

## **PRINCIPLES OF JUDICIAL INTERPRETATION OF THE REPUBLICAN CONSTITUTION OF GHANA**

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IN his pioneering work on the constitutional law of Ghana, Bennion<sup>1</sup> presents an interesting catalogue of the “formal principles governing Ghana’s republican constitution.” This catalogue is as follows :

1. It is a mechanism, and all its operative provisions are intended to have the precise effect indicated by the words used — no more and no less.
2. It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning; that that they mean what they say and not what people would like them to mean; and that if they prove unsuitable they will be altered formally by Parliament and not twisted into new meanings by ‘interpretation.’
3. It leaves no powers unallocated; those not reserved to the people are exercisable by the authorities established by it.
4. In its original form, or as for the time being expressly amended, it overrides any inconsistent law whenever made.
5. It assumes that legitimate inferences will be drawn by the reader, but that he will not transgress the rules of logic— as by drawing an inference from one provision which is inconsistent with the express words of another provision.
6. It needs to be read as a whole and with care.’<sup>2</sup>

Coming as they do from the technical adviser to the Government of Ghana during the period stretching from immediately before to immediately after the establishment of the republican constitution in 1960,<sup>3</sup> these “principles” certainly deserve more than cursory comment.

The object of this Article will be to subject the foregoing “principles” to intensive critical analysis in terms of their relation to express provisions of the ill-fated<sup>4</sup> Republican Constitution of Ghana and the nature of written Constitutions generally. In this way, it is hoped that the gross inadequacy of the “principles” especially when offered as intellectual tools to be used by those who embark upon the task of interpreting the Constitution, will have been

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<sup>1</sup> Bennion’s *Constitutional Law of Ghana* (London, 1962).

<sup>2</sup> *Ibid.* p. iii.

<sup>3</sup> See *Ibid.* p. vii (Preface).

<sup>4</sup> By section 2 of National Liberation Council (Proclamation) (Amendment) Decree, 1966, the 1960 Republican Constitution of Ghana has been suspended with effect from February 24, 1966.

demonstrated. On the positive side, suggestions will be put forth throughout the discussion as to the lines along which the development of principled criteria for the guidance of those engaged in judicial interpretation of written Constitutions may properly proceed.

To be taken together with these "principles" is a general caveat entered by the author in his preface, that "while the writing of this book was undertaken with the approval of the Ghana authorities, the views expressed in it are my own and in no sense official."<sup>5</sup> Thus, we may legitimately conclude that the "formal principles" constitute the author's own inference from his reading of the Constitution as a whole. Indeed, since we are provided with no source-references for the "principles" offered, we cannot do otherwise.

#### **A. ON THE INTERPRETATION OF THE CONSTITUTION GENERALLY**

The first two "formal principles" may conveniently be taken together for the purposes of a brief critical analysis. Their combined effect may be stated thus:

- (i) That the provisions of the Constitution have a determinate meaning for all time, and that this determinate meaning is discoverable from the plain or ordinary meaning of the words used.
- (ii) When faced with the task of applying any provision of the Constitution to a given situation, the decision-maker is precluded from any creative activity. His is merely to lay the given situation alongside the relevant provision invoked, and it should then be clear to him whether the provision is applicable to the situation or not. The Constitution, so to speak, is self-executory after the fashion of a production machine, and its application to a given situation should occasion no difficulty whatsoever.

Thus conceived, the Republican Constitution of Ghana becomes a unique document, the like of which exists nowhere else on earth. An instrument which represents the collective efforts of a people acutely sensitive to the growing problems of nation-building is thus relegated to the lifeless status of a "mechanism," devoid of any capacity for organic evolution through the process of "interpretation." But, it is perhaps only fair to add that by enclosing the word "interpretation" in quotation marks in his formulation of the "principles" Bennion was not ruling out all interpretation from the actual working of the Constitution. Also, he must have been clearly aware of the existence of the Interpretation Act of 1960<sup>6</sup> from which he quotes freely throughout his book. Perhaps the clue to the meaning

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<sup>5</sup> *Ibid.* pp. vii-viii (Preface).

<sup>6</sup> Interpretation Act 1960 (C.A. 4), contained in Vol. 1 Acts of Ghana (Cumulative Binder Service); hereinafter cited as C.A. 4. The Act was passed by the same Constituent Assembly that passed the Republican Constitution into law.

he intended to convey by the laying down of these “formal principles” may be gleaned from the use of such loaded expressions as “they (the words) mean what they say and not what people would like them to mean” and “twisted into new meanings by ‘ interpretation.’”

At the time Bennion’s book was written, Article 13 of the Constitution had just been ruled upon by the Supreme Court of Ghana,<sup>7</sup> which had held, *inter alia*, that the declaration of fundamental rights and freedoms required by that Article to be made by the President on assumption of office did not create a legal obligation binding on the President. In that case, counsel for the appellants, detainees under the Preventive Detention Act of 1958, had argued, *inter alia*, that though set forth in the form of a declaration of adherence rather than as guarantees and prohibitions expressed to be binding on all organs of government, the principles were to be construed as having legal effect in the sense of being justiciable. To construe them otherwise, continued counsel, would be to openly admit that the people of Ghana had been tricked into adopting a Constitution which contained no guarantees of fundamental human rights and freedoms.

This is the point at which Bennion’s objection to “twisting” the words of the Constitution into new meanings receives significance. He is saying, in effect, that fidelity to the express provisions of the Constitution should transcend all considerations of what is desirable. So that where the Constitution expressly provides for a “declaration of principles” it is not open to anyone to read into this a “bill of rights,” expressly guaranteed, for clearly a “declaration” is not synonymous with a “guarantee,” nor does the latter necessarily flow from the former.

But surely it is only through the process of interpretation by some authorised governmental institution, in this case the Supreme Court of Ghana, that a “declaration” of adherence to certain principles can be decisively said to be a different thing from a “guarantee.” This is so because the words used in legal documents such as the Constitution of Ghana rarely have a “fixed and definite meaning” in spite of Bennion’s views to the contrary. Surely, the intellectual task called for here is not the bland statement that “the words mean what they say,” but rather a genuine effort at the formulation of intelligible criteria by which the meaning of the words is to be elicited? “Justice,” to take a crucial example, is one of the pivotal words used in the Constitution. Yet, out of the extensive scholastic inquiry by

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<sup>7</sup> Civil Appeal No. 42/61. The Supreme Court’s judgment is reprinted in (1961) 3 *International Commission of Jurists J.*, pp. 86-99 as Appendix II The case is considered more fully later.

linguistic philosophers and others from the heyday of Greek civilisation to our own times into the meaning and attributes of that word, the only sure conclusion one can draw is that the word has no “fixed and definite meaning.”<sup>8</sup> General usage of the word is no more helpful in this respect. It may be that Plato’s discussion of “justice” was premised upon the fallacy, repeated since his time, that abstract words like “justice” possess an existence independent of the social milieu within which they operate as symbols of communication.<sup>9</sup> But, to point out this ancient and persistent error is merely to reveal the confusion of thought liable to be attendant on the practice of placing too much store on words when used to express general “truths” or beliefs.

Quite often, to be sure, it is easy to determine the meaning of a general word used in a statute or elsewhere from its paradigm or standard usage. But once we move away from the paradigm case to penumbral situations, infinite problems of interpretation present themselves. Professor Hart<sup>10</sup> provides an admirable example of this type of penumbral situation: A statute prohibits the taking of a *vehicle* into a public park. A motor-car is easily seen as being covered by the statute. We can be sure that if Professor Hart had been writing in eighteenth-century England, he would doubtless have picked on a stage coach as being clearly covered by his hypothetical statute. But, to come back to our own time: does the statute clearly indicate whether bicycles, aeroplanes, roller-skates or toy-cars are also covered? To meet the problem of the penumbra thus posed, Professor Hart has this to say:

“When the unenvisaged (open-texture) case does arise, we confront the issues at stake and can settle the question by choosing between the competing interests in the way that best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word.”<sup>11</sup>

Such an answer, however, would be of little help to a court puzzled as to the applicability of the statute to bicycles, aeroplanes or roller-skates, for it merely counsels a choice between policy alternatives while offering no criterion for the exercise of choice except “in the way which best satisfies us.” If it be supposed, as suggested by Professor Hart,<sup>12</sup> that the policy behind the statute is the maintenance of “peace and quiet” in the park, then it is perhaps worth

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<sup>8</sup> For early use of the philosophical method of linguistic analysis to probe the meaning of the concept “justice,” see Aristotle, *Nicomachean Ethics* (Mckean Trans.), pp. 308-543 (1947); Plato, *The Republic*, Bk. I, Chaps. 1-4, and Bk. II, Chap. 5. (Cornfield Trans.) (Oxford, 1945).

<sup>9</sup> See Williams, “Language and the Law, I” (1945) 61 L.Q.R. 71 at pp. 81 and 83.

<sup>10</sup> Hart, *The Concept of Law*, p. 123 (Oxford, 1961).

<sup>11</sup> *Ibid.* p. 126.

