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Shareholder Rights in a Digital Age: The Ghana Experience

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Abstract

Shareholders represent an important organ in the affairs of a company. Over the years the courts have upheld the rights of shareholders in the management and running of the company. In recent times, the availability and application of technology has affected how shareholders assert and enforce their rights within the company. Recent events associated with the Covid-19 pandemic in Ghana has stretched shareholder rights and their ability to function vis-à-vis the functions of the directors of the company. This paper discusses the rights of the shareholders in the digital age and looks at how the digitalization policy of the government of Ghana as well as the events of covid -19 have affected shareholder rights in Ghana. The methodology used for this study is to analyze the current legal provisions on shareholder rights in the lights of the digitalization drive of the government of Ghana and directives issued by the Registrar of Companies during the Covid-19 pandemic. The paper finds that both the digitalization drive of the government of Ghana and the directives from the Registrar of Companies have improved shareholder rights. However, there are still a lot more reforms in the area of providing clear legislative and administrative guidelines to ensure an enhanced shareholder rights within the company.

Keywords: shareholder rights, technology, digitalization, corporate reform, Ghana, Covid-19.

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INTRODUCTION

The modern company is as indispensable as it is ubiquitous. It is the vehicle through which goods and services are made available to the public. The company pays taxes and employs people. In the past, the shareholder was seen as a keystone on which the rest of the company was built. Modern wisdom has shaken this foundation. The company now exist separately from its shareholders; it can exercise rights and execute responsibilities[1]. While the normative justifications of shareholder rights are openly being thrown into doubt, others are arguing that the stakeholder model should become the new basis of modern corporate law. Whichever side one takes, shareholders remain important entities in the company[2], not just in the continual provision of capital, but also as executors of State policy. Empowered shareholders are good for corporate governance because they keep the other organs of the company, particularly, the directors in check. The coming of the digital age has also provided opportunities for the advancement of shareholder rights and eased the means and methods of exercising such rights. Many jurisdictions have been incorporating technological developments into their corporate law for

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[1] In the case of *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22, 51; Lord Macnaghten established the principle that: "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."

[2] Shareholders although own an interest in the company may not have a long-term perspective on the company and can sell the shares at any time. Stakeholders are seen as often having a long-term view of the company and therefore may have a greater need to see the company prosper. See the following: Mark R. DesJardine, Muhan Zhang, and Wei Shi. 'How Shareholders Impact Stakeholder Interests: A Review and Map for Future Research' (2023) Journal of Management 49(1) 400; Konstantin Bottenberg, Anja Tuschke, and Miriam Flickinger, 'Corporate Governance between Shareholder and Stakeholder Orientation: Lessons from Germany.' (2017) Journal of Management Inquiry 26(2) 165; Gerald Vinten, 'Shareholder versus Stakeholder–Is there a Governance Dilemma?' (2001) Corporate Governance: An International Review 9(1) 36.

years.[1] The Covid-19 pandemic helped speed this up, encouraging even the most unwilling countries to adopt technology friendly solutions to ensure that companies can operate while complying with the law.[2]

Ghana carried out a comprehensive corporate law reform in 2019 which culminated in the passage of the Companies Act 2019 (Act 992). As a forward-looking statute, it took into consideration the need to harness technology to simplify many processes on the side of the company and that of the regulator. In less than a year, the Covid-19 pandemic forced the Registrar of Companies to direct companies to hold virtual shareholder meetings as physical meetings were impossible considering the range of government restrictions on travel, movement and assembly. Till now, very little research has been conducted on the impact of the digital age on shareholder rights in Ghana, particularly during the Covid-19 pandemic. This paper is intended to interrogate this issue further. It looks at the shareholder rights in Ghana, the laws which have been passed to legitimize electronic transactions and communications, and the impact of these laws on shareholder rights. It is argued that prior to Covid-19, no legal impediments existed to prevent the regulator from simplifying corporate processes using electronic means. However, no far-reaching steps were taken prior to the outbreak of the Covid-19 pandemic. This paper welcomes Act 992 which has factored in these concerns; though the opportunity to leverage technology is lopsided in favor of e-government services as against shareholder rights. It is also noted that the Covid-19 pandemic helped protect shareholder control rights in the only way possible. It is argued the continued use of virtual meetings as well as other electronic platforms although calculated to enhance shareholder interest and rights, they may also undermine shareholder interests and rights. The paper concludes by saying that a lot more needs to be done to ensure that the use of technology, especially in the area of shareholder meetings to enhance shareholder rights in the company.

This paper is divided into five parts. Part A discussed shareholder rights in Ghana from the standpoint of corporate law statutes, Ghanaian judicial decisions, and Anglo-American influences. Part B justifies why shareholder rights are still important regardless of the unsettled debates about the doctrinal basis of shareholder primacy. Part C examines the digital age prior to Covid-19 while part D zooms into emerging issues such as the impact of Covid-19 on shareholder rights. Part E evaluates the entire framework and records areas where shareholder rights have been advanced by technology. It recommends solutions to address emerging concerns especially on control rights.

PART A: SHAREHOLDER RIGHTS—THEORY

Who are shareholders?

In the modern company, shareholders are the persons or group of persons who hold the shares of the company. it is the shareholders who capitalize the company. It is usually the money or the value that shareholders bring that capitalizes the company at the time of incorporation.[3] In return, it is the hope of every shareholder that the company will run so well that the company will generate profit and distribute part of the profits as dividends for the benefit of the shareholder. In addition, when the company is profitable or has good prospects, the value of the shares will increase so that a shareholder can sell part of or all the shares at a profit.

Despite the fact that shareholders capitalize the company, it is not everyone who provides capital for the company that is deemed a shareholder. There are a number of ways by which a person or an entity may be a shareholder of a company. According to section 33 of the Companies Act, 2019 (Act 992)[4], a person who has subscribed to the Constitution of a company or whose name has been entered into the company's register as a member[5] pursuant to any agreement to become a member of that company shall be deemed to be a member of the company. Where the company is one limited by shares, each member of the company shall hold at least one share. Shareholding is thus one of the three recognized ways by which a person can become a member of a

[1] Yaron Nili, and Megan Wischmeier Shaner, 'Virtual Annual Meetings: A path Toward Shareholder Democracy and Stakeholder Engagement.' (2022) 63 Boston Colege Law Review 123; Elizabeth J. Boros, 'Corporate Governance in Cyberspace: Who Stands to Gain What from the Virtual Meeting?' (2003) 3(1) Journal of Corporate Law Studies 149; Dirk Zetzsche and Others, 'Enhancing Virtual Governance: Comparative Lessons from COVID-19 Company Laws." (2022) 22(1) Journal of Corporate Law Studies 115.

[2] Piotr Pinior, 'Impact of the COVID-19 Pandemic on Company Law. Shareholders' Meetings and Resolutions' (2022) 19 European Company and Financial Law Review 100; Ikhyari Fatuti Nurudin, Agus Nurudin and Fifiana Wisnaeni, 'The Role of Video Conference During Pandemic Times: A Case of General Meeting of Shareholders (GMS) to Reduce the Spread of the Covid-19 Virus' (2021) 18 Computing Technology and Information Management 963.

