

The Legal Status of Public Universities in Ghana

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ABSTRACT

The recent growth of public universities in Ghana and their claim to autonomy have often generated discussion around the legal personality of public universities. The fact that they are subvented by public funds and are creatures of public law often blur their unique identity. This work is an attempt to examine the legal identity of the Ghanaian Public University as a higher education institution within the context of other similar public bodies. Referring to the statutory framework of these institutions, the work exposes the unique characteristics of the Ghanaian Public University as a creature of law. It also examines the common characteristics shared by the Ghanaian Public University and other Institutions. The work hopes to provide a deep understanding of the nature and complexity of the Ghanaian Public University and to give direction to public policy in addressing its peculiar needs.

Keywords

Public Universities, legal identity

INTRODUCTION

Public Higher Education has existed in Ghana at least since the inception of the University of Ghana in 1948¹. Generally, these institutions are created by Acts of Parliament and are granted wide powers for their internal management and governance². In many ways, these institutions may fit the description of public authorities in some well-known common law jurisdictions³. Whether or not by their nature, they qualify as agencies of government or are part of central government remains a question for legal analysis. The attempt by government to directly supervise their activities through institutions such as the National Accreditation Board and the proposed public universities bill raise many issues relating to the autonomous personality of these institutions⁴. In rather ironic terms, the apparent unique attributes of these Institutions in their governance and mandate even further deepens the confusion about their true nature and character. In the Ghanaian case of *Klomega v Attorney General*, the Supreme Court observed that government as used in article 295 of the Ghanaian constitution excludes public corporations⁵.

It is against this background, that this study sets for itself a fundamental question being: What is the legal Identity of a Public University in Ghana? To explore this question, three sub questions are answered namely: a) how similar or different is the Ghanaian University to government and government agencies b) To what extent is the Ghanaian university different from other public corporations? c) In the face of what we know, what is the most appropriate legal characterization of the Ghanaian Public University?

It is hoped that this work will help clarify the legal place of the Ghanaian University and thereby enhance our knowledge and understanding of the policy context within which public universities operate. It will also promote the development of more tailored to fit policies for public universities.

¹ Agbodeka, Francis *A History of the University of Ghana (Half a Century of Higher Education)* (Accra Woeli Services Publishing 1998), 20. Also see, 'Profile of University of Ghana' available at <https://www.ug.edu.gh/about/overview>

² See for example, University of Development Act, 1992 (PNDCL 278)

³ The Human Rights Act, UK 1998, s 6(3)(b), for example define public authority to include anybody whose functions are functions of a public nature. Higher Education constitutes a public function see, Article 25 and 38 of the 1992 Constitution of Ghana, where higher education is a major state objective and a positive duty of the state.

⁴ The National Accreditation Board is a statutory body created to regulate quality of Higher Education in Ghana for details of their functions see, National Accreditation Boards Act, 2007 (act 744) and its regulations LI1984. Also, see, The Public Universities Bill 2020. The Public Universities Bill seeks to empower the Minister of Education to issue directives to the Councils (Boards) of Public Universities.

⁵ *Felix Klomega vs. Attorney General* [2013] Writ No. J1/110/2012. Also see, *infra* note 7 at art. 295

THE GHANAIAN UNIVERSITY AS A PUBLIC CORPORATION

Public Universities generally are corporate bodies established by Acts of Parliament to fulfill a public or social purpose.⁶ The Constitution of Ghana explains what a public corporation is in the following terms “a public corporation shall not be established except by an Act of parliament⁷”. Public corporation is further defined as “an entity established by an Act of Parliament other than one set up as a commercial venture⁸”. Given that Public Universities are set up by Acts of Parliament to fulfill a non-commercial purpose,⁹ it without doubt fit into the intendment of article 190 as a public corporation. Article 70 of the 1992 Constitution requires that the President appoint chairpersons of boards of public corporation. The University of Ghana Act at section 8 (1) provides that the chairperson of the university council shall be appointed by the President in accordance with article 70 of the constitution. Thus, it could be inferred that the University of Ghana Act places the university in the category of a public corporation. Being a Public Corporation, universities are considered part of the Public Services within the category of public corporations¹⁰.

For purposes of financial administration, funds of public corporations could be classified as public funds. Public funds is defined to include the Consolidated Fund, the Contingency Fund and such other Public Funds established under the authority of an Act of Parliament¹¹.