<sup>12</sup> *Ibid.* For a fuller discussion of the penumbral problem involved in the quoted hypothetical statute, see Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv.L.R. 593.

observing that it would be perfectly consistent with the policy of the statute to hold that a noisy roller-skate is within the purview of the statute as it would be to hold that a motor-car noiselessly pushed through the park is outside the purview of the statute. Yet, there was no initial difficulty in deciding that *all* cars were within the coverage of the statute. It thus becomes apparent that the formula of “choosing between competing interests in the way which best satisfies us” adds little to our understanding of the meaning of a general word like “vehicle” when used in a statute. But it is the virtue of Professor Hart’s answer that it clearly brings out the fact that more is involved in deciding the meaning of the words used in a statute in order to apply them to concrete situations than just “choosing between competing interests.” What is more significant, Professor Hart is here describing an important function of a judge—the legislative function— whose frank admission has, since Blackstone, proved anathema to adherents of the myth, now almost completely exploded, that judges never make law, their sole function being to administer the law.<sup>13</sup>

Another writer,<sup>14</sup> addressing himself to the same problem of the penumbra, concludes that “since words have a penumbra of uncertainty, marginal cases are bound to occur, and continues:” If marginal cases must occur, the function of the judge in adjudicating upon them must be legislative. The distinction between the mechanical administration of fixed rules and free judicial discretion is thus a matter of degree, not the sharp distinction that it is sometimes assumed to be.” Then, in an effort to delimit the legislative powers of a judge: “A judge has a discretion to include a flying-boat within a rule as to ships or vessels; he has no discretion to include a motor-car within such a rule.” One salutary result of the foregoing approach to the penumbral problem is that it accentuates the need for the judge to pay due regard to legislative purpose without limiting the task of interpretation to the ascertainment of that purpose.

Blackstone once castigated as being “[c]ontrary to all true forms

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<sup>13</sup> See Blackstone’s *Commentaries*, Vol. I, 49 (Lewis’s ed., 1897). The theory that judges only administer law really dies hard. Thus, as late as 1951, at the Seventh Legal Convention of the Law Council of Australia, Viscount Jowitt, one of the Law Lords of the House of Lords of England, had this to say:

“We are really no longer in the position of Lord Mansfield who used to consider a problem and expound it *aequa et bona*—what the law ought to be. ...

“I do most humbly suggest to some of the speakers today that the problem is not to consider what social and political conditions of today require; that is to confuse the task of the lawyer with the task of the legislator.” (1951-52) 25 Aust.LJ. 233 at p. 296

<sup>14</sup> Williams, “Language and the Law, III” (1945) 61 L.Q.R. 293 at pp. 302-303.

of reasoning “the Roman practice of sending laws of doubtful meaning to the Emperor, who then handed down his interpretation ;in a “rescript,” which became, like the edicts, law.<sup>15</sup> In place of this early and somewhat arbitrary form of statutory interpretation the great commentator suggested that since the object of statutory interpretation is to discover “the will of the legislature . . .,” “the fairest and . . . most rational way of discovering this intention is by ‘ exploring \* the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law.”<sup>16</sup> The point of interest about the Romans’ and Blackstone’s approaches is that they both proceed from the same premise, namely, that the intention of the legislator who made the law in question unfailingly yields the true meaning of that law. The same search for the intention of the legislator is seen in Chief Justice Hengham’s remarks to counsel arguing about the meaning of an Act of Parliament in 1305: “Do not gloss the Statute; we understand it better than you do for we made it.”<sup>17</sup> To this day, much of the judicial interpretation of statutes actually undertaken as well as juristic inquiries by scholars into the problem of the interpretation of statutes has proceeded under the basic assumption that the object of the exercise is to discover the intention of the legislator. And the first two “principles” of Bennion’s under discussion would seem to indicate that he, too, opts for this line of reasoning; for otherwise why the assertion that “if they (the words of the Constitution) prove unsuitable they will be altered formally by Parliament”?

But contrary and weighty opinions have also been expressed. Thus, Lord Chancellor Halsbury wrote in an opinion in 1902:

“I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact had been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done.”<sup>18</sup>

And one recent writer, going even further than Lord Halsbury, almost sermonises in telling tones:

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<sup>15</sup> *Op. cit., supra*, note 13, p. 49.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Per* Hengham CJ. in *Aumeye v. Anon*, Y.B. 33 and 35 Ed. 1, 79 at p. 82 (Harwood ed., 1879). Quoted by Frankfurter J. at (1950) 3 Vand.L.R. 365 at p. 366

<sup>18</sup> *Hilder v. Dexter* [1902] A.C. 474 at p. 477. Quoted in Frankfurter, *op. cit., supra* note 17, p. 366

“It is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head.”<sup>19</sup>

Now, the insistence on seeking the intent of the legislator on the one hand and the denial on the other hand that seeking the legislator’s intent is at all possible, or of any value, spring from two different ways of looking at the meaning of words used in a statute or elsewhere. The intention-seekers are in revolt against the medieval, widely-discredited notion that words have only one meaning. They maintain that words in themselves have no *meaning*, and that we can only give them meaning by looking into the author’s intention and behind the words themselves. This is a serious form of illusion, perhaps worse than the other illusion that words have only one meaning,<sup>20</sup> for surely if words in themselves have no meaning, then there is no basis of communication upon which to begin any inquiry into the meaning of any words, which *ex hypothesi*, must be meaningless.

On the other hand, the anti-intention theorists sometimes argue in tones which seem to indicate that words always have a “plain” or “ordinary” or “natural” meaning which is not to be disturbed by interpretation. An extreme formulation has been thus tersely expressed: “It is not permissible to interpret what has no need of interpretation.”<sup>21</sup> Essentially the same kind of sentiment is expressed in the opinion of the International Court of Justice in the Second Admissions Case:

“When the court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other. In the present case the court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them.”<sup>22</sup>

The weakness of this position is that it views the task of interpretation as consisting in a mechanistic, almost automatic intellectual exercise, thereby failing to provide any answers in those cases when, by the very fact that litigation arises on the meaning of a statute, the meaning is not “plain.” It may be, to be sure, that in such cases there will be tacit, unacknowledged reliance on one or other of the

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<sup>19</sup> Curtis, “A Better Theory of Legal Interpretation” (1950) 3 VandJLR. 407 at p. 409.

<sup>20</sup> See *ibid.* p. 407-409.

<sup>21</sup> Vattel, *The Law of Nations* (Fenwick trans. text of 1758), Carnegie Institution 199 (1916); or, “Research in International Law, Draft Convention on the Law of Treaties,” A.J.I.L., Vol. 29, Supp.Art. 19, p. 940.

<sup>22</sup> See, “Competence of the General Assembly for the Admission of a State to the United Nations,” 1950 I.C.J. Reports 8.

technical canons of interpretation.<sup>23</sup> But, these canons have severe limitations,<sup>24</sup> the most obvious being that they are often contradictory of one another, so that choice, if any, among them, becomes arbitrary. A famous indictment of the canons of interpretation runs thus:

“Formal maxims do not decide concrete cases; no one of the so-called rules of interpretation is so inexorable that it actually dominates the process of giving meaning to an instrument. Indeed, it is easy to see that in the application of the familiar canons one is often in competition with the other. It is believed that the matter is put in its proper light if it is realised that in the actual order of judicial decision the conclusion is reached before the maxim is invoked. A rule of construction is a way of stating the result rather than a way of arriving at the result. By a subtle process which may take many competing considerations into account, the mind comes to rest at a conclusion which seems proper in the case. . . . The rule is then invoked to support the conclusion.”<sup>25</sup>

It seems apposite to observe at this juncture that such cynicism towards the canons of interpretation is a healthy sign only in so far as it mitigates the tendency to reduce the task of interpretation to a simple mechanical routine. That task is necessarily complex, calling as it does for a realistic identification of the content of those communications (statutes, treaties, constitutions) through a systematic, comprehensive examination of all the relevant features of that context along with a deliberate appraisal of their significance. Such relevant features will normally include some of the canons, such as the strong authoritative effect of judicial interpretative opinions that the legislature has acquiesced in by lapse of time.<sup>26</sup> But they need not, and should not, be limited to these canons.

If, however, the cynics *vis-à-vis* canons imply the dangerous conclusion that a court faced with the task of interpretation is free to

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<sup>23</sup> For a comprehensive classification and critical appraisal of the canons of interpretation, see Johnstone, “An Evaluation of the Rules of Statutory Interpretation” (1954) 3 U.Kans.L.R. 1. Prof. Johnstone classifies the “canons” into 3 broad divisions, giving examples from U.S. experience:

- (a) Those concerned with the words of a statute; (e.g., *Ejusdem generis, noscitur a sociis*; highly ambiguous statutes are invalid; only limited effect is given to titles, preambles, and punctuation marks).
- (b) Those concerned with the relation of the words in a statute to outside materials; (e.g., plain meaning rule; the strong authoritative effect of judicial interpretative opinions that the legislature has acquiesced in by lapse of time without action; when two statutes are in conflict, the latest in time prevails).
- (c) Scattering of rules not falling under either of the above categories; (e.g., the strict interpretation of some kinds of statutes and liberal interpretation of others; presumption against retroactive operation of statutes).

<sup>24</sup> *Ibid.* 5 at pp. 7-10. See also Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed” (1950) 3 Vand.L.R. 395 at pp. 399-406. Curtis, *op.cit., supra*, note 19, pp. 409-415.

<sup>25</sup> Fairman, “The Interpretation of Treaties” (1934) 20 Trans.Grot.Soc. 123. The same position is taken, in the field of international law, by Sohwarzenberger, *International Law*, Vol. I, pp. 488-497 (3rd ed., 1957).

<sup>26</sup> See Johnstone, *op. cit., supra*, note 23, under category (b).

decide in a way that “seems proper in the case,” thus substituting its discretion for that of the legislature, then we need to remind ourselves of Bennion’s warning that “the words ... do not mean what people would like them to mean.” In other words, the task of statutory interpretation is not capable of satisfactory execution by the simple resort to the “plain meaning” canon. Nor can it be satisfactorily executed by merely throwing overboard, as if in sheer desperation, all the available disciplinary canons, and deciding on the subjective basis of what “seems proper in the case.” It requires, it must be emphasised, a disciplined, objective intellectual exercise aimed at discovering what meaning must be ascribed, in the light of all the relevant features of the context.