[3] Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' (1998) 57(3) The Cambridge Law Journal 554.

[4] Hereafter referred to as Act 992.

[5] In a company limited by shares, the members of the company are also shareholders of the company.

company, specifically a company limited by shares.[1] Thus, shareholders are members of the company. The shares of the company are issued and allotted to members of the company in exchange for consideration which is for the benefit of the company only. The consideration may be either cash or a combination of cash, property, a service rendered to the company or some other tangible asset of value that is transferred for the benefit of the company alone.[2] At incorporation, the value in the issued shares of the company therefore constitutes the capital of the company. In the life of the company, any person who agrees to become a shareholder of the company, fulfils the obligations thereof and his name is entered in the register of members of the company is deemed a shareholder or member of the company.

The shares that a member holds in the company therefore constitute the units of ownership or interest in the company. Although it is shareholders that primarily capitalize the company from time to time, the law does not allow shareholders to run the company on a day-to-day basis.[3] The company which is capitalize by the shareholders is run by the directors of the company[4]. It is the hope of the shareholders that the directors will run the company in an efficient and effective way to make profit for the company. It is out of the distributable profits of the company that the shareholder may earn dividends for the capital that they provide to the company. The ownership of the shares confers certain rights and obligations on the holder of the shares. [5]

Shareholder Rights in Ghana

Shareholder rights have been described as "set of legal entitlements that shareholders enjoy vis-à-vis companies in which they invest".[6] The shareholders of a company have many rights. These rights may be individual rights that are enjoyed by individual shareholders or collective rights that are enjoyed collectively by all shareholders or a group of shareholders.[7] These rights may be conferred by the company or they may be conferred by the law.[8] Shareholder rights are conferred by the company when the constitution of the company confers certain enforceable rights on shareholders collectively, as different classes or as individuals within the company. These rights may also be conferred through shareholder agreements or by way of resolutions at the general meetings of shareholders within the company. The law, through pieces of legislation may also confer rights on shareholders. In Ghana, the principal law that confers rights on shareholders within companies incorporated in Ghana is the Companies Act, 2019 (Act 992). For the purpose of this article, the focus is on those individual or collective rights that are conferred by law on the shareholders of the company. According to Amour, shareholder rights can be put into four main categories: payment rights, control rights, information rights and fiduciary duties.[9] The fiduciary duties is an imperfect way of characterizing the litigation rights of shareholders. Directors' breach of their fiduciary duties may empower the shareholders to bring an action against them. However, this is just one of those circumstances which might so empower shareholders. This paper rather prefers the terms litigation rights and will use this Amour scheme of classification, as amended to explain the scope of these rights as conventionally understood and the form these rights take under Ghanaian law. Since Ghana's corporate law relies heavily on Anglo-American corporate law, appropriate comparative references are made to British and American corporate law.

a) Payment rights

Payment rights pertain to three main things. First is the right of shareholders to receive dividends. Though dividends are paid out of profit, the shareholders, each individual or collectively as one, cannot compel the payment of dividends.[10] The board of directors must as a matter of course, initiate any action for the payment of dividends.[11] The Supreme Court of Ghana recognized this right of the directors as regards dividends in *Nicholas*

[1] *Adehyeman Gardens v Assibey* [2003-2004] SCGLR 1016.
[2] Act 992, ss 45 & 48.
[3] Ibid s 170 & 190.
[4] Ibid.
[5] Denis Keenan, *Smith & Keenan's Company Law* (Pearson Education 2005) 196, 403.
[6] John Armour, 'Shareholder Rights' (2020) 36 Oxford Review of Economic Policy 314.
[7] The rights of shareholders may be personal or collective. Personal rights of shareholders are those rights that are enjoyed individually, and which can be enforced in the shareholders' personal capacity. Collective rights on the other hand are those enjoyed by all the members collectively or a class of members. These rights are therefore exercised on behalf of the members or class of members. It is usually manifested through the passage of a resolution—ordinary or special—by a majority of the members or class of members. The rights of the shareholders of a company are also not to be confused with the company's rights, which refers to those rights exercisable on behalf of the company typically by its directors.
[88] Keenan (n 5) 194-196.
[9] Amour (n 6) 315 – 317.
[10] C.G. Killian and J. Jean Du Plessis, 'Possible Remedies for Shareholders when a Company Refuses to Declare Dividends or Declare Inadequate Dividends' [2005] Journal of South African Law 49, 57.
[11] Julia Velasco, 'The Fundamental Rights of the Shareholder' (2006-2007) 40 University of California Davis Law Review

Bernard Asare v Dupaul Wood Treatment (Ghana) Co Ltd & Anor.[1] There the Supreme Court held, "[t]here is no legal obligation to declare dividends. The board of directors of a company is entitled to exercise its discretion freely as to whether to declare dividends or to accumulate profits within the business for re-investment". Under sections 76 and 321 of Act 992, shareholders of both public and private companies with shares are entitled to benefit from any dividends declared. Secondly, shareholders have the right to any residual amounts which accrue on the winding up of the company.[2] Under the Corporate Insolvency and Restructuring Act 2020 (Act 1015), during liquidation, the assets of the company must be used to pay off the debts of the company and satisfy the cost of winding up the company.[3] Any assets which remain, are to be "distributed among the members according to the rights and interest of the members in the company, unless the constitution of the company says otherwise".[4] If one draws motivation from a hohfeldian model in which rights are closely related to duties, shareholders, both past and present, may be liable to contribute to the assets of the company if the company is unable to satisfy its debt on winding up.[5] Shareholders liable are usually those who have unpaid liabilities on their shares.[6] The third specie of payment rights is the right to sell off one's shares in the company either at a profit or at a loss.[7] Generally, and under Ghanaian law, a shareholder may offer his shares up for sale. For a private company with shares, the other shareholders under the company's constitution may be required to first offer the shares to the other shareholders before offering them to a third party.[8] It should be noted that under section 7(5) of Act 992, private companies are prohibited from making calls to the public for the acquisition of shares or debentures in the company. However, public companies are not so restricted and when making such calls to the public are required to comply with sections 303 – 319 of Act 992 regarding the disclosure of relevant information. Usually, public companies are also listed with the Ghana Stock Exchange and are thereby permitted to participate in the securities market. The share price of listed companies is at best volatile depending on the availability of information in the market. Thus, shareholders who no longer wish to invest in the company or are desirous of divesting themselves of the company's shares may proceed to sell their shares at a profit.[9] These three rights line the shareholder's pocket with money, and one legal scholar, Valesco refers to, them as economic rights.

b) Control rights

Modern companies arose from the ashes of joint stock companies in which the members of a joint stock company contributed towards the capital of the company and owned the assets of the joint stock company.[10] As they owned the assets of the company, there was a heightened need to see that the company was properly managed.[11] As will be explored later, the emergence of companies as separate legal entities, the reconfiguration of the office of the director as a separate company organ, and the popular use of such professional managers to run the company severely strained the traditional ownership model of the company. By 1932, Berle and Means in their groundbreaking work on the history of American corporate law concluded that a wedge had been driven between ownership and control.[12] While ownership[13] seemed to be vested in the shareholders, ultimate control was vested in the board of directors. They further posited that by ceding control to the board of directors, the shareholders surrendered much of their control rights in return for periodic income.[14] However, appealing this

