PARTNERSHIP UNBOUND:
A CASE FOR REFORM
OF THE PARTNERSHIP LAW IN GHANA

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Abstract

The thesis to be developed in this write-up is that the legal landscape in Ghana is not conducive to the development of the contractual relationship and business of partnership. It will be contended that the law of partnership, as it now stands, is fundamentally flawed, business-unfriendly and needs to be extensively and radically reformed. It is hoped that in the end it will be clear from the critique to be launched that the law of partnership and particularly the Partnership Act, 1962, Act 152 must be reformed, if partnership is to be unbound in Ghana.

Headnote

In Part I, an attempt will be made to hold a mirror to the law of partnership as it is. In Part II, a case for the reform of the law of partnership in Ghana will be argued.

The Law of Partnership

Incorporated Private Partnership Act, 1962, Act 152 as amended by the Incorporated Private Partnership (Amendment) Act, 1980, Act 423; Rules of Common Law and the Doctrines of Equity.

PART I

The Partnership Law As It Is

One of the associations that may be formed to carry on a business in Ghana is *partnership*. The association and the business of partnership in Ghana are governed by the Incorporated Private Partnership Act, 1962, Act 152 as amended by the Incorporated Private Partnership (Amendment) Act, 1980, Act 423. In addition, section 58 of Act 152 provides that *"the rules of equity and common law applicable to partnership shall continue in force except in so far as they are inconsistent with the express provisions of this Act."* This means that partnership in Ghana is equally governed by the rules of Common Law and the doctrines of Equity.

In the Partnership Act of 1962 as amended, *partnership* is defined as *"The association of two or more individuals carrying on business jointly for the purpose of making profits"*. The essentials of this statutory definition need to be highlighted. The use of the word "*individuals*" instead of "*persons*" is significant, because the Partnership Act, 1962 excludes artificial legal persons such as corporate entities from becoming partners. '*Business'* is defined under the Partnership Act, 1962 to include trade and profession. By the use of the word '*includes'*, it can be argued that *occupation* and *vocation* are not excluded from the meaning and scope of the term '*business'*. It should also be noted that, by definition, the individuals forming the association must carry on business jointly or in common and their purpose or object must be to make profit. *Profit* has itself been defined by Lord Lindley (Lindley & Banks on Partnership, 2002 Ed., page 11) as *"the net amount remaining after paying out the receipts of a business all the expenses incurred in obtaining those receipts; this should be contrasted with "gross returns"*. With regard to profits, it is pertinent to note further that the law only requires that the partners should *make* the profits and that there is no requirement that the profits so made should be *shared* [1] among the partners. However, the sharing of net profit, according to the

Partnership Act 1962, shall be *prima facie* evidence of the existence of a partnership. Be that as it may, a body corporate, a family ownership or co-ownership of property or business, even if profits are shared, are not, without more, considered to be partnership under the Partnership Act, 1962. Similarly, a servant or agent whose remuneration is in the form of a share of the profits accruing to a business shall not become a partner by reason only of the share of the profit.

A useful (but arguably no longer necessary) qualification of the definition of partnership under the Partnership Act, 1962 is the capturing of the principle in the English case of COX v. HICKMAN (1860) 8 H.L. Cas. 268 in Section 3(3) (b) of the Partnership Act, 1962 which provides as follows:

> *"A person shall not be deemed to be a partner if it is shown that he did not participate in the carrying on of the business and was not authorised so to do."*

This provision, though problematic, makes participation in the carrying on of the partnership business a statutory requirement.

It is also a statutory requirement that a partnership shall be *registered* under the Partnership Act, 1962 and it shall not be lawful for a partnership business to be conducted without its being registered. Similarly, no partnership consisting of more than 20 persons shall be registered. To register a partnership the following must be supplied to the Registrar-General: firm name, nature of business, address of the business (postal and situational), particulars of the partners, date of commencement of the partnership and particulars of any charges (e.g. mortgages).

In considering the application for registration of the partnership, the Registrar-General shall answer among others the following questions: Does the business association sought to be registered fit into the statutory definition of partnership? Is the business sought to be registered lawful? Are any of the partners, infants or of unsound mind? Have any of the partners been found guilty of fraud or dishonesty? Is any partner an un-discharged bankrupt? Is the application itself regular in form and substance? Curiously, section 6(3) of the Partnership Act, 1962 provides that the Gazetted Certificate issued to the partnership upon due registration *"shall* [simply] *be conclusive evidence that the firm has been duly incorporated under this Act."*

Also to be noted is the annual renewal of the registration. Section 9 of the Partnership Act, 1962 provides that where the partnership is not registered in accordance with Section 5 of the Partnership Act, 1962 or the registration renewed pursuant to section 8 of the Act, *"the rights of the firm concerned and of the partners therein arising out of any contract made during such time as the default continues shall not be enforceable by action or other legal proceedings".* (See section 9 (1) (b) of Act 152). However, where the firm is brought to Court, it shall be lawful for the firm to enforce any counterclaim or set-off within that legal action or proceeding. See the case of In Re SASU-TWUM (decd); SASU-TWUM v. TWUM [1976] 1 GLR 23 where the High Court held that *"since the partnership agreement was never registered, neither of the partners could enforce any right arising out of the said agreement. Consequently, the Plaintiff could not rely on the partnership agreement to claim her half-share of the value of the shop".* Clearly, the penalty for non-compliance with the requirement of registration and its annual renewal is the closure of the judicial doors to the unregistered partners and partnerships.

A plus for the Partnership Act 1962 is the fact that the partnership business has been given a separate legal existence apart from the partners. Section 12 of the

Partnership Act 1962 provides that *"the firm shall be a body corporate under the firm name, distinct from the partners of whom it is composed, and capable forthwith of exercising all the powers of a natural person of full capacity in so far as such powers can be exercised by a body corporate"*. What this means is that, like a company duly registered under the Companies Code, 1963, Act 179, the firm of partners shall enjoy a distinct legal personality described in the case of SALOMON v. SALOMON & CO. [1897] A.C. 22. The difference here is that, unlike a company, both the number of partners and their liability have been statutorily circumscribed. The number of partners is limited to 20 individuals and their liability is unlimited.

