JUDICIAL REVIEW OF LEGISLATION IN GHANA SINCE INDEPENDENCE*

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GENERAL INTRODUCTION

At the outset, we may distinguish between two forms in which judicial review manifests itself. The first situation occurs in a constitutional scheme in which the courts have or exert the power to declare an enactment of the legislature contitutional. Usually its exercise is based on a written, rigid constitution, changeable, if at all, only through a complex process. The second type is where a court resorts to strict interpretation of a piece of legislation. That is to say the court, while professing to interpret the enactment, frustrates the legislature's intention! We shall be concerned in this article with only the former situation.

Judicial review of legislation is predicated on the acceptance of the primacy and inviolability of certain legal principles. It involves the creation of a hierarchy of laws and the conferment of the power to determine and to maintain that hierarchy. Thus the concept of judicial review stems from a belief in the rule of law; that is to say, a belief that government should be by law, not of me.[1] It is possible to believe in the rule of law and yet to deny courts the power to determine the constitutionality of the acts of other branches of government, as is the case in countries like Great Britain. In modern times, however, most nations which adopt a written constitution provide for judicial review. In essence, judicial review is an endeavour to judge positive law in the light of ultimate values.[2]

The Supreme Court of the United States is noted for its use of judicial review of legislation as a means of imposing social order; however, the idea of subordinating the actions of various organs of state to "higher principles" did not originate from there. As Professor Capelletti has pointed out, judicial review in the United States was the result of "centuries of European thought and colonial experiences, which had made western man in general willing to admit the theoretical primacy of certain kinds of law. . . ."[3]

To say that judicial review antedates the United States is not to minimize the importance of the American contribution to the development of the theory and practice of judicial review; for it was in the United States that judicial review as we know it today first took root effectively. The Constitution of the United States, or perhaps more accurately, Chief Justice Marshall's interpretation of it in the case of *Marbury v. Madison*,[4] initiated the era of "constitutionalism" with the

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* Editor's Note. Many cases are only cited to S. GYANDOH and J. GRIFFITHS, A SOURCEBOOK OF THE CONSTITUTIONAL LAW OF GHANA (University of Legon 1972). Notwithstanding these are primary citations. The authors state in their preface to Volume II:

"Our objective has been to assemble all cases of constitutional significance and interest, including especially those *hitherto unpublished*." (Emphasis Added)

1. E. MCWHINNEY, JUDICIAL REVIEW 13 (4th ed. 1969).
2. Cappelletti & Adams, JUDICIAL REVIEW OF LEGISLATION: *European Antecedents and Adaptations*, HARV. L. REV. 1207 (1966).
3. M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, Chap. II *Passim* (1971).
4. 5 U.S. (1 Cranch) 137 (1803).

notation of the supremacy of the Constitution over ordinary laws.[5] Marshall's decision can be considered as the high-water mark of judicial review. The power of the courts to exercise judicial review is postulated as flowing necessarily from their duty of applying the law. The supremacy clause of the Constitution on which Chief Justice Marshall based his historic decision has therefore been used as the source of the supremacy of constitutional provisions over Acts of Congress and the Executive; it is also the basis of the power and duty of the judiciary to override laws inconsistent with the Constitution.[6]

A primary problem with judicial review is deciding which organ to vest with the power. Two solutions are to be found variously in use: namely, either to vest the power in the ordinary courts or to create a special constitutional court. In the American system, the regular courts perform the function while in some European countries, notably France and Germany, a special constitutional tribunal has been set up outside the regular court system to decide on questions of constitutionality. We may also distinguish two types of the special constitutional tribunals in use. In some countries employing it, like Germany, this special tribunal, though separated from the regular courts, is a judicial body; in others exemplified by France, the special tribunal, both in its nature and composition, is a political rather than a judicial body.

Under the European systems the invalidation of an enactment has *erga omnes* effect while under the American system a decision on a constitutional question is relevant only for the parties to the dispute.[7] However, the operation of *stare decisis* in the common law tradition ensures that in practice the difference in effect between the two systems disappears. When an enactment is declared unconstitutional in the United States, it ordinarily means that the act is *void ab initio.* Even though the Act remains on the statute book it is considered "dead law." In some European systems, as for example, Austria, the unconstitutional law is considered voidable rather than void. The enactment is valid until the court expressly annuls it. The question of the prior validity of unconstitutional laws, remains in practice a very thorny one. The solution generally employed by the Italian, German and American courts perhaps grapples with the problem best-in criminal cases the laws are apt to be held invalid *ex tunc*, whereas in civil cases their invalidity may not be retroactive.

A further problem connected with judicial review is whether the power is consistent with democracy.[8] Judicial review, it is argued, is undemocratic because it involves a serious restriction on the electoral process which is central to the theory and practice of democracy. It puts in the hands of a non-elective and irremovable organ of government the tremendous power of frustrating the majority decision of the elected representatives of the people. The people, so the argument goes, must be left to manage and mismanage their affairs through their representatives who are answerable to them without the interference of an oligarchic team of "Platonic guardians" over whom the people have no control.

5. *Capelletti & Adams, supra* note 3, at 25.

6. However, not all scholars agree that the power of judicial review in the United States can be found in the supremacy clause. The issue, though now of theoretical importance only, is still controverted by many scholars. SEE GUNTHER & DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL Law (9th ed. 1970).