407, 414.
[1] [2005-2006] SCGLR 667.
[2] Amour (n 6) 316.
[3] Act 1015, s 130(1).
[4] Ibid s 131(2).
[5] Act 992, s 44(2).
[6] Ibid s 40.
[7] Valesco (n 11) 414 – 415.
[8] Act 992, s 189(1)(a)(i).
[9] Under section 220, a member may require the company to purchase its shares when the company passes a special resolution to amend its Constitution in order to change its business activities or objects; approve a major transaction, arrangement, compromise, merger or division of the company; vary class rights. The member who requires the company to purchase its shares must have opposed the resolution at the time it was passed.
[10] Ross Grantham, 'The Doctrinal Basis of The Rights of Company Shareholders' (1998) 57 The Cambridge Law Journal 554.
[11] Ibid 559-560.
[12] Adolf Berne and Gardiner Means, *The Modern Corporation and Private Property* (The Macmillan Company 1932).
[13] Ownership here is used in reference to the fact that shareholders capitalized the company and will ultimately earn dividends as and when declared. When the company is being wound up, the shareholders will be get any excess money after creditors have been paid. However, the law deems the company as a separate legal entity capable of owning its own assets and carrying its own liability. The reference to ownership here is therefore not in reference to the right of the company to exist as a separate legal entity.
[14] Bearn & Means, (n 12).

proposal may be, it is still widely acknowledged that shareholders can tangentially exercise control rights by appointing and removing directors[1]. Under Ghanaian law, shareholders of both private and public companies can appoint or remove a director in accordance with the constitution of the company and the provisions in Act 992. Control rights, though, far exceed the appointment and removal of directors. In addition to this express provision, the court has held in the case of *Pinamang v. Abrokwah*[2] that where the procedure set out to remove directors fails, the members can seek a court order to remove a person as director. This is yet another indication of the court's reception to enforce shareholder rights. Shareholders also have the right to appoint the auditors of the company.[3] The auditors, once appointed reports directly to the shareholders. Although the directors must provide a report of the company on the year under review at annual general meetings of the company, it is the auditors who provide an independent financial assessment of the company for the year under review for the benefit of the shareholders. Since the shareholders do not run the business on a day-to-day basis and the directors have the discretion to declare or not to declare dividends, it is the independent report of the auditors that give the shareholders the assurance as to the financial well being of the company.

Shareholders may also approve or disapprove major transactions under section 145 of Act 992. Major transactions refer to any arrangement which either acquires or disposes of an asset valued at over 75% of the value of the assets of the company.[4] The acquisition of any rights or liabilities equivalent of more than 75% of the value of the assets of the company is also classified as a major transaction.[5]

Control rights carry with them, related rights to attend and vote at general meetings[6] as provided in section 34 of Act 992. Although the directors of the company are clothed with the power to administer the company on a day-to-day basis, it is at general meetings of the company that the shareholders share the responsibility of managing the affairs of the company with the directors. [7] Meetings are therefore inextricably linked to the ability of shareholders to exercise control over the affairs of the company. In Eshun and another vrs. Poku[8] the court said about the annual general meeting as follows.

> "The A.G.M. no doubt affords protection to members. Indeed, no one would deny that it is meant for their good, for this meeting gives them a glorious opportunity of meeting the directors, and as the learned author Gower in his book The Principles of Modern Company Law (3rd ed.) at p. 475 puts it:
>
> ". . . for it is the one occasion when they can be sure of having an opportunity of meeting the directors and of questioning them on the accounts, on their reports, and on the company's position and prospects . . . Most of these things could, of course, be done at an extraordinary meeting, but the members who want to raise these matters may not be able to insist upon the convening of an extraordinary meeting. The annual general meeting is valuable to them because the directors must hold it whether they want to or not."

Members have the right to receive notices of general meetings.[9] The law requires that members be given 21 days' notice ahead of every general meeting of the company. Members are also entitled to be given in advance all documents and reports incidental to the meeting, such as director's and auditor's reports, financial statements and other relevant reports – and these equally fall squarely within the ambit of information rights. This is meant to afford the members both the time and opportunity to adequately prepare for the meeting—or even seek counsel—to hold those that run the company (the directors) to account. This right also allows members to either attend the meeting themselves or appoint a proxy to attend the meeting on their behalf. At general meetings, members have the right to speak and to vote on any resolution.[10]

The right of shareholders to attend meetings and vote are so essential that the law makes provision for their enforcement, usually by recourse to the courts. For instance, the law makes it mandatory for a company to hold a

[1] Julian Velasco, 'The Fundamental Rights of the Shareholder' (2006) 40 UC Davis Law Review 407, 410; Farouk HI Cassim, 'The Division and Balance of Power between the Board of Directors and the Shareholders: The Removal of Directors' (2013) 29(1) Banking & Finance Law Review 151.
[2] [1991] 2 GLR 384.
[3] Act 992, s 139.
[4] Ibid s 145(2)(b) (i) and (ii).
[5] Ibid s 145 (2)(b) (iii).
[6] This could be either an Annual General Meeting (AGM) or an Extraordinary General Meeting (EGM).
[7] Act 992, s 144.
[8] *Eshun and Another v Poku and Others* [1989-90] 2 GLR 572.
[9] Act 992, para 1 of 8th sch.
[10] Ibid s 34.

general meeting as its Annual General Meeting[1]. Because the effect of this provision is to protect the members' right to attend meetings, the company is duty-bound to hold a general meeting unless the members unanimously decide to waive this right. Indeed, the court can step in to call a general meeting if it is impracticable to call one in the usual way.[2] This is the court's way of ensuring that the rights of members to attend general meetings are upheld.

Also, in connection with the notice of meetings, the English courts have held in cases such as *Young v Ladies Imperial Club,*[3] *Musselwhite v Musselwhite,*[4] and *Re West Canadian Collieries Ltd*[5] that a deliberate failure to send a notice to a member completely invalidates the proceedings and renders void any resolution that is passed at the said meeting. This means that where only one member is not given notice of a meeting, the entire meeting may be rendered nugatory. This is a clear indication of how seriously the courts view shareholder rights. In fact, short notice[6] is equally fatal and has the same effect of invalidating a meeting. Again, because this rule is meant to protect members, the members can elect to waive this right and ratify the short notice.