GOVERNMENT AGENCIES

The executive authority of Ghana is vested in the President who exercises this authority through subordinate officers notably ministers¹². The president has the power to appoint such number of ministers of state as may be necessary for the efficient running of the state¹³. The president may also appoint one or more Deputy Ministers to assist a Minister¹⁴. Ministers are generally responsible for the administration of a government ministry.¹⁵ This essentially means that a Ministry is the vehicle through which executive power is exercised. Executive agencies are created by Ministers to provide specific service delivery and thus are under ministerial control¹⁶. Some semi autonomy is given to such agencies in the discharge of their service delivery functions but the minister remains responsible for policy¹⁷. A chief executive for an executive agency is appointed by executive authority usually for a fixed period to be responsible for the day-to-day administration of the agency¹⁸.

⁶ See for example University of Ghana Act (308), 2010, Section 4, where the aims of the University are prescribed to include the provision of Higher Education.

⁷ The Constitution, art 192. This definition appears to broadly define public corporations to include all forms of public authorities. In so far as Public corporations fulfil public tasks on behalf of government, and are set up by Acts of parliament, they are public authorities and as such subject to some control by government. (See, note 9 infra. at page 14).

⁸ Ibid art 190 (1) (4)

⁹ See for example the aims and objectives of a University specified in University of Cape Coast Statutes 2012, s 2

¹⁰ Supra note 7, art 190. Note that though they are classified under the public services of Ghana, which also include the civil service, they fall into the specific category of public corporations, which is a distinctive head under the public service.

¹¹ Ibid art 175. Also, section 24 of the University of Ghana Act, 2010 (Act 806) defines University funds as follows: “The funds of the University include (a) subventions from the Government of Ghana; (b) moneys that accrue to the University in the performance of its functions consisting of (i) fees paid by students duly registered by the University; (ii) fees, charges and dues in respect of services rendered by or through the University; (iii) proceeds from the sale of publications of the University; (iv) grants, subscriptions, rents and royalties; (c) interest from investments; (d) endowments, donations and gifts; and (e) moneys from any other source approved by the Council of the University shall form part of the funds of the University as defined under this Act”. This list falls squarely within the description of public funds under article 175 of the constitution.

¹² Supra note 7, art 58 and 78

¹³ Ibid

¹⁴ Supra note 7, article 79

¹⁵ For the structure of a Ministry see ‘Office of the Attorney General and Minister of Justice’ available at: <http://www.mojagd.gov.gh/hon-gloria-afua-akuffo>

¹⁶ For understanding of the functioning of Executive Agencies generally see, John Alder, *Constitutional and Administrative Law*, 2011 (8th Edition) Palgrave Macmillan p.90-92

¹⁷ Ibid

¹⁸ See, Economic and Organized Crime Office Act, 2010 (Act 804) for appointment of Executive Director. He is appointed in accordance with article 195 (1)

The underlying feature of such agencies are that they are generally subject to the direct control of a Government minister appointed by the President and thus seen as part of government and not a separate personality¹⁹. Many agencies provide crucial government services examples include the judicial service the Immigration service, the Education Service, the Prison Service among others.

The head of a District Assembly – called a District Chief Executive is nominated by the President and is appointed with the prior approval of two-thirds majority of members of the Assembly, present and voting at the meeting²⁰. The President in consultation with traditional authorities and other interest groups in the District appoint at least two thirds of members of the District Assembly²¹. It is therefore the case that the assembly rarely rejects presidential nominees for District Chief Executive. Even though district assemblies are body corporates,²² in addition to the fact that the president appoints their heads, they are subject to direct central government control. Examples of government control include: a) they are subject to presidential guidance and direction on matters of national policy;²³ b) the Auditor General audits their accounts;²⁴ c) their budgets are sent by their regional coordinating councils to the ministry of finance for approval; and their work is subject to the supervision of the regional minister.²⁵ In sum government, ministries together with their departments and district assemblies are firmly hemmed into government machinery.