With respect to the rights and obligations of the partners vis-à-vis third parties and between themselves, the Partnership Act 1962 provides that every partner shall be an agent of the firm for the purpose of the business of the firm; the acts of the partners shall bind the firm, if the acts were authorized expressly or impliedly by his other partners or were subsequently ratified by them or such acts were done for *carrying on in the usual way the business of the kind carried on by the firm*, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing knows that he has no authority. The meaning of this provision is that where the partner has express or implied authority to act or acts for the purpose of carrying on the usual business of the firm, the firm shall be bound by the acts of the partners so acting unless it is shown that the person he deals with actually knows that the partner lacks the authority so to act. (See section 14 of the Partnership Act, 1962, Act 152).

Concerning acts of partners on behalf of the firm, section 15(1) of Act 152 provides as follows:

"An act or instrument relating to the business of a firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm by any person thereto authorized, whether a partner or not, shall be binding on the firm".

Simplified, this provision means that the act of any authorised person done in relation to the business of the firm will bind the firm if the person so acting shows an intention to bind the firm and that person is authorized. It does not matter whether that person so authorized is a partner or not. *It is, however, instructive to note that this act includes signing an instrument or deed on behalf of the firm.*

In regard to execution of instruments or deeds, Sub-section 2 of Section 15 of the Partnership Act 1962 requires close attention. The Act provides that Section 15 *"shall not affect any general rule of law relating to the execution of deeds or negotiable instruments".* The general rule under reference may be stated as follows:

"Express authority to execute a deed must itself be given by deed. It follows that such authority cannot be conferred by a partnership agreement which is under hand. It therefore comes as no surprise that the general rule is that a partner has no implied authority to bind his co-partners by deed, however the partnership was originally constituted. The only true exceptions are a deed of release executed by one partner and an assent by one partner to a debtor's deed of arrangement, which will in each case bind the firm. It should be noted that a deed may be validly executed by one partner on behalf of all his partners where he does so at their direction and in their presence; this does not represent a substantive exception to the above principles".(See paragraph 12.67, page 325 of Lindley on Partnership: 2002).

This general rule is indeed worthy of the attention of both partners and third parties who deal with the firm. The safe thing to do is to demand a power of attorney duly executed in favour of the partner signing the instrument or deed to

satisfy oneself that he has the authority of the other partners to sign the instrument or deed.

The Partnership Act 1962 further provides that as regards liability, every partner shall be jointly and severally liable with the firm and the other partners for all debts and obligations of the firm which may have been incurred while he is a partner. An incoming partner shall not be liable for debts and obligations pre-dating his becoming a partner. A retired partner is also not relieved of debts and obligations that were incurred before his retirement. However, a retiring partner may be relieved by an agreement made between himself and the firm and the creditor. A third party who deals with the firm without notice of the retirement is entitled to ignore the fact of the retirement and hold the retiree as liable jointly and severally with his former partners. The estate of a deceased partner is absolutely relieved of all debts and obligations arising after the death of the partner. It is also instructive to note that there is liability attaching to any person who holds himself out (pretends) or allows himself to be held out to third parties as a partner of the firm.

As regards the revocation of continuing guarantees, two rules need to be highlighted: (1) a change in the composition of the partnership brings to an end the continuing guarantee given by the firm in favour of a third party; (2) on the contrary, a continuing guarantee given to the firm shall not be revoked by reason only of the change in the composition of the partnership. The Partnership Act, 1962 again requires that charges such as a mortgage should be registered with the Registrar-General.

Regarding the keeping of and access to the partnership accounts, Sections 32 and 33 of the Partnership Act, 1962 provide in the main as follows:

(a) the firm shall cause to be kept proper accounts with respect to its financial position;
(b) the Profit and Loss Account and the Balance Sheet must be prepared at intervals of not more than 15 months; and
(c) each partner shall have a right of access to the firm's accounts and to inspect or copy them if he so desires.

It goes without saying that transparency in the management of the firm's account has great potential to ensure the survival of the partnership and its business.

Another important obligation of the partners that happens to be the bedrock or backbone of every firm is the fiduciary relationship of partners [2] which is provided for under Section 34 of the Partnership Act, 1962. This obligation demands that:

(a) every partner stand in a fiduciary relationship towards the firm and co-partners;
(b) be bound to render to every other partner full information of all things affecting the firm;
(c) account to the firm for any benefit derived by him without the consent of the other parties from any transaction concerning the firm or from any use of the firm's property, name or business connection; and
(d) not to compete with the firm either directly or indirectly.

It ought to be obvious that this particular set of obligations constitutes the pillars that support the relationship of the partners inter se.

Also to be noted are some very important rules of Common Law and doctrines of Equity that have specifically acquired statutory force under the Partnership Act, 1962. These rules are captured under Section 35 of the law under the heading: *"Rules Applying in Absence of Contrary Agreement"*. What this means is that unless the parties agree to the contrary, the rules set out under section 35 will be

deemed to apply to the firm and the partners alike. The rules may be set out briefly as follows:

(a) partners shall share equally in the capital and profits of the firm;

(b) partners shall contribute equally towards the losses sustained by the firm;

(c) the firm shall indemnify partners in respect of payments made and personal liabilities incurred by them:

  (i) in the ordinary and proper conduct of the firm's business; or

  (ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(d) where a partner makes any payment or advance beyond his agreed share of the capital, the extra payment or advance shall attract interest of 5% per annum;

(e) such a partner shall not be entitled to the payment of interest before the profits of the firm have been ascertained;

(f) partners are entitled to participate in the management of the firm's business;

(g) partners are not entitled to remuneration for acting in the firm's business;

(h) without the consent of all the existing partners, no person shall be introduced as a partner;

(i) the decision of the majority shall prevail;

(j) the partnership books and accounts shall be kept at the place of business of the firm.