Perhaps, it is also worth mentioning that shareholders are not allowed to exercise the votes in any way that they please. The cases are clear shareholders have a duty to vote in a way in good faith and in a way that is beneficial to the company. "bona fide for the benefit of the company as a whole" is the term often used and expounded by the English courts.[7]

c) Information rights

There are a few more information rights. This simply means a collective rights of the shareholders to access information relating to the company. It is widely acknowledged that a member has the right to be listed in the register of members provided in section 35 of Act 992. Under this section, the shareholder is entitled to have his or her name entered in the register of members. This is meant to prevent any unauthorized additions or alterations. Shareholders may inspect the register of members,[8] minute books and other relevant documents of the company. To ensure that shareholders are well abreast with the management of the company to interact with the directors at the annual general meeting of the company, shareholders are entitled to copies of the financial statement of the company, the directors report and auditors report.[9] The company must make available these reports to shareholders every year at intervals of not more than fifteen months. Shareholders are also entitled to copies of notice of resolutions to be properly moved and is intended to be moved at general meetings,[10] and circular on the business to be transacted at general meetings[11]

d) Litigation rights

Generally, directors stand in a fiduciary relationship with the company and are to exercise their powers in good faith and for the benefit of the company. Section 190(1) of Act 992 captures this succinctly in the following words: "A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in a transaction with or on behalf of the company". Under Ghanaian law, directors are to refrain from acting other than in the interest of the company.[12] Directors have an obligation to avoid conflict of interest and disclose any interest which might so conflict with that of the company.[13] A breach of these solemn duties triggers civil liabilities and the company, or any member may bring an action against the defaulting director to enforce the accrued liabilities.[14] The shareholders at a general meeting may by an ordinary resolution authorize the company to take proceedings against the defaulting director. An individual shareholder may also bring an action against the company for a wrong against the company or against the member. Where

[1] Ibid s 157.
[2] *Re British Union for the Abolition of Vivisection* [2006] EWHC 250.
[3] [1920] Ch 523.
[4] [1962] Ch 964.
[5] [1962] Ch 370.
[6] Short notice here refers to anything less than the statutory minimum of 21 days.
[7] *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656; *Sidebottom v Kershaw Leese and Co. Ltd* [1920] 1 Ch 154; *Dafen Tinplate Co. Ltd v Llannelly* [1920] 2 Ch 124; *Greenhalgh v Arderne Cinemas Ltd and Others* [1951] Ch 286; for an extensive treatment of this subject, see Paul Davis and Sarah Worthington, *Gower and Davis' Principles of Company Law* (9 ed, Thompson Reuters UK 2012) 691-696.
[8] Act 992, s 35.
[9] Ibid s 128(a), (b) & (c).
[10] Ibid 8th sch, s 5(a).
[11] Ibid 8th sch, s 6(a).
[12] Ibid s 190(2).
[13] Ibid ss 192 – 196.
[14] Ibid s 200(1).

the action is being instituted by a member of the company, the action may be brought either as a derivative action or a representative action.[1]

Before Act 992 introduced the derivative action, the Supreme Court of Ghana had occasion to comment on the application of the rule in *Foss v Harbottle*.[2] The rule holds that the company is appropriate to sue and be sued; the court will not intervene if the decision being challenged is one the shareholders can address at a meeting via a resolution. The two dimensions of the rule have come to be known as the proper plaintiff rule and the majority rule. At common law, exceptions were recognized and the English case of *Edwards v Halliwell*[3] extensively restated the principle and noted exceptions such as situations in which fraud is practiced on the minority or the actions of the company are ultra vires. The Court held in *P.S. Investment Ltd v Central Regional Development Coperation and Others*[4] that the then Companies Act 1963 (Act 179), had not abolished the common-law rule to the extent that it recognized common law principles consistent with the statute. However, it concluded that the proper plaintiff test had been significantly weathered by statute.[5] Their Lordships observed that the statutory provisions on personal rights, fraud on the minority, ultra vires, and the stipulation of special procedures to fulfil statutory requirements such as the transfer of shares have all whittled down the rule in *Foss v Harbottle*.[6] If the rule was in its death throes when this case was decided, the introduction of the derivative action has killed it.[7] Derivative actions are, therefore, new under Ghanaian law and are a deviation from the common law rule of *Foss v Harbottle*. Commenting on this innovation, Ghanaian jurist, Date-Bah has noted:

> The derivative action is a derogation from the rule in Foss v Harbottle in the interest of the protection of minority rights. Where the company is controlled by directors or majority shareholders who are set on preventing the company from seeking a remedy for a wrong done to it, the derivative. action is a useful option to have. The derivative action enforces the company's rights, distinct from the personal rights of the shareholders.[8]

The derivative action is therefore a sword against directors and majority shareholders who want the hold the company ransom and prevent concerned shareholders from seeking a remedy. On the other hand, any other right of any shareholder may be commenced by a representative action without obtaining the consent or approval of any member of the class being represented.[9] While derivative actions can only be commenced by leave of the court, representative actions do not need any such leave as they seek to vindicate personal rights and not that of the company.[10]

Transcending the duty derivative and representative action, Act 992 gives shareholders two other litigation rights in sections 218 and 219 respectively. A shareholder has the right to bring an action against the company where the company does an act or enters into a transaction which is illegal or ultra vires.[11] Where the board passes a resolution to approve such a transaction, the shareholder may still apply to the court for the nullification of the impugned resolution.[12] Furthermore, a shareholder may apply to the court for relief where:

> (a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of the proper interests of those members, shareholders, officers, or debenture holders of the company; or (b) an act of the company has been done or is threatened or that a resolution of the members, debenture holders or a

[1] Ibid, ss 72(4), 200(5) and 205(a).
[2] Other well-known Ghanaian cases which have applied this rule in the past are: *Appenteng v Bank of West Africa* (1972) 1 GLR 153 and *Pinamang v. Abrokwa* **(1992) 2 GLR 384.**
[3] [1950] 2 All ER 1064.
[4] [2012] GHASC 20.
[5] Ibid.
[6] Ibid.
[7] Christopher Y Nyinevi and Ebenezer Adjei Bediako, '"Seeking the Dead Among the Living": The Misconceived Quest to Find the Rule in Foss v Harbottle in Ghana Company Law' (2015-2017) 7 Kwame Nkrumah University of Science and Technology Law Journal 34 – 53.
[8] Kofi Date-Bah, 'Revitalising Gower's Legacy: Reforming Company Law in Ghana,' (2011) 29(3) Penn State International Law Review 459, 457-458.
[9] Act 992, ss 200, 201 and 205.
[10] Ibid s 201.
[11] Ibid s 218.
[12] Ibid 218 (1)(b).

> class of them has been passed or is proposed which unfairly discriminates against, or is otherwise unfairly prejudicial to, one or more of the members or debenture holders.[1]

While this provision applies to all shareholders, it is most likely than not that is for the benefit and welfare of minority shareholders. In the past, Ghanaian courts took the view that a member must be oppressed in his capacity as a member and not some other capacity.[2] However, the Supreme Court has departed from this position in the *Nicholas Bernard Asare* case and has held that a member can bring an action when he is being oppressed in his capacity as a director of the company.[3]

Why are shareholder rights important?