In the specific instance of the Republican Constitution of Ghana, the relevant features of the context are many, and not just the “plain meaning” of the words used. The starting point is the Interpretation Act of 1960, an Act which is expressed to “provide for the interpretation of the Constitution and other enactments.”<sup>27</sup> Next, the Act is to be read together with an official Memorandum<sup>28</sup> published with the Bill which introduced the Act. The Memorandum explains the purpose of the Act as being “to facilitate the task of construing legislation in order to ascertain the true intention of Parliament.” The explanation then continues:

“It follows that an Interpretation Act is not the master but the servant of the legislature. As the will of Parliament is supreme, so no Parliament is bound by the Acts of any of its predecessors. A rule of construction laid down by an Interpretation Act may therefore be freely set aside or modified in any later Act if it is inapt for the particular purpose and Parliament wishes to express some contrary intention.”<sup>29</sup>

Earlier, there is a clear articulation of the basic philosophy underlying interpretation of the Constitution and all statutes in terms which deserve full quotation:

“Subject only to the Constitution, the will of Parliament is supreme. This will is expressed in the form of an Act of Parliament, and it becomes the duty of every citizen and every organ of society to give effect to it. The object of all statutory interpretation is to ascertain what Parliament intends by its Acts. This involves two considerations: first, the meaning of the words used in the enactment and, secondly, the effect to be given to them. The meaning of the words is a question of fact. A word may be used in its natural and ordinary meaning or it may be used in a technical sense which may be given

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<sup>27</sup> C.A., 4. The quoted words form the Short Title of the Act.

<sup>28</sup> Contained in Vol. I, Acts of Ghana (Cumulative Binder Service), immediately preceding “The Constitution.”

<sup>29</sup> *Ibid.* p. i.

to it by statute or be indicated by the context. The effect of the words used is a question of law, to be determined according to certain principles, known as rules of construction. Strictly speaking, rules of construction may be availed of only in cases of ambiguity, or where there has been a failure to provide for every contingency or to foresee all the implications that may arise from the words used. “In such cases the intention of Parliament has to be ascertained, not alone from the express terms of the Act but by inference founded on those legal principles or rules of construction. Many of these rules have been evolved by the courts here and elsewhere in the course of time: some are no more than applications of rules of logic. Many rules have been laid down by Parliament itself in the form of Acts of Interpretation. In modern Interpretation Acts it is usual to include, also, the principal judge-made rules of construction other than those which have long since gained universal acceptance or which may be regarded as self-evident.”<sup>30</sup>

In order to remove any doubt as to the persuasive authority of the contents of the Memorandum for the courts, section 19 of the Interpretation Act 1960 provides as follows:

“(1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of inquiry into the state of the law, *to any memorandum published by authority in reference to the enactment or to the Bill for the enactment* and to any papers laid before the National Assembly in reference to it, *but not to the debates in the Assembly*. (2) The aids to construction referred to in this section are in addition to any other accepted aid.”<sup>31</sup>

It is clear from the foregoing statutory provisions and official pronouncements that in interpreting the Constitution of Ghana, the first and cardinal rule is to look at the words themselves as representing the intention of Parliament. It is equally clear that such intention cannot be the collective intention of Parliament in the sense of what actually was in the minds of the various members of Parliament when they voted for a particular measure. A minor reason for this statement, in the Ghanaian context, is that, as seen above, the debates of the legislature are excluded as aids to construction. More importantly and more generally, it is never possible, in practical terms, to elicit the collective intention of any legislature.<sup>32</sup> Truly has it been said that “the devil himself knoweth not the mind of man” ; and it is certainly incontrovertible that even of those members of a legislature who vote for a particular Act, it is always possible that there were as many, perhaps more, motivating factors (that is, intentions) for the affirmative vote. Indeed, even if these different intentions could be

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<sup>30</sup> *Ibid.*

<sup>31</sup> C.A. 4, s. 19. The italics are the author’s.

<sup>32</sup> See Maodonald, “The Position of Statutory Construction in Present Day Law Practice” (1950) 3 Vand.LJR. 369 at p. 371.

collected and generically classified, it is inconceivable that they would be capable of resolving any ambiguity.<sup>33</sup> Thus, when it is said that in interpreting the Constitution it is the duty of the court to discover the intention of Parliament, this can only mean that the court is thereby called upon to give meaning to the expressed words.<sup>34</sup>

It thus becomes a matter of sorry comment that Bennion's first two "principles" are hopelessly inadequate as intellectual tools for undertaking the crucial task of giving meaning to the expressed words of the Constitution. In spite of the self-assured manner in which they are expressed, the "principles" stop short of offering any guide to laymen and authoritative decision-makers alike as to the modalities by which to give a determinate, authoritative form to the words. They constitute, at best, an unimaginative reformulation of the "plain meaning" rule, and, at worst, a counsel of despair; for they amount to nothing more than this: that the words used have a plain meaning in their context, and if this plain meaning, which is easily discoverable (presumably by reference to the Interpretation Act and the other rules of constructions mentioned therein), proves "unsuitable" (one may ask: "unsuitable in what sense and to whom?") then an Act of Parliament or a referendum is to be resorted to by way of providing a new plain meaning.

The above remarks are partially predicated upon the proposition that words are inherently ambiguous, though it must be allowed that in practice the degree of ambiguity, observable only in the penumbral areas, is slight. If this were not so, intelligible communication among human beings would be impossible. In the result, what is needed is a pragmatic, common-sense approach to the "plain-meaning" rule—a realisation that nothing can be gained by sticking with unmitigated consistency to a sterile literalness in interpreting the words of the Constitution, or of any statute, for that matter.<sup>35</sup> Rather, the words

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<sup>33</sup> See Johnstone, *op. cit.*, *supra*, note 23, pp. 13-15.

<sup>34</sup> For a similar conclusion in respect of the judge's interpretative task in the United Kingdom, see Williams, "Language and the Law, II" (1945) 61 L.Q.R. 179 at p. 191.

<sup>35</sup> See Alien, *Law in the Making* (5th ed., 1951), pp. 482-487, for a severe criticism of the "plain-meaning" rule on the ground that there can be no such thing as the "plain-meaning" of a statutory provision. Also, Williams, "Language and the Law, IV" (1945) 61 L.Q.R. 384 at pp. 384-386 states the two senses in which, scientifically speaking, words can be said to have a "proper" meaning, namely:

(1) The *commonly-accepted* meaning, which need not be current among the whole community but may be confined to a section, e.g., lawyers, educated men, engineers, businessmen, etc.

(2) The *assigned* meaning, ascribed to a word by a particular person or group of persons, adding (at p. 385) that any other use of the expression "proper meaning" is "emotive," i.e., expresses what the user thinks the *meaning* of the word in question ought to be. Then, at p. 368, the following caustic remark appears: "The worst form of the proper meaning error is the supposition that words don't merely have proper meanings but *single* 'proper meanings.'" (Author's italics.)

are to be taken in their entirety as forming an organic whole. The “plain-meaning” rule, then, is not to be considered as a fetish, to be brandished before decision-makers called upon to decide upon the meaning of the words, but rather as a signpost which declares just this: that when the words of the Constitution are reasonably certain, they are to be given effect to.<sup>36</sup>

But there are certainly going to be cases where it is not reasonably certain what the words mean or whether they apply to a given situation. This truism appears to be the rationale for that provision of the Ghana Republican Constitution which vests in the Supreme Court “original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution.”<sup>37</sup> It also forms at least part of the reasons which led the Supreme Court of the United States to assume the power of judicial review over Congressional enactments, even though, unlike that of Ghana, the Constitution of the United States was, and is, silent on the power of judicial review.<sup>38</sup> It is in these areas of uncertainty that the formulation of general principles or theories for the guidance of present and future decision-makers becomes a matter of cardinal importance.

## B. ON NEUTRAL PRINCIPLES OF INTERPRETATION

The question thus arises: By what principled criteria may the court’s discretion within the above-mentioned region of uncertainty be exercised? Clearly, Bennion’s first two principles offer no answer to this crucial question. But efforts have been made elsewhere to discover answers to a similar question. Thus, in the United States, there has been a lively and scholarly debate which has centred over what has been termed “neutral principles.” One side of the debate is presented by the “neutralists,” to choose a convenient label, and their argument is as follows: That the opinions of the Supreme Court on constitutional matters must clearly be made to rest on reasoned elaboration of principles or standards which can be uniformly applied in all subsequent similar cases and not presented merely as decrees or *ipse dixits*.<sup>39</sup> This means, the argument continues, that the judges must

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<sup>36</sup> For a similar conclusion, see Johnstone, *op. cit.*, *supra*, note 23, p. 13. 31 38

<sup>37</sup> Constitution of Ghana, Art. 42 (2).

<sup>38</sup> For a lucid, modern critique of the reasoning of the Marshall Court in assuming the power of judicial review in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), see Bickel, *The Least Dangerous Branch* (1963), pp. 2-14.

