmly define the Ghanaian procedural regime, the introduction of disclosure must align with an attempt to give effect to these non-participatory fair trial rights and protect the accused from being used as an informational resource for the court or the Prosecution. Again, the pursuit of the truth-finding objective of the Ghanaian adversarial trial through defense disclosures must be measured by the core protective ideology of the adversarial trial that seeks to even up the balance of trial between the heavily and powerfully endowed Prosecution which is fully resourced by the state and the disadvantaged position of the accused whose safeguards are only available in the due process regime within the broader concept of equality of arms. Finally, and to the extent that the trial regime remains adversarial in nature, prudence demands that a careful scaling of the scope and nature of pretrial disclosures by the accused, primarily limited to cases where the accused seeks to adduce an affirmative defense where assuming a reverse burden of proof.

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Notes:

[1] It must be noted that this Practice Direction is a stopgap measure introduced by the Judiciary to last until a more formal prescription is made by the legislature on the matter.
[2] In this paper, a reference to the masculine gender implies the feminine.
[3] These non-participatory rights give content and purpose to the Ghanaian criminal trial which is adversarial in nature.
[4] The death penalty applies in Ghana. See, e.g., Article 3(3) of the Constitution of Ghana, 1992.
[5] They began in the 16th century after the decline of the medieval modes of proof being Trial by combat, wager of law and trial by ordeal.
[6] As the author states, the rationale was to prevent any undue interference of defense counsel with the fact adducing process. The central dynamic of the trial was to compel the accused to speak and prove his innocence or otherwise.
[7] See article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;"
[8] General Comment No. 32, UN. Doc. CCPR/C/GC/32, para 33, defining "adequate facilities" to include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that is exculpatory.
[9] See Article 14(3) (e) of ICCPR); Article 6(3) (b) & (d) of the European Convention on Human Rights (ECHR); Para (N (3)) of the African Commission on Human Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); Article 8(2)(c) & (f) of the American Convention on Human Rights.
[10] See paras 32, 33 & 39. The procedural directive is to make available to counsel for the accused, all the relevant documents. See Harward v. Norway, Communication No. 451/1991 para. 9.5 (1994); Smith v. Jamaica, Communications No. 282/1988, para. 10.4; Michael Sawyers and Desmond McLean v. Jamaica, Communication No. 226/1987, U.N. Doc. CCPR/C/41/D/226/1987 (1991).
[11] Para (N(3)(e)(iii).
[12] Paras 32 and 33 particularly in respect of the right to adequate facilities for the preparation of defense.
[13] It defines access to 'facilities' to means that "the accused and the defence counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defence."
[14] Referring to R v. Brown 3 All ER 769, 778 (1997).
[15] See Para N(3)(e)(iv).
[16] See art 19(2)(e)).

[17] art 19(2) (f).
[18] See section 182.
[19] It is a statutory form under section 201 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30) stating which provides details of offenses charged against the accused.
[20] See section 182 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30).
[21] Part 1(3).
[22] Part 1(6).
[23] These documents have been expounded in the Practice Direction to impose on the Prosecution, the duty to provide serve the accused person with the following materials: (a) the charge sheet/Indictment, (b) facts of the prosecution's case, (c) statements made by the accused person before commencement of trial (such as Cautioned Statement, Charge Statement, Statutory Statement as well as any further or other statements made by the Accused person before trial commences), (d) all witness statements made to the Police and other law enforcement or investigative bodies by persons who may not be called upon to testify for the Prosecution at the trial, (e) Any documents in possession of the Prosecution which are relevant to the case and which the Prosecution mayor may not tender at the trial, (f) Photographs of any real evidence (objects) in possession of the Prosecution which are relevant to the case and which the Prosecution mayor may not tender at the trial, such as guns, cutlasses, knifes, etc, (g) Any other materials in possession of the Prosecution which are relevant to the case including audio, video and other electronic recordings as well as any unused materials which may assist the Accused person in the preparation of his defence. (h) any exculpatory evidence in possession of the Police and other law enforcement or investigative bodies (the Prosecution is under an obligation to inquire from the relevant law enforcement or investigative bodies the existence of such evidence, procure and preserve same for disclosure). The Court, on its own motion or on an application by the Accused (Defence), may order that any statement, document, object or material in possession of the Police or other law enforcement or investigative body that is relevant to the case but which the Prosecution has not disclosed, be disclosed.
[24] Part 2 (2) (a).
[25] See Article 12(2).
[26] Stating that "…the accused is not obliged to prove his innocence and naturally he will not assist the prosecution to prove his guilt."
[27] In this case, the Supreme Court per Adinyira JSC, quoting Lamer CJ in R v. P (MB), 1994 held: "Perhaps the single most important principle in criminal law is the right of the accused not to be forced into assisting in his or her own prosecution. This means in effect that an accused is under no obligation to respond until the State has succeeded in making out a prima facie case against him or her."
[28] See Article 14(2) of ICCPR as ratified under Article 19(2) (c) of Ghana Constitution; Section 11 of Evidence Act, 1975 (NRCD 323).
[29] Referring to Woolmington v. DPP AC 462 (1935), Viscount Sankey LC, stating that "[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given... the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the

prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

[30] See also Section 97(1) & (4) of the Evidence Act of Ghana, 1975 (NRCD 323).

[31] See for example Section 131 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30).

[32] Ibid, section 187(6), stating that "[t]he failure of any person charged with an offence to make a statement under this section may be the subject of comment by the judge, the prosecution or the defence."

[33] Ibid, section 188.

[34] See, e.g., criminal law reforms in the area of defense disclosures in the United States of America and the United Kingdom.

[35] As once held in Jisl, EWCA Crim 696 (2004), holding that "[t]he defendant is entitled to a fair trial… it is not however concomitant of entitlement to a fair trial that either or both sides are further entitled to take as much time as they like...resources are limited… it follows the sensible use of time requires judicial management and control."

[36] Other factors are financial constraints on courts and litigants. as well as improvement in information technology introduced into judicial administration.

[37] Part 2 (3) (b).

[38] Part 2(4); The said duty is also elaborated in section 131 of the Criminal and other Offences (Procedure Act), 1960 (Act 30).

[39] It amended the earlier Criminal Procedure and Investigations Act, 1996.

[40] See sections 33 of the Criminal Justice Act of 2003 as amending sections 5 and 6 of the CPIA of 1996.

[41] Auld LJ in his Review of the Criminal Courts argued that change was necessary because the focus of criminal processes was on the criminal or alleged criminal "leaving the victim or alleged victim, with only a walk-on part".

[42] Section 5(5) & (6) of the CPIA of 1996.

[43] see Article 19(16) (a).