The modern company, tooled with shares and the concept of separate legal personality did not emerge until the nineteenth century.[4] Even then, corporate law was treated as an appendix of partnership law.[5] In joint-stock companies, the predecessors of the modern company, the assets of the company were jointly held by all members of the company. This all changed in 1837 when the decision of *Bligh v Bright*[6] ruled that the shareholders of a company were not entitled to the assets of the company. A share, which before then was treated as an interest in the share of the company's assets overtime became distinct property with consequential rights and obligations. Thus, what is now defined as a share is the interest of a shareholder in the company measured by a sum of money, for the purposes of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se…".[7] According to Gratham, other related developments including the judicial recognition of the office of director of as separate organ responsible for the management of the company, the recognition of a company as an entity which could have its own interest, and the emerging recognition of the interests of other shareholders has challenged the traditional ownership model of the company.[8]

With these developments, which have defenestrated the ownership model of the company, the question becomes, on what basis can shareholders be deemed to have rights and for what purpose? Some say the directors become agents of the shareholders (the agency model);[9] others say there is a contractual basis within which directors manage the company for the benefit of the shareholders;[10] yet a third argues that the shareholders are the sole residual claimants of companies' assets.[11] Scholars are not agreed on just which one best justifies shareholder rights with one scholar going as far as to describe all the three bases as "incorrect… all three give the idea of greater shareholder control an emotional appeal that ignores the realities of business law and practice".[12] Grantham however provides two additional justifications for shareholder rights. He makes the point that the "investment made by shareholders is both indefinite in term and residual in nature".[13] If a share therefore continues to impose continuing obligations, shareholders should be able to control the way in which the company is run. Gratham also argues that shareholder control is a better way for the State to enforce its corporate governance goals.[14] This paper draws inspiration from Gratham's work on shareholder rights.

Shareholder rights are important because they protect shareholder capital. Shareholders provide consideration in their money, resources, property and services in exchange for the shares that they hold. As soon as the company

[1] Ibid 219 (1).
[2] *Mahama v Soli and Anor* [1977] GLR 215; *Okudjeto v Irani Brothers* [1975] 1 GLR 96; *Re West Coast Dyeing Industry Ltd; Adams and Anor v Tandoh* [1984-86] 2 GLR 561.
[3] This position is very similar to the interpretation placed on section 210 of its repealed Companies Act of 1948. The UK has however amended the minority oppression provisions in its subsequent corporate legislation. The rule is now simply one of unfair prejudice and not oppression.
[4] Paddy, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 Modern Law Review 32, 38.
[5] Ibid 39-40; Grantham (n 10) 559.
[6] (1837) 2 Y & C Ex 268.
[7] *Borland's Trustees v Steel Brothers & Co. Ltd* [1901] 1 Ch 279, 288.
[8] Grantham (n 10) 560 ff.
[9] Livia Bonazzi and Sardar MN Islam, 'Agency Theory and Corporate Governance: A Study of the Effectiveness of Board in their Monitoring of the CEO' (2007) 2 Journal of Modelling in Management 7; Steven A. Frankforter, Shawn L. Berman, and Thomas M. Jones, 'Boards of Directors and Shark Repellents: Assessing the Value of an Agency Theory Perspective' (2000) 37(3) Journal of Management Studies 321.
[10] Stephen M. Bainbridge, 'The Board of Directors as Nexus of Contracts' (2002-2003) 88 Iowa Law Review 1.
[11] Mustafayev Rza, 'Do shareholders by being residual claimants facilitate stakeholder value?'(LLM Thesis, Vytautas Magnus University 2020).
[12] Lynn A Stout, 'The Mythical Benefits of Shareholder Control' (2007) 93(3) Virginia Law Review 789, 805.
[13] Grantham (n 10) 560-583.
[14] Ibid 584-587.

takes or receives the consideration for the shares, the consideration becomes the property of the company. The shareholder has no right either in equity or in law to the consideration that the company receives in exchange for the shares. This is because of the well-established principle that a company is a separate person at law distinct from its members (shareholders).[1] Once the consideration has been given to the company, the rights of the shareholder is to dividends as and when declared and a right to return of capital upon the winding up of the company. The shareholder may also sell the shares that it holds, subject to the constitution of the company, to another person at a price higher that he bought the shares thereby making some money off the shares purchased. The ability of the shareholder to reap these rights are based on among other things the performance of the company over the period that the shareholder holds the shares. Thus, holding shares in the company in and of itself will not automatically generate dividends. It will not automatically lead to an appreciation of the value of the shares held. On winding up, it is only after creditors are paid that shareholders capital will be returned. The shareholder needs to do more to better his chances of reaping these benefits. The shareholder must participate in the governance of the company as per the constitution of the company or the shareholder must pray that other shareholders take on the task or that the directors on their own volition run the company well so as to improve the chances of the shareholder benefits.

Often, shareholders invest in shares not for the sake of holding shares but for the sake of increasing their benefits. At incorporation, the consideration that is provided for the shares held by the subscribers constitute the capital of the company for running the affairs of the company[2]. The company may also raise additional capital by issuing additional shares and allotting them to either existing shareholders or fresh shareholders. Thus, it is the shareholders that capitalize the company. However, although it is the capital of the shareholder that capitalizes the company, the shareholder are not in-charge of the day to day running of the company. The company is run by the directors of the company. Although it is the shareholders that appoint the directors to run the company on a day-to-day basis, the directors are not bound to listen to the instructions of the shareholders that appointed them. In fact, as soon as the directors are appointed, they become the directors of the company and not the directors of the shareholders that appointed them. The director's allegiance must be to the company and his/her powers are generated through the constitution of the company and not the dictates of any individual or group of shareholders.

Although shareholders do not run the day-to-day affairs of the company, they are not left without the power to affect how the company operates. The shareholders ability to affect how the company works in through the rights that are conferred on the shareholder. Through the exercise of these rights, the shareholder can ensure that it is able to maximize the potential to increase the benefits that accrue to the holding of the shares. The shareholder rights provide an internal mechanism (no going to court) through which the shareholder can hold the directors of the company accountable for how the company is being run. These rights also ensures that the levers of power in the running of the affairs of the company are not left entirely in the hands of the directors. Shareholder rights serve as an important check on the powers of the directors. Although directors are subject to the clutches of laws and regulations in the discharge of their obligations to the company, they remain very powerful because they control the company daily. The emoluments of the directors are set up as cost to the company and therefore need not be a function of the profitability of the company.[3] However, the dividend of the shareholder is only paid out of the profit of the company. Thus, where the company makes no profit, although directors may be paid, shareholders will not get any dividends. The rights of the shareholders therefore ensure the separation of powers in the management of the company to ensure that the exercise of executive authority through the board of directors is balanced by the rights that are exercised by the shareholders in the running of the company. The rights of the shareholder are therefore fundamental to the good governance of the company. This is the major reason why Act 992 compels companies to hold meetings annually. As Lutterodt J. said in Eshun v. Poku about the annual general meeting, the annual general meeting is for the protection of members. He stated further that the meeting gives the shareholders a glorious opportunity to meet the directors and demand for their accountability in the running of the affairs of the company.[4] The eight schedule to Act 992 explains all the matters that pertain to meetings right from notices to the passing of resolution. It is important to note that at a general meeting, the financial statements are considered, and major decisions are taken. Where shareholders realize that the directors are not acting in the best interest of the business, they can remove them. Alternatively, where the auditors are not competent, the shareholders can equally remove them.