The section does not, however, show how a decision is to be taken where the partners are only two. But this is when section 58 comes in handy. It is submitted that in such circumstances, recourse will be had to the Common Law and Equity.

The Partnership Act, 1962 provides for the presumption that, in the absence of an agreement to the contrary, where a partnership for a fixed period comes to an end because the term has expired but some or all of the partners expressly or impliedly agree to continue the partnership, the old agreement will continue to bind them.

Also worthy of note is the statutory provision that the interest of a partner in the firm shall form a part of his personal estate and shall to be considered as part of his real or immovable property. Upon the assignment of the interest of a partner or his death, his assignee or personal representative shall not be entitled to participate in the management of the partnership business. His right as the assignee or personal representative shall be to receive the agreed share of the profit accruing to the assignor or the deceased partner.

It is also provided in Act 152 that a partner shall lose his membership of the partnership upon his death, becoming an alien enemy in times of war or becoming insolvent. The partner shall cease to be a partner where the agreement provides that upon the occurrence of an event, he shall lose his membership of the partnership. The partners also have the right to elect to truncate the membership of a partner where that partner's interest in the partnership is charged in the execution of a judgment debt or upon the order of the Court. However, there is the added requirement that the election by the other partners to terminate the membership of a partner shall elect in writing.

There is also the situation where upon the order of the Court a partner may cease to be a partner because of the following reasons:

(a) he has become permanently of unsound mind;

(b) he has become permanently incapable of performing his obligations as a partner;

(c) he has conducted himself in a manner that is prejudicial to the business of the partnership. For example there is the case of CARMICHAEL v. EVANS [1904] 1 Ch. 486 where a partner was expelled from the partnership for having been convicted of travelling on the railway without a ticket with intent to avoid payment; similarly in GOODMAN v. SINCLAIR, The Times, January 1951, a doctor was expelled from the partnership for having been found guilty of flagrantly immoral behaviour by having an affair with a woman patient;

(d) the partner wilfully or persistently commits a breach of the partnership agreement.

(e) Generally the *Court* has the power where it appears just and equitable to order that a person ceases to be a partner of a firm.

By '*Court'* is meant specifically the High Court of Justice and no other Court. It is submitted that '*Court'* should be amended to include the Circuit Court. (See section 2 of the Partnership Act, 1962).

It has also been provided under the law that a partner has the right to quit the partnership by giving the requisite notice where the partnership is for an undefined term or has become a partnership *at will*. Such a partnership is different from a partnership for a *fixed term*.

Another very important and salutary provision in the Partnership Act 1962 is section 40 which provides contrary to the Common Law that:

> *"The fact that a partner has ceased to be a partner in the firm shall not affect the existence of the firm or the mutual rights and duties of the other partners".*

However, it is the law that where there is only one surviving or continuing partner of the firm, then within six months of the cessation one of two options must be taken:

(1) admit another member(s) into the partnership;

(2) begin to wind up the firm's business.

In a situation where the surviving partners are, however, more than one, then within six months the other partners should elect one of three options:

(1) admit into the partnership the successor to the former partner;

(2) purchase the interest of the former partner;

(3) commence to wind up the firm.

It is also provided under Act 152 that in the course of the dissolution of the firm or partnership, the firm shall cease to carry on its business, except such business as is required for the purpose of the dissolution of the firm. However, the corporate state and powers of the firm shall not cease until the dissolution is effected.

As a contract, the partnership agreement can be rescinded for fraud or misrepresentation. The party seeking to resile from the partnership agreement on account of fraud or misrepresentation is entitled to:

(a) a lien on the assets of the firm;

(b) stand in the place of creditors of the firm;

(c) be indemnified by the person guilty of the fraud or misrepresentation.

As regards winding-up, the firm may be wound up as a result of insolvency, an order of the Court or voluntary liquidation by the partners. Worthy of note is the provision that notwithstanding the dissolution of the firm, the former partners shall remain jointly and severally liable to pay the debts and liabilities of the firm in so far as they have not been fully discharged in the winding up or otherwise.

In a discussion of the law on partnership, attention must be drawn to Order 6 of the HIGH COURT (CIVIL PROCEDURE) RULES, 2004 CI 47 with respect to *the procedure and practice of the High Court* relative to legal actions by or against the partnership. Rule 1 of Order 6 of C.I. 47 provides that any two or more partners may sue or be sued in the name of the firm. The person sued has the right to demand that the partners suing in the name of the firm disclose their names and addresses. Also noteworthy is the fact that when entering an appearance to a writ of summons, the defendants or the partners must enter the appearance in their own individual names and not in the name of the firm. Order 6 rule 5 of C.I. 47 provides among other things that a judgment entered against the firm may be executed against any person who entered an appearance as a partner or who, though served as a partner with a writ, failed to enter an appearance or admitted in his pleading that he is a partner or was adjudged by the Court to be a partner.

Endnote

In Part 1 of this write-up, an attempt has been made to take a bird's eye view of the law relative to Partnership in Ghana. Except occasionally when a critique was hinted at, the law has been presented as it is. In the next Part, an attempt will be made to critique the law as it is by highlighting its pluses and minuses and then to make recommendations for law reform which the author considers as long overdue and imperative.

PART II

The Partnership Law As It Should Be

Introduction

Commerce gave birth to partnership, the Common Law and Equity nurtured the growth of partnership; however, the unintended effect of sections 4, 8 and 9 of the Incorporated Private Partnerships Act, 1962, Act 152 as amended has been to stunt the growth and development of the partnership business and partnering in Ghana. There is a compelling case for law reform now.