<sup>39</sup> The first articulation of the neutralist position was by Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv.L.R. 1. But Prof. Wechsler’s views, originally delivered at Harvard as the Holmes Lectures for 1959, derived in part from Learned Hand’s Holmes Lectures of the previous year published in book form as Hand, *The Bill of Rights* (1960), in which the author had advocated (pp. 28-29) that the Supreme Court’s power of judicial review should be limited to a power to keep Government organs and officials within their constitutionally prescribed powers and not extended to review of the merits or substance of the prescribed powers. Other neutralists include: Griswold, “Of Time and Attitudes: Professor Hart and Judge Arnold” (1960) 74 Harv.L.R. 81; Hart, “Forward, The Time Chart of the Justice” (1959) 73 Harv.L.R. 84; Henkin, “Some Reflections on Current Constitutional Controversy” (1961) 109 U.Pa.L.R. 637.

assume a “neutral” frame of mind, expunging any predispositional or environmental influences that might lead them to decide on the basis either of the judges’ own values or policy preferences<sup>40</sup> or of some desirable social or political result. In this way, it is believed by the “neutralists” that crucial legal issues will not be missed or mishandled as has been the case in the past,<sup>41</sup> and the decisions of the court will be offered “hope for survival.”<sup>42</sup> If the neutralists stopped at this point, their position would lend itself to relatively easy analysis. It would then be possible to say that they advocate an “apolitical, logic-oriented, law-discovering judiciary.”<sup>43</sup> But Professor Wechsler, who is the standard-bearer of the neutralists, has written that value-judgments may properly form a part of the neutral adjudication which he advocates.<sup>44</sup> The extremely limited effect of this concession is, however, evident from his criticism of decisions<sup>45</sup>

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<sup>40</sup> Pollak, “Racial Discrimination and Judicial Integrity” (1959) 108 U.Pa.L.R. 1, 33 maintains that judicial neutrality “does not preclude the disciplined exercise by a Supreme Court Justice of that Justice’s individual and strongly-held philosophy.”

<sup>41</sup> Wechsler, *op. cit.*, *supra*, note 39, pp. 28-34. See also Hart, *op. cit.*, *supra*, note 39, pp. 100, 121.

<sup>42</sup> Henkin, *op. cit.*, *supra*, note 39, p. 660 states: “Neutral principles need not be eternal, but they ought to offer hope for survival.”

<sup>43</sup> This is the conclusion reached by a political scientist as to the position taken by the neutralists. See Shapiro, “The Supreme Court and Constitutional Adjudication : Of Politics and Neutral Principles” (1963) 31 Geo.Wash.L.R. 587 at p. 598.

<sup>44</sup> Wechsler, *Principles, Politics and Fundamental Law* (1961), pp. xih’-xiv (Intro.). This work reduces into book form, with additions, Wechsler, *op. cit.*, *supra*, note 39.

<sup>45</sup> The following three major decisions form the special targets for Prof. Wechsler’s theory of neutral principles:

(1) *Shelley v. Kraemer*, 334 U.S. 1 (1948): Held, that it is a violation of the “equal protection” clause of the 14th Amendment of the U.S. Constitution for state courts to compel negroes to vacate homes sold to them in contravention of restrictive covenants against selling to negroes. Wechsler argues that since the 14th Amendment covers only state action, and since private discrimination contained in a restrictive covenant is not state action (both of which premises were accepted by the court), it was illogical and contrary to principle for the court to infer state action merely because a state court enforces the agreement.

(2) *Smith v. Alwright*, 321 U.S. 649 (1944): Held, that it is a violation of the 15th Amendment (which forbids discrimination in voting rights “on account of race, color or previous condition of servitude”) for a private organisation (The Texas Democratic Party) to deny equal voting rights to negroes at the primary balloting.

Wechsler’s criticism here is as in (1) above, namely, that no state action is logically involved here, whereas the 15th Amendment, like the 14th, contemplates state action.

(3) *Brown v. Board of Education*, 347 U.S. 483 (1954): Held, that it is a violation of the “equal protection” clause of the 14th Amendment for a state to provide “equal, but separate” educational facilities for whites on the one hand and negroes on the other. Wechsler (at p. 34) criticises this decision on the curious ground that the court missed the legal issue involved, which was not one of discrimination but of the claim of a right of association (put forward by negroes) as against a claim of a right of non-association (by the whites).

See Emerson, “Freedom of Association and Freedom of Expression” (Nov. 1964) 74 Yale L.J. 1, 35, where after subjecting the allegation of a *right of association* as a separate Constitutional dogma to close examination, the following general conclusion is reached:

“As a basic principle of a democratic society freedom of association is fundamental. But the new constitutional doctrine has proved of limited value at best, and indeed has tended to *obscure the real issues*. Questions of associational rights must be framed in terms of other constitutional doctrines.” (Emphasis added.)

which he considers as offering “the best chance of making an enduring contribution to the quality of our society of any that I know in recent years.”<sup>46</sup> “His criticism is based on the ground that as the decisions are not rested on neutral principles, they are not “entitled to approval in the only terms that I acknowledge to be relevant to a decision of the courts.”<sup>47</sup> Professor Pollak<sup>48</sup> has rightly doubted the genuineness of Professor Wechsler’s stated preparedness to include considerations of a decision’s contribution to the quality of a society in the latter’s scheme of “neutral principles.”

As against the neutralist position of Professor Wechsler and others, the anti-neutralists, as we may call them, have sought to bring enlightenment to constitutional adjudication in two directions. First, it is argued that “neutral principles” in the sense of an “apolitical, logic-oriented, law-discovering” judicial process, are in practice hardly ever attainable.<sup>49</sup> Secondly, it is recommended that in adjudicating on constitutional issues the court must view as a relevant consideration the social results of their decisions.<sup>50</sup> These two main propositions are reached as a result of several collateral arguments, namely:

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<sup>46</sup> Wechsler, *op. cit. supra*, note 39, p. 27.

<sup>47</sup> *Ibid*

<sup>48</sup> Pollak, “Constitutional Adjudication: Relative or Absolute Neutrality” (1962) 11 J.Pub.L. 48 at p. 54 quotes a letter written to him by Prof. Wechsler, in which the latter denies posing an antithesis between a decision’s “making an enduring contribution to the quality of our society” and its “resting on neutral principles.” Prof. Wechsler’s letter continues: “What I did say is that it is not enough that a decision makes such a contribution unless it also rests on neutral principles, i.e., was not merely an *ad hoc* disposition of its immediate problem unrationalized by a generalization susceptible of application across the board.”

To which Prof. Pollak replies (*ibid.* p. 61): “[Apparently (Prof. Wechsler) would permit his model judge to consider the ‘contribution to the quality of our society’ which might ensue from one or another constitutional choice. But his judge’s estimate of the likely impact on American life of a proposed constitutional decision remains a thing apart from the competing constitutional principles whose neutral accommodation yields one or another constitutional result.” Thus, there is a fundamental cleavage in the thought-processes of the two Professors—a cleavage which puts them on opposite sides of the controversy about “neutral principles.”

<sup>49</sup> This conclusion has been reached by the following, among others: Miller and Howell, “The Myth of Neutrality in Constitutional Adjudication” (1960) 27 U.Chi.L.R. 661; Arnold, “Professor Hart’s Theology” (1960) 73 Harv.L.R. 1298; Miller, “A Note on the Criticism of Supreme Court Decisions” (1961) 10 J.Pub.L. 139; Miller, “Notes on the Concept of the Living Constitution” (1963)

<sup>50</sup> Among holders of this view are Pollak, *op. cit. supra*, notes 40 and 48; Wright, “The Supreme Court Cannot be Neutral” (1961) 40 Texas L.R. 599; Miller and Howell, *op. cit. supra*, note 49; Mueller and Schwartz, “The Principle of Neutral Principles” (1960) 7 U.C.L.A. L.Rev. 571; Black, “The Lawfulness of the Segregation Decisions” (1960) 69 Yale L.J. 421; Bickel and Wellington, “Legislative Purpose and the Judicial Process: The Lincoln Mills Case” (1957) 71 Harv.L.R. 1.

(1) The cases that reach the Supreme Court are the “pathological,” “trouble,” or “no law” cases where the identification of an applicable legal principle is often impossible.<sup>51</sup> Indeed, the argument continues, since by assuming jurisdiction in the difficult cases the court puts itself in potential conflict with the legislature or other body whose act is under review, the court cannot be “neutral.”<sup>52</sup> In such cases, the court’s role is to choose between the competing interests.

(2) “[I]n an age of positive government,” the function of the Supreme Court “must be that of an active participant in government.”<sup>53</sup> As such, the court must be judged not by the internal logic and coherence of its opinions but, along with other branches of government, by the social results of such opinions.<sup>54</sup> (3) If the neutralists admit, as they do,<sup>55</sup> that the court must balance interests, then they are precluded from denying that the judge’s personal prejudices should in part condition his reasoning.<sup>56</sup> “Social interests,” unlike physical objects on a laboratory scale, “do not lend themselves to a single accepted standard of measure.”<sup>57</sup>

(4) Furthermore, “unless the judge has some pre-established hierarchy of values or social goals, some pre-established standards or relevance, how can he determine which characteristics of the interests before him to balance?”<sup>58</sup>

(5) If value judgments are thus inevitable, then surely it is better to face the problem and develop a system for the identification and promotion of preferred goal-values rather than retreat into a “fictitious neutrality.”<sup>59</sup>

One contributor to the debate has discovered the following points of agreement between the two schools of thought:

- (1) that the word “neutral” is not sufficiently precise;
- (2) that “standards” or “neutral” principles, if they exist, are notoriously hard to find;
- (3) that the judge is a balancer of interests;

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<sup>51</sup> Miller and Howell, *op. cit. supra*, note 49, p. 686; Mueller and Schwartz, *op. cit. supra*, note 50, p. 585; Wright, *op. cit. supra*, note 50, pp. 616-618.

<sup>52</sup> Mueller and Schwartz, *op. cit. supra*, note 50, p. 585.

<sup>53</sup> Miller and Howell, *op. cit. supra*, note 49, p. 689.

<sup>54</sup> *Ibid.*

<sup>55</sup> See Wechsler, *op. cit. supra*, note 39, pp. 15-16; Griswold, *op. cit. supra*, note 39, p. 93.