[1] *Salomon v Salomon* [1897] AC 22.
[2] Act 992, s 68.
[3] Ibid, s 132.
[4] *Eshun* (n 8).

Shareholder rights ensure that shareholders are in a position to protect the interest that they hold in the company. In Ghana, the registrar of companies in his/her regulatory mandate plays a complementary role in ensuring the safety of the investment of the shareholder in the company. The registrar of companies has many tools under the law to ensure that the company is run not to the detriment of the shareholder. In spite of the complementary role of the registrar of companies, ultimately, shareholders by virtue of the fact that they are financially invested in the company are better placed to protect their investment in the company.

Another reason why shareholder rights are important is that by ensuring that shareholders have rights which put them in a better place to participate in the running of the company and to safeguard their investment, others are also encouraged to be shareholders. In view of the fact that the primary means by which companies raise capital is through shareholders, the more people are willing to be shareholders the more encouraged businessmen are to promote companies. As a special purpose vehicle for doing business, the company can become an important organ to the State. Companies have become important agents of development in the society. Today, companies are the leaders in groundbreaking inventions, producing lifesaving medicines and advancing the body of knowledge for the good of mankind. They have become major sources of employment. Thus, as companies continue to grow, they become centers where young people coming out of tertiary institutions have meaningful work to do. Companies also pay taxes which form an essential part of the revenue for the State. It is obvious therefore that although the State does not contribute to the capital of the company, the State stands to benefit from the proliferation as well as the growth of companies. Where shareholders do not have rights as well as avenues to express those rights in furtherance of their interest in the company, they will be less likely to inject additional capital into the company. In addition, the absence of shareholder rights as well as avenues to protect same may likely discourage potential shareholders from making their money and resources available to the company. These rights of the shareholder do not only benefit the interest of the shareholder, but they also ensure a never-ending source of benefit to the State.

Section C – Shareholder Rights in a Digital Age

Prior to the enactment of Act 992, the legislation that governed companies in Ghana was the Companies Act, 1963 (Act 179). In 1963, the modern forms of communication technology that we take for granted today were largely nonexistent. In comparison with today's technological advancement in the area of communication, one can conclude that technology in 1963 was at best rudimentary. Telephones, post offices and telegraphs were the primary means of sending information over long distances. Thus, the old Act envisaged shareholder rights as rights which had to be exercised physically, whether in person or through an agent or proxy. For example, the register of members was to be placed at company's registered place of business for inspection by members. Meetings convened unless the company's regulations stated otherwise were to be held in Ghana. Where a member appointed a proxy, the authorizing instruments were to be physically deposited at the registered office of the company. Many of the decisions shareholders make were done via resolutions, and Act 179 appeared to support the position that shareholders or their agents or proxies had to be present to sign these resolutions. Written resolutions could be passed, but it was not all clear whether a digital signature could be used to sign documents remotely.

Within sixty years, so much as changed. Globally, many countries have developed innovative ways of integrating technology advancements into their corporate laws. In the State of Delaware in the United States of America where most American public companies are incorporated, companies can have virtual meetings without being physically present unless the byelaws of the companies state otherwise.[1] Under Chinese law on the other hand, shareholders' meetings must take place physically though there is a requirement that remote access for some shareholders must be facilitated or enabled; attending such meetings virtually carries with it the right to vote online.[2]

[1] Delaware's General Corporation Law, § 211 states: 'Meetings of stockholders may be held at such place, either within or without this State as may be designated by or in the manner provided in the certificate of incorporation or bylaws, or if not so designated, as determined by the board of directors. If, pursuant to this paragraph or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this section'; Estonia also permitted virtual meetings prior to Covid-19; see Kai Härmand, 'Digitalisation before and after the Covid-19 Crisis' (2021) 22 ERA Forum 39.
[2] Chao Xi, 'Shareholder Voting and COVID-19: The China Experience' (2022) 9 The Chinese Journal of Comparative Law 125, 129 - 130.

In the late 1990s, Ghana privatized its information and communications technology sector to attract foreign investors as part of the Accelerated Development Programme 1994-2000.[1] A new National Communications Authority was established in 1996 to regulate the telecommunications industry. In the 2000s, the phenomenal growth of the telecommunications sector merged with the exponential growth of the internet, the mass availability of personal computers, and the emergence of mobile phones. Mobile network operators, internet service providers and many others made internet available thereby succeeding in connecting many Ghanaians to the global IT infrastructure. A National ICT Policy was adopted to grow the hardware and software IT industry. As far back as 2003, it is evident that the government recognized the potential of the emerging electronic technology to transformation of the society. Major reforms in the IT and telecommunications sector were carried out in 2008 with the passage of four important statutes, the Electronic Communications Act 2008 (Act 775), The National Communications Authority Act 2008 (Act 769), the Electronic Transactions Act 2008 (Act 782) (ETA) and the National Information Technology Agency Act 2008 (Act 771). While the telecommunications authority was regulated by the National Communications Authority, the implementation of the ETA was entrusted to the National Information Technology Agency. The seamless integration and implementation of these statutes, it was expected would improve Ghana's digital life and health. Because mobile network operators provide the bulk of Ghanaians with internet access, regulation of the telecommunications industry would generate access to internet and related electronic services, and this would undergird the framework for the successful implementation of the ETA. The ETA especially, was passed to:

> *(b)* promote legal certainty and confidence in electronic communications and transactions;
>
> *(c)* promote e-government services and electronic communications and transactions with public and private bodies, institutions and citizens;[2]

It also provides in section 25 that, "[a] public body shall take steps or enter into arrangements to ensure that its functions are carried out, delivered or accessed electronically or online". The Act therefore sought to guarantee the integrity of electronic communications and transactions on one hand and encouraging the government to harness electronic communications to provide government services on the other. The latter is often termed e-government.

The ETA generally has strengthened shareholder rights. It was the first to recognize electronic records and confirm the admissibility of electronic records in legal proceedings.[3] It endorsed the use of digital signatures to sign electronic documents and provided guidance of security procedures applicable to electronic records.[4] In fact, under section 386 of Act 992, the ETA has been incorporated into the law governing companies in Ghana with respect to rights and obligations of stakeholders in a company. With these provisions, resolutions could be rendered in electronic form and signed remotely without the need of a shareholder's physically presence. The register of members could be an electronic register that can be easily assessed anywhere without necessarily visiting the registered office of the company[5]. This would enhance the right of shareholders to inspect the register of members as provided for under section 35 of Act 992. members alphabetically. Under section 290(7), notices of meetings and other documents to be served on shareholders can now be served electronically through e-mails. Shareholders can conduct searches within the company electronically. Registration of transactions with respect to the issue of shares can be effected electronically. In addition, registration of charges and keeping of accounting records of the company can also be done electronically. The ETA also created a number of cyber offences including stealing, forgery and unauthorized access to protected computers.