A. The Legislative Landscape

The concept and use of partnership as a vehicle for doing business was developed in trade and commerce. Partnership evolved with the growth and development of trade and commerce. As disputes among partners and between partnerships arose and were settled by the Courts of Law and Equity, a body of law to be known as the Law of Partnership developed and came to govern the relationship and business of partnership. This flirtation between the business of partnership and the law was noted by Lord Lindley as follows:

> *"Until the Partnership Act of 1890, the law of partnership was to be found almost exclusively in legal decision and in text books; few Acts of Parliament related directly to partnerships…[T]he law of partnership was on the whole, a good example of judge-made law, developing slowly with the growth of trade and commerce and representing generally perceived view of justice".* (See paragraphs 1 – 01, page 3 of Lindley on Partnership 2002).

Lord Lindley, referring to the English Law of Partnership, emphasised the point that commerce 'begat' partnership and the courts intervened to nurture it. It was only later that statute law was brought to bear on partnerships.

What is to be noted here is the fact that partnership was initially conceived of, deigned and developed in commerce and came to be governed by judge-made laws known as the Common Law and the doctrines of Equity. It was not until 1890 and 1962 that statutes or statutory law intervened to directly govern the business and relationship of partnership respectively in England and Ghana. What then is the legal landscape in Ghana with regard to partnership? To understand the legal landscape which serves as the legal environment for the relationship and business of partnership, it is instructive to delve briefly into legal history.

Until 1957, Ghana was a British Colony known as the Gold Coast. English Law generally applied in the Gold Coast. The formal introduction of English Law into the Gold Coast was done through the Supreme Court Ordinance of 31st March, 1976. According to section 14 of the Supreme Court Ordinance, 1876, the Common Law, the Doctrines of Equity and the Statutes of general application in England and Wales as at 24th July, 1874 were to be in force within the jurisdiction of the Supreme Court which included the Gold Coast. (See page 1 of *Doing Business and Investing in Ghana* by Joe Ghartey, Esq., 2004; Janel Publications Ltd.).

With the attainment of independence from the British and the coming into force of the 1992 Constitution of the Republic of Ghana the laws applicable in Ghana came to comprise the following:

(1) the 1992 Constitution;

(2) enactments (i.e. statutes) made by or under the authority of the Parliament established by the 1992 Constitution;
(3) any orders, rules or regulations made by any person or authority under a power conferred by the 1992 Constitution;
(4) the existing law; and
(5) the common law.

For the present purpose, the relevant laws are the Enactments, the Existing law and the Common Law (See Article 11 of the 1992 Constitution). By *Enactments* is meant the Statutes or Acts of Parliament that are passed by the Parliament of the Fourth Republic of Ghana under the 1992 Constitution of Ghana. The Statutes that existed before the coming into force of the 1992 Constitution are categorised under the Existing law. The *Existing Law* comprises both written and unwritten law. The written existing law includes statutes that were passed by the military regimes and previous Parliaments. Also included are the statutes of England that were continued in force by the Courts Act, 1993, Act 459 as amended. The unwritten existing law includes the decisions of the High Court, Court of Appeal and the Supreme Court of Ghana which constitute the Superior Courts in Ghana. These judicial decisions which existed before 7th January 1992 when the 1992 Constitution came into force form a part of what is known as the Existing Law under the 1992 Constitution. It ought however, to be noted that the existing law is applicable only to the extent that it is not inconsistent with the provisions of the 1992 Constitution or has not been modified by Acts of Parliament passed under the 1992 Constitution.

As regards the Common Law, the constitutional definition is that the *Common Law* in Ghana includes the rules commonly known as the Common Law, the rules generally known as the doctrines of Equity and the rules of Customary Law to the extent that they are not inconsistent with the 1992 Constitution or have not been modified by any Act of Parliament. (See the case of EL-ROUH v.

HAMILI [1963] 1 GLR 398 at 311, C.A.). It ought to be noted that included in the definition of Common Law in Ghana is the body of rules contained in the judicial decisions of the Superior Courts of Ghana.

From the foregoing, the following observations may be made:

(a) the rules generally known as Common Law that directly relate to partnership would apply in Ghana;

(b) the doctrines of Equity would also apply to partnership in Ghana;

(c) the English Partnership Act of 1890 would *not* apply in Ghana in so far as it was passed after July 1874 and has not been continued in force the Courts Act, 1993, Act 459.

The picture therefore that one gets of *the legislative landscape* relative to partnership in Ghana is that the relationship and business of partnership are governed by the Incorporated Private Partnership Act, 1962, Act 152, the Existing law and the Common Law as defined under the 1992 Constitution in so far as they are relevant. Worthy of further emphasis is the fact that section 58 of Act 152 has specifically provided for the continued force of the Common Law and Equity to the extent that they relate to partnership and have not been modified or varied by the Partnership Act, 1962, Act 152.

B. Need For Reform

The Incorporated Private Partnership Act, 1962, Act 152 as amended does not require legislative overhaul merely because it has been around for too long; the Act demands extensive and radical amendments mainly because it is fundamentally flawed and a disincentive to partnership and partnership business. The Act, however, has its *strengths* which must be recognised, but it also has

inherent in it certain provisions that tend to *undermine* the growth of the partnership business and the development of the law of partnership in Ghana.

(1) The Strengths

A few of the strengths of the Partnership Act, 1952 may be noted here:

In the definition of partnership, the Act provides that a partnership is *"the association of two or more individuals carrying on business jointly for the purpose of making profits."* The definition continues that even though the sharing of net profits shall *prima facie* be evidence of the existence of partnership, *"a person shall not be a partner if it is shown that he did not participate in the carrying on of the business and was not authorized so to do".* The salutary element in this definition is that there is no legal requirement that there should be the *'sharing of profits'* for there to be partnership. The sharing of profits may point to a semblance of partnership but more evidence is required to tilt the scales in favour of partnership. Thus for the purpose of the law of partnership in Ghana, the essential requirement is that there must be collective participation in the carrying on of the business to support the conclusion that a partnership exists.