<sup>56</sup> Miller and Howell, *op. cit. supra*, note 49, p. 691.

<sup>57</sup> Shappiro, *op. cit. supra*, note 43, p. 595.

<sup>58</sup> *Ibid.*

<sup>59</sup> Miller and Howell, *op. cit. supra*, note 49, p. 689.

- (4) that carefully reasoned and fully articulated opinions are preferable to vague meanderings;  
(5) that the Supreme Court is in some sense political.<sup>60</sup>

He then suggests that the debate can, in the light of these points of agreement, be shifted to a new level, namely, the problem of “how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of ‘neutrality’ which are an important factor in our legal tradition and a principal source of the Supreme Court’s prestige.”<sup>61</sup> It is submitted that this attempt at synthesis in fact poses an antithesis to the neutralist thesis, unless by “neutrality” the learned author means something entirely different from the meaning which he adopts elsewhere, that is, an “apolitical, logic-oriented, law-discovering judiciary.” The same type of ambivalence would seem to characterise the author’s general thesis, namely, “that no matter what the vocabulary of the debate, the real issues are those concerning the politics of the Supreme Court, not the nature of law and judicial reasoning.”<sup>62</sup> Surely, the politics of the Supreme Court, essentially a judicial body, cannot be discussed except in terms of the nature of the *law* developed by that body and the reasoning behind such “*law-making*”?

The proposition that the judicial process, especially at its highest institutional level, operates within the social and political milieu of society is too plain to be denied by either the “neutralists” or the anti-neutralists. Thus, even Professor Hart, whose jurisprudential leanings are more to positivism than sociological jurisprudence,<sup>63</sup> has written, in a similar context:

“Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or ‘mechanical’ deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values . . .”<sup>64</sup>

Hence, there is always a need for relating processes of authoritative decision to more comprehensive social processes. But this does not justify the denial that the processes of authoritative decision-making by the judiciary are themselves judicial.

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<sup>60</sup> Shappiro, *op. cit. supra*, note 43, pp. 605-606.

<sup>61</sup> *Ibid.*, p. 606.

<sup>62</sup> *Ibid.*, p. 587.

<sup>63</sup> But see Hart, *op. cit. supra*, note 10, Preface, p. vii, where the author states that though the book is concerned with analysis, it is also offered “as an essay in descriptive sociology.”

<sup>64</sup> *Ibid.*, p. 200.

### C. CONSTITUTIONAL ADJUDICATION IN GHANA

It remains to consider the relevance of the debate over neutral principles to the specific context of Ghanaian constitutional adjudication. That relevance, it is believed, springs from the simple fact that, like the Constitution of the United States, the Ghanaian Constitution expresses the avowed political creed of a nation. This is not to gloss over the many differences of approach to the statement of the respective creeds.<sup>65</sup> It is merely to point to the similarity of the problem posed for both Supreme Courts, namely, whether or not the court's decisions should advance the political creed contained in the Constitution. On this issue, the President of Ghana had this to say on the occasion of the ceremonial opening of the Ghana Law School:

“Law, to be effective, must represent the will of the people and be so designed and *administered* as to forward the social purpose of the State. . . . The teaching of law is totally incomplete if it is not accompanied by a background of economic, social and political science, and even politics, science and technology . . . The law should be the legal expression of the political, economic and social conditions of the people and of their aims for progress.”<sup>66</sup>

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<sup>65</sup> Chief among these differences in approach may be noted the following:

(1) The “protection” of fundamental freedoms by the Constitution of Ghana in the form of a required Presidential Declaration, instead of a substantive guarantee of such freedoms in the form of a Bill of Rights as in the U.S. Constitution.

(2) The specific grant of the power of judicial review in Ghana as opposed to the mere inference of such power from the U.S. Constitution. The specific grant in the Ghana Constitution may be thought to limit the power of judicial review in the sense suggested for the U.S. by Judge Learned Hand (Hand, *The Bill of Rights* (1958), pp. 28-30), i.e., that the Supreme Court of the U.S. should limit its power of judicial review to keeping the various organs of government, really the legislature and the Executive, within their proper spheres of activity and desist from becoming “a third legislative chamber.” But there is authority for the proposition that the Ghana Supreme Court need not so limit itself, for the Interpretation Act of 1960 states (s. 10 (2) ) that where an enactment (including the Constitution—see s. 1 (a) of Interpretation Act) grants a power, “all such powers shall be deemed to be also given as are reasonably necessary” to enable the power to be exercised, “or are incidental” to the exercise of the power. It is, therefore, arguable that a power to declare an Act as having been enacted in excess of Parliament’s power includes a power to review the substance of the legislature’s actions (as opposed to the narrow authority to confine Parliament and other officials to their assigned areas of responsibility).

(3) The built-in system of “checks and balances” of the U.S. Constitution as opposed to the immense concentration of power in the Executive by the Ghana Constitution without any apparent checks. Perhaps the Ghanaian approach is explicable on the ground that the Constitution was framed at a time when the preservation of national frontiers and internal security under a strong leadership was seen as the guarantee of the survival of the new nation. On the other hand, the framers of the U.S. Constitution were sharply divided on the issue of a strong national Government on the one hand, and strong state Governments on the other. In the end, a compromise was reached by which the powers of government were distributed as between the national Government on the one hand and the state Governments on the other. It is believed that this factor, perhaps more than any other, accounts for the peculiarly bold activism of the U.S. Supreme Court in the field of judicial review.

<sup>66</sup> Speech delivered by Osagyefo Dr. Kwame Nkrumah at the Ghana Law School, Accra. Reprinted in December 1962-March 1963, *Review of Contemporary Law* at pp. 9, 10 and 14.

From these authoritative observations as to the dynamic role of law in a changing society, it is evident that the Executive authority in Ghana under the Republican Constitution did not expect the Ghana Supreme Court to administer the law of the Constitution as though it consisted in a series of disembodied rules having “a predetermined meaning,” and existing in a social vacuum. The judges are urged to supplement their reading of the words of the Constitution with deductions of the social values enshrined therein. This necessarily involves the exercise of choice, for clearly the values to be advanced will not always be consistent with one another in individual situations. Often a choice will have to be made between advancing the value of “freedom and justice,” so far as it involves individual liberty or that of maintaining order or preventing the disintegration of society. In such delicate situations, it will not do to merely hide behind Bennion’s screen that “the words mean what they say, and not what people would like them to mean.” It is in this context that the call for “reasoned elaboration” in judicial opinions rather than “*ipse dixit*” needs to be heeded. But it is submitted that “reasoned elaboration” of opinions need not be expressed in terms of “general principles” capable of uniform application for all time. The very notion of such principles of uniform application ignores the plainly observable fact that all societies partake in a continuous process of change all the time. It is sufficient if judicial opinions at a high constitutional level are comprehensively reasoned so as to reflect a high degree of fidelity not only to the words of the written law of the land but also to the spirit of that law.<sup>67</sup> To this extent, judges cannot be neutral, though in exercising their judicial discretion they should be guided by principled criteria for choice.

Against this background of what appropriate conceptual tools may be employed in constitutional adjudication, we may with profit, consider one important aspect of the justly celebrated case of *Re Akoto*,<sup>68</sup> referred to earlier.

We return to the case not only because it is the only one in which the Supreme Court of Ghana has been called upon to decide on the constitutionality of an Act of Parliament but also because it is the only litigation in Ghana in which counsel on both sides, in written submissions, presented arguments on the nature of the Constitution

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<sup>67</sup> There has been judicial opinion in the U.S. to the effect that “the spirit of an instrument, especially of a constitution, is to be respected no less than its letter, yet the spirit is to be collected chiefly from its words.” *Per* Marshall C.J. in *Sturges v. Crowninshield*, 4 Wheat (U.S.) 122 at p. 202; 4 L.Ed. 529 at p. 550 (1819). For other similar statements, see *Fairbank v. United States*, 181 U.S. 283, 45 L.Ed. 862 (1901); *Fallbrook Irrigation District v. Bradley*, 164 US 112\* 41 L.Ed. 469 (1896).

<sup>68</sup> See note 7, *supra*.

itself and the manner in which it can be interpreted. The Act in question was the Preventive Detention Act 1958—an Act which empowers the President of Ghana to order the detention of any Ghanaian national if satisfied that the order is necessary to prevent such national from acting in a manner prejudicial to the defence of Ghana, the relations of Ghana with other countries, or the security of the state.<sup>69</sup>

Dr. J. B. Danquah, counsel for eight detainees under the Preventive Detention Act, maintained that the Act was unconstitutional, and therefore void, “because of a prima facie conflict with the terms of the Constitution.”<sup>70</sup> This general submission was buttressed by several separate but related arguments. First, it was urged upon the court that the Act contravenes certain provisions<sup>71</sup> of Article 13 of the Constitution, which requires the President on his assumption of office to declare his adherence to certain fundamental principles. In particular, counsel relied on the principle of free access to the courts of law as having been contravened by the Act. In answer to the Attorney-General’s argument that the “right of access to the courts” contained in Article 13 (1) must “mean the type of access which the petitioners are enjoying at this moment,” Dr. Danquah asked the following rhetorical question.