Despite these legal developments, the Registrar of Companies did not provide sufficient guidance on how these electronic provisions could be used to advance shareholder rights. For instance, no sufficient guidelines existed for the conduct of virtual meetings, electronic access to a company's register, and the use of electronic signing of documents in which case shareholders can pass written resolutions remotely.

Although under section 4(g) of the ETA had excluded its application to the electronic registration of the documents required for incorporating a company, the Government used the corporate law reforms in 2019 to pursue an aggressive corporate digitization agenda. Section 378 of Act 992, breathtaking in scope, has given the Registrar of Companies the power to direct use of electronic means to perform certain activities under the Act, irrespective of any other provision in the Act. These include the incorporation or registration of a company, the

[1] For a fuller discussion of the history of telecommunications in Ghana and the rise of e-government initiatives, see Ama F. Hammond and Samuel Obeng Manteaw, 'Ghana' in Jos Dumortier and Others, *International Encyclopedia of Laws: Privacy and Technology Law* 21-108.
[2] Act 772, s 1(1) (a) & (b).
[3] Ibid ss 5–7.
[4] Ibid ss 10–14.
[5] Ibid s 293(1).

filing of particulars, the keeping and maintenance of a register, and the inspection of a register. Within five years after the passage of the Act, all the activities stated in section 378 are to be carried out only through electronic means.[1] Section 378 is to be construed together with the ETA and where there is a conflict between the two, section 378 takes precedence.[2] in 2020, the Cybersecurity Act was passed to strengthen Ghana's cybersecurity infrastructure. It establishes the Cybersecurity Authority, creates a licensing regime for cybersecurity practitioners, establishments, and service providers; and expands the list of offences created under the ETA. Act 1038 will therefore strengthen the integrity of electronic communications and make the malicious disruption of electronic communications and electronic transactions expensive.

Section D – Recent shareholder rights issues in Ghana

Ghana recorded its first two Covid-19 cases on 13th March 2020. The scale of the pandemic was not well known at the time, but the scientific predictions of the disaster were gloom. Governments around the world were desperate to contain the spread of the virus. By 15th March 2020, Ghana too, decided to take drastic action against the virus' spread. The Imposition of Restrictions Act 2020 (Act 1012) was soon passed authorizing the President to curtail people's rights to among other things, move and assemble. By virtue of powers granted under the Public Health Act 2012 (Act 851),[3] the Minister for Health declared the pandemic a public health emergency and triggered relevant institutional mechanisms.

Under this web of covid-era laws, the borders of were closed for months, making it impossible for many people to travel in and out of Ghana.[4] Between March and April 2020, the movement of persons living in Accra and Kumasi, the two big cities in Ghana where most Ghanaian businesses have their registered places of business, was restricted.[5] Public gatherings were banned till the end of May 2020.[6] Though the restrictions began to ease in June 2020,[7] many businesses proceeded with caution.

While the corporate law reforms of 2019 as discussed helped improve shareholder rights in some respect, the pandemic tested the robustness of these reforms and the gaps therein. The obvious area of concern for many companies was shareholder meetings. The opportunity for shareholders to meet and interact with the people who run the company on a day-to-day basis, directors.[8] As shareholder meetings under the law were to be held in person, the restrictions on movement, travel and assemble frustrated the exercise of this shareholder right. The crisis legislation in force did not provide any instructive guidance either.

Pursuant to her power to "direct that any matter, act or thing …required to be done under this Act shall be submitted or done electronically",[9] the Registrar of Companies authorized Companies to hold annual general meetings electronically. Guidelines were also provided.[10] Companies could only hold such a meeting if it notified the Registrar of Companies of its intention to do so and clearly stating the electronic means to be used. All members were entitled to electronic notice in accordance with the company's constitution and the electronic means used was one which had to be fair to all the shareholders. During the pandemic when companies were cast adrift and in need of direction, it was the Registrar General of Companies which was the lighthouse.

[1] Act 992, s 385(9).
[2] Ibid s 386.
[3] Declaration of Public Health Emergency Coronavirus Disease (COVID-19) Pandemic Instrument 2020 (EI 61 of 2020).
[4] Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020 (EI 64); The Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 3) Instrument 2020 (EI 66); The Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 5) Instrument 2020 (EI 68); The Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 7) Instrument 2020(EI 109)
[5] Imposition of Restrictions Coronavirus Disease (Covid-19) Pandemic (No.2) Instrument 2020 (EI 65); The Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 4) Instrument 2020 (EI 67)
[6] Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) Instrument 2020 (EI 64); The Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 4) Instrument 2020 (EI 67); Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 6) Instrument 2020 (EI 90); Imposition of Restrictions (Coronavirus Disease (COVID-19) Pandemic) (No. 8) Instrument 2020.

[7] E.I. 134 Imposition of Restrictions (Coronavirus Disease (Covid-19) Pandemic) (No. 9) Instrument 2020.

[8] *Eshun* (n 8).
[9] Act 992, s 378(2).
[10] Guidelines on Holding of Virtual Annual General Meetings of Companies (No. 1 of 2020) as published in the Companies Bulletin.

The Securities and Exchange Commission [1] released a banal and unhelpful statement asking collective investment schemes to hold their general meetings in "conform[ity] to the directives on public gatherings announced by the President."[2] The Ghana Stock Exchange welcomed the move by some listed companies to hold virtual AGMs; though it doubted the capacity of large listed companies like MTN Ghana and Ghana Commercial Bank to hold virtual AGMs.[3] Contrary to fears of the Ghana Stock Exchange, both small and large listed companies were able to host virtual AGMs.[4] These meetings were streamed live by the companies via various platforms such as Zoom and YouTube. Members could ask questions or type out their questions to be asked for them. Shareholders were able to vote, usually through two options: an online platform and a USSD short code. Irrespective of the pandemic's effect, Ghanaian companies took initiative and adapted workable strategies to protect shareholder rights and ensure their maximum enjoyment at shareholder meetings.

The aggressive digitization agenda roughly pursues the two-pronged approach taken by the ETA: enhancing confidence in electronic transactions and encouraging the use of e-government services. For shareholders, it is the former that matters and not the latter. An evaluation of the current digitization agenda as typified by statute as well as the directives of the Registrar of Companies during the Covid-19 pandemic reveals an enhancement of the rights of shareholders. Information rights are advanced because the register of members can be rendered in electronic form and its inspection done electronically. This is an improvement from the past where a physically ledger like book with columns and rows was lodged at the company's registered office. Shareholders need not trek to the registered office of the company to inspect the register of members or gain access to the minutes book. These can be easily assessed from the comfort of your home or office. The control rights of the shareholders have only been improved to the extent that notices of meetings as well as accompanying documents can now be sent to shareholders electronically. However, for some strange reason, the entire corporate framework on electronic means says nothing on virtual or hybrid meetings, presupposing that shareholder meetings must necessarily be in person. Act 992 however gives the Registrar of Companies the residual power to direct that anything which may be done under Act 992 may be carried out electronically. It is admitted that shareholders do not necessarily need to have a meeting to pass written resolutions, and to that extent there is some limited advancement of control rights and economic rights. Nonetheless, written resolutions are not carte blanche. They cannot be used to oust directors or auditors.[5] The cumulative effect of the statutes described above is that a shareholder meeting cannot be held remotely but in person unless the Registrar of Companies provides otherwise. Litigation rights are improved in a limited way because of the admissibility of electronic records. On the whole, the focus of the State has not been the furtherance of shareholder rights, but rather the promotion of e-government services to improve company compliance as evidenced by the administrative nature of the activities listed in section 378 of Act 992.