The position of the law with respect to *participation* in the carrying on of the business is similar to the position the House of Lords took in the case of COX v. HICKMAN (1860) 8 H.L.C. 268. (See also Lindley on Partnership, paragraphs 5.35, page 88). In that case the House of Lords held that:

> *"person who share profits of a business do not incur any liability as partners UNLESS they personally carry on the business or it is carried on by others as their real or ostensible agents".*

It should be clear now, as was stated by Lord Lindley, that *"the division of profits is no more than a common incident of the partnership relation, rather than of its very essence."* (See paragraphs 2 – 10, page 13 of Lindley). With such a definition in place, it seems possible then, under the law in Ghana, for individuals to associate, carry on a business together and *not share* the net profits but put the net profits to some social use or apply them for a charitable purpose. However, there are some problems with the statutory definition of partnership which will be considered in due course.

Another strength of the Partnership Act, 1962 can be found in the provision that attributes a distinct corporate personality to the firm or partnership. Section 17 of Act 152 provides that *"the firm shall be a body corporate under the firm name, distinct from the partners of whom it is composed, and capable forthwith of exercising all the powers of a natural person of full capacity in so far as such powers can be exercised by a body corporate"*. This provision means that the firm or partnership under the law of partnership in Ghana is a legal person in its own right quite distinct and apart from the members or partners who constitute the partnership.

However, unlike shareholders of limited liability companies formed under the Companies Code, 1963, Act 179, the partners have unlimited liability. The partners are liable without limitation for the debts and obligations of the firm. Section 14(4) of the Partnership Act, 1962 provides that any attempt by the partners to limit liability shall be ineffective with respect to any liability of the firm or the partners to a third party; such an attempt to limit liability shall only be effective as between the partners inter se. This point will be re-visited in due course.

Yet another strength of the Partnership Act, 1962 is section 35 which crystallizes into statutory law some very important rules of Common Law and doctrines of

Equity. Two of such rules may be referred to briefly: The first rule is that in the absence of an agreement to the contrary, the partners shall share equally in the capital and profits and contribute equally towards the losses of the firm; the second rule is that the decision of the majority shall prevail in the ordinary matters affecting the forms business.

The foregoing covers only a few of the many strengths of the Partnership Act, 1962. All the same there is the fact that in practice these strengths are undermined by some very serious weaknesses in the Partnership Act, 1962 which deserve a great deal of attention and action.

(2) Weaknesses

Under the Partnership Act 1962, a partnership is defined as *"the association of two or more individuals carrying on business jointly for the purpose of making profits".* The English Partnership Act 1890 rather defines partnership as *"the relation which subsists between persons* [3] *carrying on a business in common with a view of profit".* The use of the word "*individuals*" instead of *'persons'* is not stylistic. A *person* in law can mean both a natural and an artificial person. A natural person refers to a human being while an artificial person may refer to a partnership or a company. A legal *person* may be an individual or a group. On the contrary, the use of the word *'individual'* instead of *'person'* emphasizes singleness or individuality as opposed to group. The fact of the exclusion of a group as a member of a partnership is emphasised by Sections 1 (a-d) of Act 152. According to Act 152, a registered company, a body corporate or an unincorporated association formed under any other enactment are excluded from the membership of a partnership under Act 152. It would appear that under the law of partnership in Ghana, it is impossible for *a group as an entity* to partner with other *individuals* and carry on business as a firm. In fact, all the members of a partnership in Ghana must be natural persons and

individuals. This is the case because section 32 of the Interpretation Act, 1960, C.A. 4 provides that an *individual* means a natural person and does not include a corporation. With regard to a person, the section 32 of C.A. 4 provides that it includes a body corporate (whether a corporation aggregate or a corporation sole) and an incorporated body of person as well as an individual. It ought to be sufficiently clear by now that the deviation from the Common Law definition of a partnership as an association of *persons* carrying on a business in common with a view of profit is for the specific purpose of excluding a group or a corporate entity from the membership of a partnership in Ghana.

The question to ask is what purpose does this exclusion serve. No known judicial decision has turned on this point in Ghana and there does not seem to be a need to speculate. What is important to remember is that partnership as a vehicle for doing business has been the creation of commerce and not of the law. This being the case, the question to ask is what justifiable reason exists for the Legislature to legislate out of existence, for example, a partnership between an individual and a limited liability company? For their part, the authors of Lindley on Partnership saw no justifiable reason and had this to say on this point:

> *"By virtue of the Interpretation Act 1978, the word 'person' includes "a body of persons corporate or unincorporated" and there is no doubt that a partnership can exist between an individual and a limited company or, indeed, between two or more such companies. In recent years, so called "corporate" partnerships have become popular as a vehicle for companies to pool their resources for a particular project, e.g. oil exploration, or for tax reason. Further impetus has been given to this trend by the official recognition of the role which such partnerships have to play in the venture capital field (albeit in this case exploiting the advantages of the limited partnership)."*

It is submitted that section 3 of Act 152 must be amended by the replacement of the word "*individual*" with "*person*" and the deletion of paragraphs (a), (b) and (c) of Section 3(1) of Act 152. These sections only serve to stifle the growth of partnership business in Ghana.

Also deserving of attention is paragraph (b) of Section 3(3) of Act 152 which provides that:

> *"a person shall not be deemed to be a partner if it is shown that he did not participate in the carrying on of the business and was not authorized so to do".*

As was earlier indicated, this provision is the statutory rendition of the decision in COX v. HICKMAN (1860) 8 H.L.C. 268. However, since COX v. HICKMAN (1860) was decided, the law of England has moved on with the passage of the Limited Partnership Act 1907 which provides that a limited partnership shall comprise both *general partners* and *limited partners*; the limited partners shall be excluded from the management of the partnership business. According to the authors of Lindley on Partnerships:

> *"The essence of partnership is the combination of (1) one or more partners whose liability for the debts and obligations of the firm is unlimited and who alone are entitled to manage the firm's affairs, and (2) one or more partners whose liability for such debts and obligation is limited in amount and who are excluded from all management functions".* (See paragraph 28-01, page 841 of Lindley on Partnership).