“Taken in conjunction with the letter *and* the spirit of the other clauses of Article 13, and with the letter and the spirit of the national motto of the Republic of Ghana, is it consonant with freedom and justice that ‘right of access to courts of law’ means, not that detainees be able to question their detention in the same way that a common criminal accused is able to question his indictment, but that such detainees are able to question the legality of the Act which deprives them of their full and fair hearing?”<sup>72</sup> He concluded that to interpret “right of access to the courts” in the way suggested by the Attorney-General would be “utterly out of keeping with traditions of customary statutory and constitutional interpretation, as well as with the entire spirit and intent of the Ghana Constitution of 1960.”<sup>73</sup>

The second collateral argument relied upon by counsel for the detainees was that the Act conflicts with the Rule of Law on which the Constitution is avowedly<sup>74</sup> based. The essence of their argument was that while the Rule of Law is a vague concept incapable of precise definition, even the most restrictive possible definition of that

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<sup>69</sup> See s. 2 of the Preventive Detention Act, 1958 (as continued by the Preventive Detention Act, 1964), hereinafter cited as P.D.A. By decree No. 30 issued on April 5, 1966, the National Liberation Council, the ruling authority in Ghana since February 24, 1966, repealed this Act.

<sup>70</sup> Civil Appeal No. 42/61, submissions on behalf of Appellants by Dr. J. B. Danquah, Solicitor for the Appellants, Accra, June 19, 1961, pp. 28-35.

<sup>71</sup> *Ibid.*, p. 28.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, p. 29. See also note 77, *infra*.

concept will “point to the essential inhumanity and arbitrariness of enactments such as the Preventive Detention Act 1958,” which grants the power to detain citizens for up to five years, “with ill-defined charges, vagueness and generality of expression in the detention order, with no opportunity to be heard before a disinterested tribunal, with no opportunity to cross-examine witnesses, or to ask for a production of evidence against them, . . . and without the safeguards normally given in this Republic to common, criminal accused. . . .”<sup>75</sup>

The third argument is based partly on the alleged inconsistency of the Act with the Rule of Law and on a provision<sup>76</sup> of the Act which states that a person detained under the Act must be given an opportunity to make “representations” to the President with respect to the order under which he is detained. The crux of the argument is that the President, by whom or in whose name the order to detain a person can be made, cannot be impartial in his consideration of the representations made by a detainee because the President, under the Act, will then be judge in his own cause—a notion utterly repugnant to a Constitution “firmly based upon the Rule of Law “and under which the President swears “to do right to all manner of people.”<sup>77</sup>

The fourth argument is that the requirement under the Act that the President should be *satisfied* that the order he makes is necessary for the attainment of stated objectives renders the power granted to the President “judicial” in character. Hence, to give such a power to the Executive branch of government is to unconstitutionally wrest the judicial function from the judiciary, on whom the Constitution confers all judicial powers. Alternatively, it was argued, “even if this judicial function can constitutionally be vested in the Executive branch, then it must nevertheless be performed in a judicial manner and not in an executive manner.”<sup>78</sup> In the words of counsel, “No matter how impartial or how judge-like is a President in the exercise of his powers of decision, he cannot by legislative grace or executive magic supply the bedrock requirements of the judicial process, namely, the right of an accused person to be confronted by witnesses against him, or the right of an accused to hear the evidence against him. This is not contemplated by the Act in so many words, but in order for this Act not to fall it must at least *recite* these principles.”<sup>79</sup>

The last two arguments on the contention that the Preventive

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<sup>75</sup> *Ibid.*

<sup>76</sup> P.D.A., s. 2 (2).

<sup>77</sup> Dr. Danquah in his submissions (at p. 29) quotes from a broadcast by the President on March 6, 1960, in which the Constitution was said to be “based firmly on the Rule of Law.” Art 12 of the Constitution requires the President to swear, on his installation, that he will “do right to all manner of people.”

<sup>78</sup> Dr. Danquah’s submissions, at pp. 30-31.

<sup>79</sup> *Ibid.*, at p. 32.

Detention Act is unconstitutional may conveniently be put down without elaboration. One is that the Constitution, which was adopted after the passing of the Act, must be taken to have impliedly repealed the Act because of the latter's repugnancy "to the whole spirit, tenor and letter of the Constitution. . . ." The other is that the Act is unconstitutional because the evil which it purports to cure, namely, the threat of political assassination and forcible overthrow of the government, is not reached by the remedy sought but rather tends to subvert the Constitution by closing avenues for the free expression of dissent and thus encouraging "the emergence of the political assassin."<sup>80</sup> In counsel's view, the Act might conceivably be valid if passed during an officially declared period of emergency, which was not the case here.

In defence of the constitutionality of the Preventive Detention Act, Mr. Geoffrey Bing, Q.C., the then Attorney-General of Ghana, made the following points: First, he argued that the issue of the constitutionality of the Act must be judged primarily by reference to Article 20, which defines and sets the boundaries of Parliament's law-making powers; that there is nothing in Article 20 which in terms or by necessary implication limits the power of Parliament to enact an Act of the type of the one in question.<sup>81</sup>

Secondly, no part of Article 13 could be said to be in conflict with the Act for the simple reason that that article does not create legally enforceable obligations, it being expressed entirely differently from the rest of the Constitution.<sup>82</sup> Thus, instead of the mandatory "shall" which is used in cases where the Constitution imposes legal obligations, the precatory "should" is used throughout Article 13. Further, the use in Article 13 of imprecise and vague concepts, such as "That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country," points irresistibly to the conclusion that that article does not form part of the general law of the Constitution. It merely provides a political yardstick by which to measure the conduct of the President during his incumbency. That is to say, the people's remedy, in the event of any departure from any of the principles set out in the declaration, is through the use of the ballot box, and not through the use of the courts.

Thirdly, though not legally enforceable, Article 13 is of enormous importance in that it "ensures fundamental rights in a much more satisfactory way than could be achieved by attempting to make them

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<sup>80</sup> *Ibid*, at pp. 33-35.

<sup>81</sup> Civil Appeal No. 42/61. Submissions on behalf of respondents by Mr. Geoffrey Bing, Q.C., Attorney-General for Ghana, Accra, June 12, 1961, at pp. 9-10.

<sup>82</sup> *Ibid*, at pp.10-11, 26-27.

legally enforceable through court action, a method that has . . . been in many cases singularly unsuccessful and has in fact resulted in the establishment of principles which are the direct opposite of those intended by the framers of the Constitution in question.”<sup>83</sup>

Fourthly, in any case the Act was not in conflict with the President’s declaration because: (a) if it is said that it is not in accordance with the will of the people, the answer is that the will of the people can only be determined by reference to the actions of their duly elected representatives, who had not only passed the Act in question, but had also continued it under the Constitution (Consequential Provisions) Act 1960<sup>84</sup>; (b) if it is said that the Act is contrary to the declaration that freedom and justice should be maintained, the answer is that “the maintenance of freedom and justice and indeed of the Constitution itself may require the taking of the most drastic steps against persons who are determined to overthrow it by force”<sup>85</sup>; (c) it could not be said that the detainees who were appellants in this case had been incarcerated because of their political leanings as prominent members of the then opposition party for it would be “entirely unrealistic” for the court to ignore the fact that the prime ministers of three former British colonies and the founder of the Indian Republic, Mahatma Ghandi, had been assassinated, and that a Commission of Enquiry had reported in Ghana that certain persons who were under detention under the Act at the time of this case were engaged in illegal acts, revolutionary in character<sup>86</sup>; (d) if it is said that the Act is contrary to that part of Article 13 which requires the President to declare that “no person should be deprived of freedom of religion or speech, or of the right to move and assemble without hindrance, or of the right of access to courts of law,” then it must also be remembered that this provision was made “subject to such restrictions as may be necessary for preserving public order, morality or health.”<sup>87</sup> So that, apart from the important consideration that by bringing this action petitioners were, in fact, enjoying their “right of access to the courts,” there is no guarantee in Article 13 that no one will be imprisoned or detained in accordance with the provisions of the law.

Lastly, the contention that in construing the Constitution for an alleged unconstitutionality regard must be had not only for the letter

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<sup>83</sup> *Ibid*, at pp. 11-12.

<sup>84</sup> *Ibid*, at p. 16.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*, at pp. 16-17. The reference to “Commission of Enquiry” is to the Report of Commission of Enquiry into the trial of Captain B. Awhaitey. Proceedings and Report: January to March 1959.

<sup>87</sup> *Ibid*, at p. 18.

but also for the spirit of the Constitution is answered by the assertion that the Constitution is in fact a “mechanistic “instrument,” as an examination of Article 20, and indeed of other articles will show.”<sup>88</sup> By mechanistic, the Attorney-General meant “that not only does the Constitution express general principles but it provides the detailed mechanism by which these principles are to be implemented.” In the absence of express provisions in the Constitution to the contrary, it could not be said that the Act would have been valid only if it was passed during a period of officially declared emergency.<sup>89</sup>

The comprehensive and exhaustive manner in which written arguments were presented to the court on the issue of the constitutionality of the Preventive Detention Act contrasts sharply with the somewhat tightly confined judgment of the Supreme Court on this issue, holding that the Act was not unconstitutional, and, therefore, valid. The enormously important question of the scope of judicial review over legislative action by Parliament was answered only by inference. Having first considered the effect of Article 20, which defines the powers of Parliament, the court observed that the limitations imposed by that article on legislative authority in no way forbid Parliament to pass an Act of the type in question in either peacetime or a period of emergency. In the end, the court relied entirely on the legal effect of Article 13 (1), as to which it agreed with the Attorney-General that it does not create any binding obligations but merely provides a political yardstick with which the electorate might measure the conduct of the President.<sup>90</sup>

In so doing, the court clearly opted for the “mechanistic” interpretation of the Constitution urged by the Attorney-General without in terms adopting the latter’s arguments in this regard. Thus a golden opportunity for the court to lay down the principled criteria upon which interpretation of the Constitution must proceed was missed. A written constitution, if it is to deserve its characterisation as the fundamental law, must be capable of organic growth. It is, by the very nature of things, impossible for any framers of any constitution, however far-sighted and wise these may be, to foresee all the possible future combination of facts which will require assessment in terms of the constitution. If, in view of this, it is said that the Constitution in question must be changed whenever a situation arises which cannot be mechanistically related to any provisions of the Constitution, then we thereby relegate the fundamental law to the status of an ordinary statute, whose provisions may be changed at any time to suit changing

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<sup>88</sup> *Ibid*, at p. 10.