Ultimately, shareholder rights are often exercised during the general meetings of the company. As held in the case of Eshun & Anor v, Poku, general meetings present a glorious opportunity for shareholders to question directors and hold them accountable for their stewardship in running the company.[6] The digitalization agenda and the directives of the Registrar of Companies have greatly enhanced the ability of shareholders to exercise their rights by making it easy for shareholders to attend meetings. Circulating documents of the meeting electronically gives easy access of the documents to shareholders. Virtual meetings make it convenient for shareholders to attend meetings irrespective of their physical location.

Despite the above, it must be noticed that while the interventions taken by both the regulator and companies, especially following the Covid -19 era were timely and relevant, their continued existence may be a threat to shareholder control rights. Virtual meetings are an imperfect substitute for physical meetings. The ability to confer with fellow shareholders; influence and be influenced by the vigor of a shareholder making a point on the floor; assess the behavior of directors and other corporate officers were all lost. Fast forward into 2022 (the post Covid-19 era), many public companies including Access Bank Ghana Plc and Ecobank Ghana Plc chose to

[1] The Securities and Exchange Commission ('the Commission') is established by the Securities Industry Act, 2016 (Act 929) with the object to regulate and promote the growth and development of an efficient, fair and transparent securities market in which investors and the integrity of the market are protected.
[2] Securities and Exchange Commission, 'Circular on Coronavirus (COVID-19)' (SEC Ghana, 21 March 2020) <https://sec.gov.gh/circular-on-coronavirus-covid-19/> accessed 10 June 2024.
[3] JoyNews, 'COVID-19 Pandemic: Ghana Stock Exchange Urges Companies to Hold Virtual AGMs' (Myjoyonline, 20 May 2020) <https://www.youtube.com/watch?v=kt5iNCF0BlM> accessed 1 April 2023.
[4] Access Bank Ghana Plc was arguably the first public company to hold an AGM; B&FT Online, 'Access Bank Embraces New Normal with Virtual AGM for Shareholders' (B&FT Online, 1 June 2020) <https://thebftonline.com/2020/06/01/access-bank-embraces-new-normal-with-virtual-agm-for-shareholders/> accessed 6 April 2023.
[5] Act 992, s 163(5).
[6] *Eshun*, (n 8).

continue with virtual meetings despite the retreating effects of the pandemic and the removal of all restrictions on movement and public gatherings. The absence of the personal element of a shareholders' meeting seems to have impacted participation at these meetings. When Access Bank Plc held its AGM in 2022, many of its resolutions passed with less than 30 votes out of 1846 verified potential votes.[1] Ecobank Ghana Plc did not fare any better, with many of its resolutions being carried by just about 70 votes or less out of 13561 verified potential votes.[2]

No research has yet been conducted to assess shareholder participation before Covid-19 and post Covid-19. But the unpopularity of the virtual meetings may be attributed to the fact that the decision to hold a meeting is usually taken by the board of directors of the company rather than the members. Members may requisition meetings, but even this is constrained by trickly requirements of Act 992. Unlike other jurisdictions where the law specifically provides for virtual meetings, Ghanaian law does not have any specific provisions with its associated guidelines. In effect, unless the shareholders amend the company's constitution to provide for guidelines for holding virtually meetings, directors can choose to hold virtual meetings and the shareholders will have no choice. The undemocratic nature of exercising this option may be one reason why shareholders are apathetic at meetings. A commenter on Access Bank's AGM video on YouTube, presumably a shareholder, expressed the sentiment of many shareholders when he wrote, "Unless extended by the Bank of Ghana, this year should be the last time".[3] In essence, the decision to hold a physical or virtual shareholders' meeting should be the sole preserve of the shareholders and not the directors and the Registrar of Companies. While shareholders may have been keen in the covid-era and ready to compromise the residual benefits of a physical meeting, it is not clear if this is still the position in the post-Covid-19 era.

In all this, we should not be carried away by the lofty benefits of virtual meetings and forget that Ghana is a developing country where the digital divide still exists. Many ordinarily Ghanaians are retail investors in major listed companies like MTN Ghana. It will be incredible to conclude that they are all sophisticated and tech-savvy enough to participate meaningfully in virtual meetings. This is a country in which many Ghanaians born before the 2000s call themselves BBCs (Born Before Computers) and resign themselves to a false conclusion that modern technology is something beyond their comprehension.

The Registrar's guidelines during Covid-19 provided terse guidelines with no sunset provisions and companies are taking advantage of this. The lessons learnt from Covid-19 is that in exceptional circumstances, meetings may be held in other forms under than in person. During Covid-19, everyone was affected, and virtual meetings were the only means of ensuring that shareholders exercised their control rights. Post Covid-19, it is conceivable that some shareholders' may not be able to make it to meetings for genuine reasons. In this case, hybrid meetings should be explored, and the Registrar of Companies should take steps to provide detailed guidelines for such meetings. Hybrid meetings are those in which some of the members and officers of the company appear in person and others participate remotely.

In addition, the guidelines for holding virtual meetings should address the issue of potential abuse by directors or even controlling shareholders when general meetings are held virtually. The guidelines should address how notices of virtual meetings should be sent. The processes by which shareholders will be admitted into the meeting. The form in which discussions will be allowed on a motion. The order in which shareholders will be allowed to contribute to discussions at meetings. The process by which voting by show of hands will be conducted. Whether meeting attendees will be required to keep their cameras on. What is the protocol when shareholders encounter network/connection challenges and how shareholders can address such network/connection challenges in an ongoing meeting. In the absence of such guidelines, the chairman of the meeting may decide not to allow a contribution at a virtual meeting by keeping the person muted during critical periods of the meeting. In addition, shareholders deemed cantankerous may find themselves discounted during meetings to avoid them swaying the views of others in the meeting. Real debate at the general meeting may be stifled by tampering with the online platforms. In this regard, only online platforms with full audit capacity should be allowed to be used for online meetings. Overall, digitalization and the use of technology is the way to go to enhance shareholder rights in Ghana. However, there is still a lot to be done to ensure that shareholders can fully benefit from the exercise of their rights.

[1] 'Access Bank Ghana AGM 2022' <https://youtu.be/VrLZ3esLAsI?si=GkMWLjlRmB_ULj-T> accessed 10 June 2024.
[2] 'Ecobank Ghana PLC AGM 2022' <https://youtu.be/k1pNoJhThBA?si=AQ-MUfPoAaFoIGys> accessed 10 June 2024.
[3] 'Access Bank Ghana AGM 2022', (n 1).