PUBLIC CORPORATIONS AS AGENTS OF THE STATE

It has generally been argued that Public corporations are also essentially part of government and must be viewed as such. Arguments proffered for this view include:

- 1) Public corporations are required to obey directions of a general nature issued by sector ministers²⁶
- 2) Funds for their operations are largely obtained from government through loans or budgetary allocations²⁷
- 3) Their accounts are audited by the Auditor General of Ghana and a copy of its annual report on its operations is laid before the parliament of Ghana²⁸
- 4) Most public corporations can't borrow money without approval from the minister²⁹

These arguments notwithstanding, there are clear peculiarities that still point to the uniqueness of public corporations as compared to central government and its agencies some of which are presented below

PECULIARITIES OF PUBLIC CORPORATION

Public Corporations have a separate legal personality from central government and unlike some agencies of government can sue and be sued³⁰. Public Corporations may generally have the power to raise or to borrow money without recourse to central government³¹. They may enter into contracts and create other civil obligations without recourse to central

¹⁹ Supra note 16

²⁰ Supra note 7 art 243

²¹ Ibid art 242 (d)

²² Local Government Act, 1993 (Act 642) s.4

²³ Ibid at s [100]

²⁴ Ibid at s [121]

²⁵ Ibid at s.146 [4]

²⁶ See Ghana Revenue Authority Act 2009 [Act 791], s [11]

²⁷ Ibid s [22]

²⁸ Ibid s [24 and 25]

²⁹ Ibid s 22[c]. Note however that some public corporations can temporarily borrow money without such approval see Ghana Maritime Authority Act, 2002 [Act 630], s. 18. This feature of public corporations does not generally apply to Universities. In addition, under the Ghana Export Promotion Authority Act, 1969 (NLCD 396), s.11, the authority can only borrow money with the approval of the minister.

³⁰ Supra note 6, s 1. However some government agencies may have no statutory existence. See infra note 34

³¹ Ibid

government³². In addition, Public Corporations are set up by specific statute and not pursuant to a statute.³³ Executive instruments generally establish executive agencies.³⁴ The constitution provides under article 70 that the president shall appoint chairperson of governing boards of public corporations however; it is parliament, through legislation that sets up the overall constitution of these bodies³⁵. Public Corporations generally are given the power to make regulations for the management of their internal affairs, which has the force of law. Executive agencies may make guidelines and rules for their operation but this may only be contractually binding.³⁶ Once appointed, the terms and conditions of heads of public corporations including their tenure of office are governed by their appointment letters³⁷. They can therefore not be removed in a manner inconsistent with their appointment letters³⁸. A minister is responsible and accountable for a public corporation only to the extent that the minister has powers concerning it³⁹. The extent of this depend on the particular statute. Sometimes a minister may have power to give non-binding guidance or binding directions⁴⁰.

A key distinction of public corporations is the fact that they are not obliged to submit their International Commercial Agreements for parliamentary approval as required under article 181 (1) of the constitution. Article 181 (1) and (2) provides

“(1)Parliament may by resolution supported by the votes of a majority of all the members of parliament, authorize the Government to enter into an agreement for the granting of a loan out of any public fund or public account.

(2) An agreement entered into clause (1) of this article shall be laid before parliament and shall not come into operation unless it is approved by a resolution of parliament”.

The above provisions received judicial attention in the case of *Felix Klomega v. Attorney General, GPHA and two others*⁴¹. The facts were that the first defendant Ghana Ports and Harbors Authority (GHAPHA), a public corporation, entered into a shareholders agreement and concessionary agreement with third and fourth defendants respectively without parliamentary approval. Plaintiff claimed that the said agreements constituted international economic agreements and as such should have received parliamentary approval. They therefore sought the court to declare the transactions void.

A key issue for determination was whether the GHAPHA is part of Government or is a government agency whose international business transaction should be subject to the requirements of article 181(1) & (2). Darteh Bah (JSC) concluded that the Ghana Ports and Harbour Authority (GHAPHA) being a public corporation does not need to submit its international business or economic agreement to government for approval. He stated “Government in the context of article 181 (1) & (2) should be interpreted purposively to exclude corporations such as the second defendant. The interpretation is the only reasonable one if one reads the constitution as a whole.”(Page 13) He however raises one exception; “This court should, however, not lay an absolute rule. If, on the facts of a particular case, central government were found to have made a particular statutory corporation its alter ego under the circumstances of the particular case, the possibility of the holding that that statutory corporation comes within 181(1) & (2) should not be ruled out”. From this position, it appears that the only exception could be when the public corporation acts as the alter ego of government. Darteh Bah’s view resonates with the position of this paper on public corporations except to say that Public corporations may be regarded as having a distinct personality of their own so that their identities do not merge with the

³² Ibid s. 24 (6). Note that this may not apply to all public corporations for example the Ghana maritime authority have power to borrow money temporarily. See Ghana Maritime Authority (GMA) Act, 2002, s. 18

³³ The distinction here is that companies for example are formed pursuant to statutes viz, the Companies Act, Ghana, 2019 (Act 992). Also, District Assemblies are incorporated according to the Local Government Act, Act 490 and not a stand-alone law.