The provisions in section 3(3) (b) and section 12(3) of Act 152 need to be fine-tuned through amendment. The requirement of participation in the business of the firm needs to be re-examined.

Also deserving of closer examination is section 12(3) of Act 152 which provides that:

> *"Notwithstanding that the firm is a body corporate, each partner therein shall be liable, without limitation, for the debts and obligations of the firm in the manner referred to in section 16 of this Act."*

It would appear that the second leg of section 12(3) of the Act 152 would permit contracting out of the unlimited liability provision. It reads:

> *"…but shall be entitled to an indemnity from the firm and to contribution from his co-partners in accordance with his rights under the partnership agreement".*

This being the case, it is puzzling that section 14(4) of Act 152 seems to truncate the right of a partner to contract out of the unlimited liability provision. Section 14(4) provides as follows:

> *"If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement shall be binding on the firm with respect to persons having notice of the agreement: Provided that on agreement purporting to limit the extent of the liability of the firm or the partners in respect of any act binding the firm shall not be effective except as between the actual parties to the agreement".*

It would seems from sections 12 (3) and 14 (4) of Act 152 that as between the partners it is legally possible under the Act to limit the liability of a partner, but the same is not possible as between the firm or partners on the one hand and third parties dealing with the firm or the other hand. This position needs re-examining for it should be possible within a vibrant business environment for a

person to invest funds in a partnership, be a *limited partner* [4] in the sense of not participating in the business of the partnership and be spared liability to third parties. It is also refreshing to learn that there exist registered limited liability partnerships in other jurisdictions which are in the main similar to general partnerships except in one respect – *the liability of the partners is limited*. However, the requirement of registration in respect of limited liability partnerships must be imperative and renewable for good reason.

There is also the requirement of registration and the annual renewal of the registration of the partnership under Act 152. In this regard section 4(1) of the Act 152 provides as follows:

> *"After the expiration of three months from the commencement of this Act, it shall not be lawful for a partnership to carry on business unless the firm shall have been duly registered in accordance with section 5 of this Act and not struck off the register under sections 51, 52 or 53 of this Act".*

The effect of the statutory registration has been provided for under section 6(3) of the Act 152 as follows:

> *"The certificate, or a copy thereof, certified as correct under the hand of the Registrar, or the Gazette containing the notice referred to in the immediately preceding subsection, shall be conclusive evidence that the firm has been duly incorporated under this Act".*

Clearly, the purpose of the registration is merely proof of the fact of incorporation or registration and one would speculate, *revenue* to the State.

Then comes the overly burdensome requirement of annual renewal of registration provided for under section 8 of Act 152. Section 8(1) provides as follows:

> *"Once in every year the partners shall deliver to the Registrar for registration a statement in the prescribed form renewing the registration."*

This requirement of registration and renewal is supported on a penal provision which is section 9 of Act 152. Section 9 thereof provides in part as follows:

> *"In the event of the default in complying with section 4, 5, 7 or 8 of this Act …. (b) the rights of the firm concerned and of the partners therein arising out of any contract made during such time as the default continues shall not be enforceable by action or other legal proceedings …"*

It is clear that non-compliance with the statutory requirement of registration of the firm and its annual renewal render the rights of the firm and the partners unenforceable except by way of 'counterclaim, set-off or otherwise'. (The term '*otherwise'* is better read *esjudem generis*). What this means is that any business carried on by a non-registered partnership is unlawful and therefore unenforceable at law unless the firm is sued by a claimant whereupon Act 152 will permit the firm to hit back with its own claim for the enforcement of its rights or those of the partners. It is note-worthy from the outset that there is no requirement of registration under the English Partnership Act 1890.

By the provisions of sections 4, 8 and 9 of Act 152, the Legislature succeeded in effectively legislating out of existence partnerships and partnership businesses that were not registered. But did partnership businesses cease to exist in fact? This question is a matter for empirical study. For the present purpose, it is plausible to conclude that these

sections are the explanation for the paucity of reported judicial decisions on partnerships and partnership businesses. There does not seem to be more than twenty reported judicial decisions bordering directly on partnerships or partnership businesses registered under Act 152.

All the same, of the few reported cases some are of some interest. In the case of In Re SASU-TWUM (decd); SASU-TWUM v. TWUM [1976] 1 GLR 23 the widow of the deceased sued for a declaration that she was engaged in a partnership business with her deceased husband and was therefore entitled to one-half of the business by reason of the partnership. The High Court held that since the partnership agreement was not *registered*, neither of the partners could enforce any right arising out of the said agreement. The Court therefore concluded that the widow could not rely on the partnership agreement to claim her half share of the value of the shop. The Court relied on section 4 of Act 152.

Again in the case of BAIDOO v. SAM [1987-88] 2 GLR 666, the Court of Appeal reiterated the point that Act 152 prohibits the carrying on of a partnership business unless the partnership has been registered under the Act. The IN RE SASU-TWUM (DECD) and BAIDOO cases (supra) clearly show that the courts have been consistently faithful to sections 4, 9 and 9 of Act 152 and have effectively held the judicial doors closed to unregistered partnerships.

By far the most interesting case is the Supreme Court case of MENSAH & ORS v. ADU & ORS [1965] GLR 198. In this case the Nkwanta State Council, aware of its incompetence to engage in commercial and industrial undertakings, granted a loan to five persons who the State Council encouraged and assisted to form a partnership called Nkwanta Industrial Corporation. The State Council got the Local Councils to revoke all existing timber felling agreements and re-grant the timber felling rights to the Nkwanta Industrial Corporation whose initial capital

was the loan granted by the State Council. The understanding was that out of the profits of the firm, "the firm would give financial assistance to the State Council from time to time, and would also do such things as the award of scholarships to deserving young persons in the State for the general good and welfare of the State." In due course the loan was refunded to the State Council.