<sup>89</sup> *Ibid*, at pp. 2-3.

<sup>90</sup> Cyclostyled Judgments of Supreme Court, Civil Appeal No. 42/61, pp. 12-13. Accra, August 28, 1961.

conditions. This is not to say that the general principles of a constitution cannot be altered or added to from time to time if the people so desire. It is to express regret for the court's abdication of its power to review an Act which, it was argued, goes against the spirit of the Constitution so far as this protected human rights and fundamental freedoms by merely issuing an "*ipse dixit*" to the effect that a certain part of the Constitution was not justiciable. As recent events in Ghana and elsewhere in Africa have shown, governmental action that offends the spirit and intent of the fundamental law tends to subvert that law by encouraging its forcible overthrow.

#### D. POPULAR SOVEREIGNTY AND THE SUPREMACY OF THE LAW OF THE CONSTITUTION

Bennion's third and fourth "principles" — (a) that the Constitution leaves no powers unallocated, and (b) that the Constitution overrides any inconsistent law whenever made—are plainly accurate restatements of well-known principles of constitutionalism. The latter principle is a "legitimate inference" from the nature of a written constitution and calls for no special comment except this: that this principle is violated when a constitution is mechanistically interpreted so as to allow an impugned enactment to stand even though its effect is repugnant to the spirit of the constitution.

The former is of such universal importance that it calls for some elaboration. The notion of popular sovereignty—that all the powers of government spring from the people—is nothing new. Its philosophical basis was first popularised by John Locke in the seventeenth century and refined and further popularised by Jean Jacques Rousseau in the next century.<sup>91</sup> Locke maintained, following earlier natural law philosophers,<sup>92</sup> that natural rights existed prior to government or law and that men came together to form communities only by means

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<sup>91</sup> See Robson, *Civilization and the Growth of Law: A study of the Relations between Men's ideas about the Universe and the Institutions of Law and Government*, pp. 260-264 (London, 1935).

<sup>92</sup> *Ibid.* pp. 258-259, 262. Among the philosophical precursors of Locke and Rousseau were (1) Francisco de Vitoria (c. 1483-1546), who had argued in a treatise, *De Indis Noviter Inventis—On the Indians Recently Discovered*, that the Law of Nature commands that the same rules of justice contained in the same rules of law should be applicable alike to the civilised nations of Europe and the primitive Indian tribes recently discovered on the continent of America; (2) Grotius, usually regarded as the Father of International Law, who had remarked "that human nature is the mother of natural law, and, through contractual relationships due to the exigencies of society, the great grandmother of civil law." (3) Dufendorf, who "insisted that one must consider the natural state, not of animals governed by mere impulse, but of man endowed with reason, the controller of all his other faculties, which even in the State of Nature has a common, steadfast, uniform standard to go by" quoting from Phillipson, *Great Jurists of the World*, pp. 314 and 324.

of a social compact which expressed the will of the majority.<sup>93</sup> Rousseau advanced the theory a step further, discovering in the pre-social condition of man “the splendour of a lost paradise,” in which men were absolutely free to do as they liked. The contract resulting in the transition from the pre-social to the social condition “reduces itself to the following terms: ‘ Each of us puts into the common pool, and under the sovereign control of the general will, his person and all his power. And we, as a community, take each member unto ourselves as an indivisible part of the whole.’”<sup>94</sup> Then, in the chapter headed “Concerning the Sovereign,”<sup>95</sup> Rousseau puts forth the seemingly surprising proposition: “Whoever refuses to obey the general will shall be constrained to do so by the entire body politic, which is only another way of saying that his fellows shall force him to be free.”<sup>96</sup> Unless we accept this proposition, it is urged upon us, the social pact would be “a meaningless formality.”

To be sure, few, if any, would now attempt the articulation of the notion of popular sovereignty in such metaphysical and transempirical terms without exposure to the charge of sounding essentially obscurantist. Yet, the immensely profound influence of Locke’s ideas in England and the American colonies,<sup>97</sup> and of Rousseau’s on the Continent of Europe,<sup>98</sup> derived precisely from the fact that the ideas

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<sup>93</sup> Locke, *Two Treatises on Civil Government*, Bk. 11, s. 96, has this to say: “For, when any number of men have, by the consent of every individual, made a community, they have made that community one body, which is only by the will and determination of the majority.” Quoted by Bennion, *op. cit. supra*, note 1, p. 112, n. 1.

<sup>94</sup> Rousseau, *The Social Contract*, Bk. I, Chap. VI (Kendall trans., 1945), p. 20.

<sup>95</sup> *Ibid.*, Bk. I, Chap. VII, p. 25.

<sup>96</sup> At first sight, it sounds absurd to talk of forcing a man to be free. On reflection, however, all that this means is that an agreement, *voluntarily* entered into, creates binding obligations, which are enforceable. To deny this commits one to the curious argument that the ability to break promises unilaterally is the concomitant of freedom.

<sup>97</sup> The influence of Locke’s ideas on English and American constitutional developments is freely admitted by the authorities. Of the more notable works in which we find such acknowledgment are: (1) Legislative Reference Service, Library of Congress, *The Constitution of the United States: Analysis and Interpretation*, p. xvi (Intro.), Corwin ed. (1952); (2) Alien, *Law and Orders*, p. 9 (London, 1956); (3) Hawgood, *Modern Constitutions Since 1787*, p. 18 (1939). The last-cited work points out the large extent to which the U.S. Federal Constitution itself drew upon the ideas enshrined in the Constitutions of the thirteen American colonies, framed after the Declaration of Independence in 1776 (at pp. 19-21), and borrowing freely from the ideas of Locke (popular sovereignty) and Montesquieu (separation of powers) 11 out of the 13 American colonies framed republican constitutions after the Declaration of Independence. The remaining two—Rhode Island and Connecticut—merely amended their colonial charters.

<sup>98</sup> Robson, *op. cit. supra*, note 91, p. 263, writes: “Only on a few rare occasions in history have the doctrines of an abstract theorist exercised the irresistible power over the thoughts and actions of men which the ideas of Rousseau acquired in the 18th century. To them must be ascribed, more than to any other single intellectual force, the tremendous explosion of the French Revolution, which transformed European society root and branch.” And see Rousseau, *op. cit. supra*, note 85, p. vii (Intro.).

were seen as offering *practical* solutions, justified by reason, to the problem of government. As one writer has put it:

“The power of the prince, the rights of the people, the privileges of the aristocracy, the position of the Church, the functions of government, the status of the peasant, the right of property, freedom of speech—all were referred to the pre-social condition in which man was originally supposed to live, the compact he made when agreeing to enter into community with his fellows, and the consequences which could be said to flow therefrom.”<sup>99 100</sup>

The validity of the concept of a pre-social condition of man at any point of time in his history is at least doubtful. That concept can certainly not be maintained in any modern society, including those in which Locke and Rousseau lived, where the individual is plainly born into a community without any volition on his part. In communities like Sweden, Britain, Soviet Russia, and to a limited extent the United States of America, to mention only a few, the concept constitutes a plain travesty of truth because society claims and effectively asserts a social interest in the individual right from his conception throughout his life.

Be that as it may, the basic notion of popular sovereignty articulated by Locke and Rousseau has found its way into several constitutions for the government of peoples the world over. The forms of expressing the concept have been, naturally enough, different; but the idea has always been the same. Thus, the preamble to the Constitution of the United States opens with the words “We the People . . .”; the Belgian Constitution of 1831, which has been described as “the pattern and the prototype for constitutional monarchies everywhere during the century following 1831,”<sup>101</sup> proclaims in the first article: “All powers emanate from the people” ; the Weimer Republican Constitution of August 11, 1919, proclaimed the sovereignty of the people in the preamble and the first article, which declared: “The German Reich is a Republic. The political power emanates from the people.”<sup>102</sup> In 1956, it was estimated that in “about 71 per cent, of the total number of nations . . . comprehending about 80 per cent, of the world’s total population this concept (that sovereignty rests with the people) appears in existing constitutional provisions.”<sup>103</sup> The percentage of nations whose constitutions embody the concept must now be rated much higher in view of the many nations that have emerged since 1956, especially in pre-colonial Africa and Asia, all of

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<sup>99</sup> Robson, *op. cit. supra*, note 91, p. 263.

<sup>100</sup> Footnote number not used. Subsequent restarted from 1 in original text. Here they are incremented by 100.

<sup>101</sup> Hawgood, *op. cit. supra*, note 97, p. 146.

<sup>102</sup> *Ibid.* p. 554.

<sup>103</sup> *Constitutions of Nations*, 2nd ed. (ed. Peaslee), Vol. I, p. 5 (1956), quoted by Bennion, *op. cit. supra*, note 1, p. 113, n. 1.

which proclaim the concept in their constitutions. Finally, Britain's better-known concept of parliamentary sovereignty is in fact based on popular sovereignty, which alone accounts for the conventionally required ministerial responsibility to Parliament, more specifically the House of Commons, which is entirely representative of the people.