³⁴ For example, School Feeding Programme and the Youth Entrepreneurship Support Initiative, National and Entrepreneurship Innovation Plan. For details see ‘Ghana School Feeding Program’ available at: http://schoolfeeding.gov.gh/?page_id=1486, ‘National entrepreneurship and Innovation Program’ available at: <http://neip.gov.gh/>

³⁵ See for example, Ghana Revenue Authority Act, 2009 (Act 791), s.4

³⁶ Ibid. at s. 27 however note that regulations may be made by the Minister on the recommendation of the Board

³⁷ *Donkor vs. Attorney General* [2019] (J1/08/2017) GHASC 52

³⁸ Ibid

³⁹ See the GIMPA Act, 2004 (Act 676) the Minister may make regulations only on advise of the Board.

⁴⁰ In the case of Ghana Revenue Act, 2009 (Act 791), the Minister has the power to give directives to the Board and they shall comply. In some cases the Minister may only issue regulations on the advice of the Board – see, Forestry Commission Act, 1999 (Act 571), s. 30

⁴¹ *Felix Klomega vs. Attorney General* [2013] Writ No. J1/110/2012

government creating them neither are they agents of the parent government. These bodies have functions to discharge and do so without control of government.⁴²

THE UNIVERSITY AS A SPECIAL TYPE OF PUBLIC CORPORATION

As much as this paper will categorize a University as a public corporation, it is important to mention that a University is “sui generis” for the following reasons.

A key peculiarity is the fact that Public Universities in Ghana have a bicameral governance structure namely the Council, and the Academic Board⁴³. These two bodies operate within a framework of separation of powers. The Council on one hand is responsible for general management of the assets and finances of the University whilst the Academic Board on the other hand is responsible for academic governance and policy⁴⁴. No member of the academic Board of the University is appointed by the government neither is there any form of control by government over the board⁴⁵. The academic board powers are far reaching including the power to regulate and award degrees. This bicameral governance system does not apply to other public corporations, which typically have a single governance system, which is the Governing Council or Board.⁴⁶

Public universities have a Chancellor, designated as a titular head who is appointed by the Council itself with no involvement of the President⁴⁷. Likewise, their Councils and not the President of the Country appoint the Executive head of universities⁴⁸. In the case of other Public Corporations, the president appoint their executive heads in consultation with the public services commission and where applicable with advise from their respective Boards⁴⁹.

The public services commission conducts the recruitment, appointment and promotion of all members of the public service including public corporations⁵⁰. In the case of Public Universities however, the power to appoint staff is vested in the Council.⁵¹

The enabling law of most public higher education provide for what is termed institutional autonomy⁵². Section 2 of the Ghana Institute and Public Administration Act for example expressly provides that the Institute shall have financial and academic autonomy. This provision is repeated in other Higher Education Instruments⁵³.

To Berdahl institutional autonomy has two dimensions, procedural and substantive autonomy. The first type relates to the way in which the universities spend, or are authorized to spend, public funds. The second type comprises decisions, which concern the appointment of teachers, the selection and certification of students, research programmes, etc. An investigation into the amount of procedural autonomy will look at the administrative system: planning,

⁴² Jain P.M, “The legal Status of Public Corporations and their Employees”[1976] *Journal of the Indian law Institute* Vol 18:1, 26. It is important to observe that the torts of these corporations are not considered torts of the central government neither do they act under the direct authority of government and hence can't be the agents of government.

⁴³ See, University of Ghana Act, 2012 (Act 806), s 11 and 17

⁴⁴ Ibid

⁴⁵ See generally supra note 6

⁴⁶ See for example Ghana Maritime Authority Act, 2002 (Act 630), s 4

⁴⁷ See, supra note, 7 art 68 (b), supra note 39, s 6

⁴⁸ Supra note 7, art 195 (3)

⁴⁹ Ibid 195(1.) Under article 196 of the Ghanaian Constitution, the Public Services have powers to prescribe the supervision and regulation of entrance and promotion examinations, recruitments and appointments into or promotions within the Public Services and establishments of standards and guidelines on the terms and conditions of employment in the Public Services.