However, sometime in 1957 differences arose between the partners which were settled by the State Council. Another difference later in 1959 resulted in the Court case that ended up in the Supreme Court with the Omanhene of Duayaw Nkwanta joining the fray.

In the Supreme Court the point was taken that since "there was no proof that the five persons who carried on the business of the firm agreed to *share profits* from the business, and therefore the association is not a partnership." In support of this point, counsel for the Defendants and Co-Defendant quoted section 1 of the English Partnership Act 1890 as follows: *"the relation which subsists between persons carrying on a business in common with a view of profit"*. On this point the Supreme Court held that:

> *"Though the Act is subsequent to 1874, yet this definition is applicable to Ghana, for as Farewell J. points out in British Homes Assurance Corporation, Ltd., vs. Paterson, 4 it is merely declaratory, and states the Common Law position of partnership, see for example GREEN v. BEESLEY J and POOLEY v. DRIVER 6. This definition does not mean that a combination of persons doing business together for profit cannot be a partnership in law unless they were to share the profits for their individual personal benefit. The learned authors of LINDLEY ON PARTNERSHIP (12th ed.), p. 14, commenting on the definition with respect to profits said:*

"It is apprehended that even before the Act of 1890 persons who carried on a business in all other respects as partners, but with the object of applying the profits towards some charitable purpose, instead of dividing them among themselves would have been partners, "and referred to the trust in the case of R. *v. SPECIAL COMMISSIONERS OF INCOME TAX, 7 as an example where a partnership business may be carried out with the object of applying the profits therefrom to charity."*

While emphasising the point that the sharing of net profits is not a *sine qua non* for the existence of a partnership, the Supreme Court found as a fact that the Nkwanta Industrial Corporation made awards of scholarships to members of the State, acquired a building for the use of the Omanhene (i.e. the State) and made financial grants to the State from the profits that accrued to the business of the partnership. In this regard the Supreme Court observed:

"But it will be most unfortunate both for the parties to it, and for the State which is shown to be benefiting so much from it, that such a useful business be determined; it would appear that a conditional order for dissolution to take effect upon the expiration of twelve months from the date hereof will meet the justice of the case, and would give all parties concerned an opportunity to reconcile their differences for the common good of all, and come together to re-organise the business on a firmer basis".

In fact, some very useful lessons can be learnt from this very important case. The first lesson is that the English Partnership Act 1890 is "*merely declaratory, and states the common law position of partnership*". This same point was emphasised by the learned authors of LINDLEY on PARTNERSHIP as follows:

"The Act is not (and does not purport to be) a complete code of partnership law."

And indeed the same can be said for the Incorporated Private Partnership Act, 1962, Act 152 to only some extent. As a matter of fact, one would have expected that the Legislature, in passing Act 152, would have allowed partnerships to exist both under the Common Law and the Statute. In other words, there was no justifiable reason why unregistered partnerships should have ceased to exist in the eyes of the law. Though unregistered, such partnership could have been cognisable under the Common Law and the Doctrines of Equity, which section 58 of Act 152 itself saves.

It is plausible that a number of unregistered partnerships still do exist in Ghana though not cognisable under Act 152. It is also arguable that if the judicial doors had not been legislatively closed to unregistered partnerships, judicial decisions would have assisted in shaping the development and growth of partnership and partnership business.

In fact, once sight is not lost of the fact that *partnership* is a matter first and foremost for commerce, the law should follow and assist commerce in much the same way as Equity still follows the Law and no attempt should be made, in the circumstances in which the partnership business finds itself in Ghana now, to stifle it any further through legislation. *An 'open-ended legislation' is what is required. By 'open-ended legislation' is meant the kind of Statute that will allow commerce to re-craft or re-shape partnership and the Common Law and Equity to fine-tune and refine the craft with the Statute intervening only in very exceptional circumstances not to redesign the craft but only to ensure justice and to protect commerce.*

The second lesson to be gathered from the case is that *corporate partnership*s and *group partnerships* are a sign to be encouraged. But for the Statute, what justifiably should stop the Duayaw Nkwanta State Council from partnering with the Nkwanta Industrial Corporation? There is the need in future to explore this

question with respect to the District Assemblies and other corporate establishments.

(3) Recommendations

In recommending amendments to the Partnership Act 1962, Act 152, two salient points ought to be always kept in mind:

The first point is that *"the law of partnership was, on the whole, a good example of judge made law, developing slowly with the growth of trade and commerce and representing generally perceived views of justice"*. (See Lindley on Partnership, paragraph 1.01). The emphasis here is that *the law of partnership should be the handmaid of the business of partnership*. Inputs from stakeholders engaged in commerce must therefore be countenanced and encouraged. Statutory provisions that tend to have the effect of stifling the ingenuity of stakeholders engaged in trade and commerce must be avoided.

The second point worthy of note is that *"partnership, although often called a contract is more accurately described as a relationship RESULTING FROM a contract"*. In HURST v. BRYK [2000] 2 W.L.R. 740, Lord Millett reiterated this point and expressed the following view:

> *'… while partnership is a consensual arrangement based on agreement, it is more than a simple contract (to use the expression of DIXON J in McDONALD v. DENNYS LACELLES LTD., 48 C.L.R. 457, 476); it is a continuing personal as well as commercial relationship"*.(See paragraph 2.13 of Lindley on Partnership).

Once these two points are noted (i.e. first, that partnership is first and foremost a matter of trade and commerce, second, a continuing personal and commercial relationship resulting from an agreement), then the law of partnership will seek to fine-tune and smoothen the rough edges of the relationship and business of partnership rather than take the lead position which tends to stifle the growth of partnership.