Ghana's own formulation appears in the preamble to the Republican Constitution, which begins with the familiar "We the people," and in Article 1: "The powers of the State derive from the People, *as the source of power and guardians of the State*, by whom certain of those powers are now conferred on the Institutions established by this Constitution. . . ."<sup>104</sup> The concept of popular sovereignty is emphasised through the device of "entrenching" certain provisions of the Constitution with the result that those provisions are alterable only by way of a direct voting by the people on terms of universal adult suffrage in a referendum ordered by the President.<sup>105</sup> Finally, Article 13 requires the President to declare his adherence to certain fundamental principles, the first of which is: "That the powers of Government spring from the will of the people and should be exercised in accordance therewith."<sup>106</sup>

But it is certainly not enough for an instrument of government to proclaim a political creed of popular sovereignty unless this creed is buttressed by effective devices for meaningful implementation. In this connection it is of interest to note that several of the members of Parliament who spoke in Parliament on the 1964 amendments to the Constitution rested their observations on the conclusive character of the verdict of the people in the referendum preceding the adoption of the amendments.<sup>107</sup> Two examples from the proceedings will suffice. The Minister of Justice, addressing himself to Part I of the Bill which contained amendments affecting entrenched clauses, declared:

"Of the total electorate of 2,988,598, as many as 2,776,372, representing 92-89%, cast their votes at the referendum; out of this number, 2,773,920, representing 92-81% of the total electorate, recorded their

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<sup>104</sup> The italicised words were added by s. 1 of the Constitution (Amendment) Act, 1964 (hereinafter cited as Act 224). The added words may have been introduced by way of emphasis to the original idea that the people, being sovereign, are the source of all power. In moving the second reading of the Bill that introduced Act 224, the Minister of Justice described the first of five aims behind the introduction of the amendments thus: "to emphasize the fact that the powers of the state derive from the people as the source of power and the guardians of the state." (The Parliamentary Debates, Official Report, February 18, 1964, p. 1124).

<sup>105</sup> See the Constitution of Ghana, Art. 20 (2) and (4).

<sup>106</sup> It is submitted that the decision of the Ghana Supreme Court (*Re Akoto, supra*) that the principles to which the President must declare his adherence do not create legal obligations enforceable in the courts does not in any way derogate from the argument that Art. 13 contains some of the most important theoretical doctrines on which the Constitution is based.

<sup>107</sup> See The Parliamentary Debates, Official Report, February 18, 1964 (Accra).

votes in favour of the changes in the Constitution outlined in Part I of this Bill; and only 2,452, representing -08%, voted against these proposals. The overwhelming majority of the electors have, therefore, clearly and conclusively expressed their support for these amendments. This House, therefore, has a legal mandate from the people and, in fact, it is our duty to the people to pass the necessary legislation to bring these constitutional changes into effect.”<sup>108</sup>

Another speaker, who found it necessary in his remarks to criticise among other things “the high-handed measures used in governing this country” and “the system of giving responsible jobs to only C.P.P. members and none to non-party members,” nevertheless admitted this much:

“The referendum was held to determine the wishes of the people, and we are told that the majority of the electorate of this country voted a ‘ massive Yes ‘ to the Government proposals. It is futile, therefore, to say ‘ No’ to this Bill.”<sup>109</sup>

The most theoretically effective of the devices for implementing the ideology of popular sovereignty would seem to be the basic right to vote—a right which, happily, is firmly entrenched in Article 1 thus: “That, without distinction of sex, race, religion or political belief, every person who, being by law a citizen of Ghana, has attained the age of twenty-one years and is not disqualified by law on grounds of absence, infirmity of mind or criminality, shall be entitled to one vote, to be cast in freedom and secrecy.” It thus becomes plain that in order that the right to vote should be meaningful, it must, in practice, be exercised freely. This does not, and should not, preclude the education of the generality of the people as to the significance and implications of the alternative policy preferences presented to them. Indeed, it is the duty of every government, no matter what its form, to apprise the people of its policy preferences to the end that government might not be removed in its operations from the mainstream of the society it governs. It means, however, that where a person alleges, for example, that though he has exercised his democratic right to vote, he was prevented by some official or individual or organisation from doing so in “freedom and secrecy” he should have some means of vindicating his right. That is to say, since the right to vote in “freedom and secrecy” is guaranteed specifically by the Constitution, it should be capable of judicial adjudication aimed at discovering whether or not a citizen has been deprived of this right.

#### E. ON THE LEGITIMACY OF INFERENCES DRAWN FROM THE CONSTITUTION

The last two principles of Bennion’s may be taken together. They

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<sup>108</sup> *Ibid.* p. 1125.

<sup>109</sup> *Ibid.* p. 1140, per Mr. A. W. Ossei, U.P. member from Ahafo.

amount to this: that the Constitution must be read as a whole, so that “legitimate,” not illogical, inferences will be drawn by the reader. The author’s illustration of an illogical inference—one that draws “an inference from one provision which is inconsistent with the express words of another”—betrays his limited scope in offering these two “principles.” It would appear from what follows that what are stated as “formal principles” are, in fact, little more than an immediate response to some specific arguments offered in respect of certain provisions of the Constitution. Shortly before the writing of the work in which the “formal principles” appear, a somewhat less ambitious book had been published in which the joint authors had argued<sup>110</sup> that both Article 55 of the Constitution (which confers the power to make legislative instruments on the first President) and legislative instruments made pursuant to that article are of doubtful legal validity. Three reasons were offered for the expression of these doubts.

The first one<sup>111</sup> is an involved argument which seeks to establish that the Supreme Court, by virtue of its being invested with the judicial power of the state, has the implied power to invalidate a provision of the Constitution which was not referred to the people in the referendum which approved of the Draft Constitution. The argument is buttressed by invoking Articles 1 and 13, both of which declare that the powers of the state, that is, of the government, spring from the people. If this argument were valid, it would follow that the Constituent Assembly which drew up the Constitution would have no power to make provisions for such matters as the territories of Ghana, the mode of electing a President, the colours and designs of the National flag or indeed any other matter without express and specific authorisation from the people. Clearly, no country can ever meet such impossible requirements. The task of constitution-making everywhere has, naturally, been delegated by the people to a select few, and it is idle to object to the contents of the finished document, unless it sharply departs from the democratically expressed aspirations of the people. And, in such an event, the remedy can be nothing short of a complete rejection of the constitutional document. Legality surely reaches a low point of grotesqueness when stretched to the point of questioning the legality of part of the fundamental law, against which all other laws of the state are measured.

The second reason<sup>112</sup> for questioning the validity of Article 55 is

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<sup>110</sup> Rubin and Murray, *The Constitution and Government of Ghana*, pp. 30-32, 111-112, 2nd ed. (London, 1964).

<sup>111</sup> *Ibid.* pp. 30-32.

<sup>112</sup> *Ibid.* p. 111.

that to impliedly “amends” Article 20 (5), which; provides that no; person other than-Parliament shall have the power to make provisions having the force of law. The authors contend that; a specific provision in Article 20 excluding Article 55 from the operation of Article 20 (5.) would: have; removed doubt as to the validity, of Article: 55. But Article- 55 (1) in terms states that the contents of Article 55: are provided for “notwithstanding anything in Article Twenty of: the: Constitution,” thus achieving precisely the same result mentioned. Bennion rightly castigates this second-reason by. observing that it “reveals a basic misconception of the nature; of a legislative enactment, which must be read as a whole, and cannot be said to amend itself, although: some provision in it may override others.”<sup>113</sup>

The third reason<sup>114</sup> is confined to instruments made under Article 55 and argues that the court can strike down such an instrument on the- ground that it is not mentioned in Article 40, which enumerates the “laws of Ghana.” Here again Bennion points out, correctly-, that an instrument made pursuant to Article 55 is an enactment made under the authority of the Constituent Assembly which-passed the Constitution, and such enactments are mentioned: under Article 40 (c).

The-significant point about the doubts expressed as to the validity of Article 55 and the rebuttal of the grounds offered for such doubts is that all discussion on these matters proceed from the underlying assumption that legitimate inferences may be drawn by the reader from the Constitution; read as a whole. Hence, the “formal principles” articulating this assumption that underlies the Constitution cannot be questioned. But it must be emphasised—a point which is not made too clear by Bennion - that the drawing of an “illogical” or “misconceived” inference from the Constitution in no way disturbs the paramount principle that, legitimate inferences, even if proved wrong subsequently, may be drawn from the Constitution by the reader, and one may add, the court.<sup>115</sup>

## CONCLUSION

In this survey- and critical examination of’ the general principles underlying constitutional interpretation; with special reference to the now suspended Republican Constitution of Ghana; attempts have

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<sup>113</sup> Bennion, *op. cit. supra*) note 1, p. 136, n 1.

<sup>114</sup> Rubin and Murray, *op. cit. supra*, note 10, p. 112.

<sup>115</sup> It is of interest to note that the first-mentioned ground for doubting the validity of Art 55 is, ignored by Bennion in answering the doubts expressed about Art. 55. In spite of this omission, the wording of the “principle.’ about inferences; to be drawn from the Constitution suggests strongly that it was the expression’ of’ these specific doubts that drew the “principle” from Bennion.

been made to point out expressly and by implication the inadequacy— one may say without exaggeration, the total lack—of principled criteria for the determination of the meaning of the Constitution in Ghana. This nation, it is submitted, can ill-afford to shirk the task of consciously developing such\* principles. The greater part of this burden will surely fall on our higher courts of Law, which must regard themselves as the custodians of the high ideals for which the nation stands. But the burden will not be theirs alone. All of us—teachers, legal practitioners, litigants or potential litigants who claim that rights granted them under the Constitution have been infringed, indeed all citizens—must play our part in preserving the law of the Constitution so long as this law is of our own making. If this article helps to sharpen our awareness of some of the problems involved in this noble task, then it will have achieved one of its humblest; though crucial, objectives.