⁵⁰ Supra note 7, art 195. Note that Universities are excepted

⁵¹ See University of Cape Coast law, 1992 (PNDCL 278), s 11 &12 that has explicit powers on the role of the Council and academic board in appointment of university staff. Also see article 195(3) of the constitution

⁵² Ghana Institute of Management and Public Administration Act, 2004 (Act 676) s.2

⁵³ Ibid

budgetary processes, allocation systems, audit programmes, etc. The degree of substantive autonomy depends on the state involvement in academic policy and in the choice of goals and methods within educational and scientific fields⁵⁴.

The powers of the academic board on academic matters and the broad financial powers of the University council discussed below point to significant substantive and procedural autonomy of many Ghanaian Universities⁵⁵. It is however important to add that legal autonomy may not necessarily constitute real autonomy^{56, 57}.

Higher Education Institutions are given broad financial powers under their Act⁵⁸: They can borrow without Executive Authority and they can enter into any transaction in furtherance of the aims of the University. They can lease, sell, and mortgage any University property. Other public corporations however have very limited financial powers - for example, they cannot enter into any long term borrowing without the authority of the Minister⁵⁹.

Also, universities require their executive heads to belong to the academic profession. This special requirement for universities makes them unique from other public corporations⁶⁰.

Finally, the Acts of most public corporations empower the president to give directives of a general nature⁶¹. In some cases, their enabling Act provides that the minister shall give directives to the board on matters of policy and the board shall comply⁶². There is no such broad power granted to the minister under any enabling act of a public university in Ghana. Thus by way of conceptualization we can say that whilst Universities are generally autonomous in their orientation, other public corporations generally seem to be heteronomous.⁶³

This without doubt establishes the autonomy of the governance institutions of public universities in clear terms.

⁵⁴ Glenny, L. A. and Dalglish, T. K. *Public Universities, State Agencies and the Law: Constitutional Autonomy in Decline*. (Berkeley: Center for Research and Development in Higher Education, 1973). 6, 8, 61. Also see, Kogan, M. and Pope M., "Freedom and Participation in the Universities" [12th May, 1972] *The Times Higher Education Supplement*, 14. ; Moodle, G. C. 'Authority, Charters and the Survival of Academic Rule'. *Studies in Higher Education*. 1.2, [1976], 128. ; Fredriksson, B. and Lane, J. E. *From Elite to Mass: The Swedish University System 1945-1975*. (Lund: Liber, 1979).

⁵⁵ Berdhal, R.O *Statewide Coordination of Higher Education*. (Washington .D.C ACE 1971), chapters 1-2.

⁵⁶ In their investigation into university systems in the United States which are guaranteed autonomy in the state constitution and university systems which do not have such guarantees, the authors observe: In conclusion, universities with constitutional status do not all possess such status in the same degree and do not enjoy whatever autonomy they have simply as a result of constitutional language vesting management and control in a governing board of regents. Real autonomy is also a function of a host of non-legal considerations: tradition, the political winds in a state at any time, the popular respect accorded higher education or the institution or its administrators, faculty and students, and other concerns not founded entirely in the legal framework provided for the institution. 9

⁵⁷ See generally, the Technical Universities Act, 2016 (Act 922)

⁵⁸ See supra note 32

⁵⁹ This is not the case under the Ghana Maritime Authority Act for example; the Board of the Authority can only temporarily borrow.

⁶⁰ See University of Cape Coast statutes, 2016. S.2

⁶¹ Supra note 41. s. 11

⁶² Ibid

⁶³ Lane, J. E. *Some Theoretical Notes on Institutional Autonomy*. (*Statsvetenskaplig Tidskrift*, 80.4, 1977), 247-257. The author observes: The opposite of autonomy is heteronomy. A university or a university system is heteronomous to the extent that the environment decides what it is to do and how it is to do it. Heteronomy may occur as the outcome of power or result from authority. In the first case, the university is forced to comply with directives determined by the environment in the second case the university voluntarily obeys what the environment decides.

CONCLUSION

This work has attempted to expose the legal personality of the Ghanaian public university. It has arrived at three key conclusions.

First, that the Ghanaian Public University is a public corporation and thus has a unique mandate and unique relationship with central government as compared to government agencies in the strict sense.

Second, that even as a public corporation, it is unique given the vast autonomy enjoyed by its governance institutions free from ministerial and presidential directives.

Finally, in its true sense, the Ghanaian Public University though may be controlled by government is not part of government.

It is hoped that this paper will open the door for further research on the legal personality of the Ghanaian public university and its relationship with other government institutions.

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