In the light of the foregoing, it is recommended that the following amendments be considered: As already indicated, the word *'individual'* in the statutory definition of a partnership should be changed to *'person'* to make way for partnership between an individual person or persons and an incorporated or unincorporated body and between even partnerships. The limit on the number of members of a partnership which has been set at 20 in Act 152, need re-visiting to account for professionals. In doing so, it ought to be remembered that the number 20 has nothing fetish about it, it is only arbitrary; its only purpose may be to hold impersonality at bay. Indeed, as was noted by the learned authors of Lindley on Partnership (paragraph 4.29, page 66), *"Apart from statute, there is no limit to the number of persons who may be members of a partnership"*. It is however conceded that the number should not be so large that it cannot reasonably and for practical purposes be said that the partners are agents one for the other whilst engaged in the usual business of the partnership. Also the words 'occupation and *vocation'* [5] should be specifically included in the definition of business in the Act.

With respect to the issue as to whether a partnership exists or not, the amended statute ought to be limited to giving the courts a set of open-ended guidelines as to how to determine the existence or non-existence of a partnership [6]. (See paragraph 5.04, pages 73-74 of Lindley on Partnership) and the case of ADAM v. NEWBIGGING (1888) 13 APP CAS 308). See also paragraph 7 – 30 of Lindley on Partnership.

Similarly, sections 17 and 18 of Act 152 with respect to retiring partners and holding out need to be re-examined particularly in regard to what exactly a retiring partner or a person being held out should reasonably do to escape liability to third parties. (See WILLIAMS v. KEATS (1817) 2 STARK 289, paragraph 5-62, page 98, of Lindley on Partnership).

It is also recommended that inputs should be invited from the financial institutions with respect to charges and securities and sections 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 of Act 152. Professional bodies ought also to be consulted for inputs. The Investment Promotion Centre has an immeasurable role to play in respect of corporate partnerships and group partnerships.

Equally important and worthy of consideration is the form a partnership agreement should take. This point deserves consideration alongside the statutory definition of partnership. In fact, there is no justifiable reason why a partnership agreement cannot be *oral* or *implied* from conduct and course of dealing [7]. The agreement can be oral or written and none should detract from the fact of the partnership. Whatever problem that may arise may be a matter of evidence and the Courts are competent to deal with it. This point was noted by the learned authors of Lindley on Partnership (paragraph 7-01, page 109):

> *"Unlike the position in most other European jurisdictions, no particular formalities attend the creation of a partnership and there is in general no need for a written agreement, much less a dead. Nevertheless, reliance on an oral agreement may, inter alia, present certain problems of proof".*

The learned authors continued (paragraph 7 – 23):

"It has already been seen that partnership can be, and frequently are created by parole. It follows that the absence of direct documentary evidence of an agreement for partnership is not of itself fatal to the care of a claimant who seeks to establish a partnership between himself and the defendant. In addition to the claimant's oral testimony, the existence of such a partnership will have to be proved by reference to the parties' conduct and, in particular, to the way in which they have dealt with each other and with third parties".

Admittedly, given the statutory requirement of registration and sections 4, 8 and 9 of the Partnership Act 1962, Act 152, there cannot be an oral or implied partnership agreement which the courts in Ghana will countenance. It is submitted that the current state of the law of partnership in Ghana must change to accommodate oral and implied partnership agreements.

In reforming the law of partnership to accommodate a partnership agreement between natural persons and corporate entities or between corporate entities, the doctrine of *ultra vires* should be kept in mind. Possible conflicts between the intended amendments and the provisions of the Companies Code, 1963, Act 179 should be avoided. Questions as to how the corporate entity will be represented on the board of the partnership have to be considered. Finally, an area of interest to be explored is the partnership business involving a husband and his wife as well as goodwill [8] as an asset.

Conclusion

As has been demonstrated hopefully, the legislative environment has not been conducive to the growth and development of the partnership law and business. The Partnership Act 1962 as it stands now has so much strangulating effect on the formation, operation and expansion of partnerships and their businesses that

there is the need to set in motion a law reform that will call for the essential inputs from the relevant stakeholders in the private business sector, the financial institutions, the professional bodies, the Investment Promotion Centre, the Ghana Stock Exchange, the Registrar-General's Department, the tax authorities to mention but a few.

In the law reform exercise, it is seriously recommended that, in order not to repeat the mistakes of the Parliament of the First Republic, it is not forgotten that partnership belongs to commerce and not to the law: the role of the law is to guide commerce and not to strangulate it.

Footnotes

1. *Halsbury's Laws of England, 4th ed. 1994, Volume 35. paragraph 11: the sharing of profit is no a conclusive proof of the existence of partnership.*
2. *Ibid. paragraph 93: "Ordinary partnerships are presumed by law to be based on the mutual trust and confidence of each partner in the integrity of every other partner; and as a result partners owe each other a duty of good faith."*
3. *Ibid. paragraph 1.*
4. *Ibid. paragraph 207: "A limited partner is a person who on entering into the partnership contributes to it a sum or sums as capital or property valued at a stated amount, and who is not liable for the firm's debts and obligations beyond that amount, unless he acts in such a way as to deprive himself of the privileges of a limited partner. A body corporate may be a limited partner. A general partner is any partner other than a limited partner. General partners are liable for all the firm's debts and obligations, in effect, managing partners."*
5. *Ibid. paragraph 4 'business' includes occupation and profession.*
6. *Ibid. paragraphs 36-38: evidence of partnership by writing (signed or unsigned), oral or mode of dealing.*
7. *Ibid. paragraph 2: "The question whether or not there is a partnership is one*

of mixed law and fact."

8. *Ibid. paragraph 203: "Generally, the firm's goodwill is treated as one of its assets and the fact that it is not included in the annual balance sheet drawn up for the firm does not mean that it does not exist as such partnership asset."*