7. Kanper, *Judicial Review of Constitutional Issues in the United States*, 36 BEITRAGE RUM AUSLINDISCHEN OFFTENTLICHEN RECHT AND VOLKERRECHT HERAUSGEGEBEN VON HERMANN MOSLER, 568, 611 (1961).

8. JUDICIAL REVIEW AND THE SUPREME COURT, SELECTED ESSAYS (L. Levy ed. 1967).

Judicial review, so the argument continues, has the effect of blunting the people's vigilance in respect of their rights since the courts then become their conscience; this in itself contains the seed of destruction for democracy. Democratic battles are not won in the courts but in the legislatures and arenas of public opinion. The judiciary is accountable to no one but itself. The fact that now and again some of its judgments also have the effect of furthering the goals of democracy does not make it escape the censure that it is essentially undemocratic.

The protagonists of the consistency of judicial review counter by saying that democracy should not be confused with unchecked majoritarian rule, unlimited government or legislative sovereignty. Democracy does not require policy decisions to be made by bodies ever sensitive to electorial sentiment. History confirms that judicial review has popular support and therefore it is democratic. Democracy does not require that there should be a voting on all major policy issues; neither is it necessary in a democracy to elect all the officers who exercise crucial authority in the society. The protagonists further contend that judicial review is inherently adapted to preserving broad and flexible lines of constitutional growth and maintaining a pluralist equilibrium in society.

Suffice it to say as Levy[9] rightly notes that the question whether judicial review is consistent with democracy does not appear to have a one-sided answer. For while we may admit that judicial review does appear a deviant growth on pure democracy, it seems perfectly arguable, as Bickel does, that judicial review can and does achieve "some measure of consonance . . . a tolerable accommodation with the theory and practice of democracy."[10]

Judicial review may thus be postulated as the result of an evolutionary pattern common to much of mankind. It is in a sense a combination of the "forms of legal justice and the substance of natural law. Desirous of protecting the permanent will, rather than the temporary whims of the people, many states have reasserted higher law principles through written constitutions."[11] It is "a synthesis of three separate concepts, namely, the supremacy of certain higher principles, the need to put even the higher law in written form and the employment of the judiciary as a tool for enforcing the constitution against ordinary legislation."[12]

JUDICIAL REVIEW IN GHANA

Judicial review in Ghana can be traced to the fact that before independence, as was the case with all British colonial territories, the Privy Council exercised that power in relation to the overseas Empire.[13] The underlying legal basis for this power of judicial review exercised by the Privy Council was to be found in the hierarchy of norms in the British Colonial Empire. In the legal system that existed in the colonies, English law was supreme. The colonial legislatures were subordinate to the English Parliament. Often the Orders-in-Council setting up these legislative bodies provided that they could pass laws only if they were reasonable and not contrary to the sovereign will of the English Parliament expressed in English enactments.

9. ID. AT 42.
10. A. BICKEL, THE LEAST DANGEROUS BRANCH; THE SUPREME COURT AT THE BAR OF POLITICS 27-28 (1962).
11. Cappelletti T., *supra* note 3, at 42.
12. *Id.*
13. McWhinney, *supra* note 1.

Colonial laws were thus in theory equated with regulations passed by local government bodies in England under some enabling law. They could therefore not stand if they were inconsistent with the laws of England. Thus in *Numo v. Koft*[14] where a provision of the West African Court of Appeal Ordinance was found inconsistent with a rule of court which had been made under an Order-in-Council, the rule of court was held to prevail because the Order-in-Council had provided that the rules of court when made were to be incorporated into the Order-in-Council. At the time of independence, therefore, Ghana was not innocent of judicial review.

REVIEW UNDER THE INDEPENDENCE CONSTITUTION OF 1957

At the time of independence in 1957, Ghana adopted the institutional form of the British Parliamentary system. The legislative power of the state was vested in Parliament.[15] The constitution, however, imposed three substantive limitations on the power of Parliament: (1) No law could "make persons of any racial community liable to disabilities to which persons of other such communities are not made liable."[16] (2) Except for restrictions imposed for the preservation of Public order, morality or health, no law could "deprive any person of his freedom of conscience or the right freely to profess, practice or propagate any religion."[17] (3) The taking of private property was subject to a right of adequate compensation, to be judicially determined.[18]

The Constitution also placed certain procedural limitations on the exercise of legislative power, some involving the necessity for approval by regional organs. These applied to enactments altering regional boundaries and names of regions,[19] affecting the status and functions of chiefs,[20] or modifying the constitutional provisions of Ghana.[21] The various limitations, both substantive and procedural, were buttressed by the power of judicial review granted to the Supreme Court. Article 31(5) which confers this power reads:

> The Supreme Court shall have original jurisdiction in all proceedings in which the validity of any law is called in question and if any such question arises in any lower court, the proceedings shall be stayed and the issue transferred to the Supreme Court for decision.

Article 31(5) exhibits a distinction between judicial review in Ghana and the United States which was to become a permanent feature of judicial review in Ghana. In the United States, questions of constitutionality are dealt with by both state and federal courts. Under the 1957 Constitution, however, questions of constitutionality were made the exclusive preserve of the Supreme Court. Where the issue arose in any lower court, the proceedings were to be stayed until the Supreme Court had dealt with the constitutional issue. It may well be that constitutional issues were considered to be too important to be adjudicated upon in every court. This aspect of judicial review would appear to group Ghana with Germany in the practice of review with the important difference that the constitu-

14. D.C. (Land) '48-'51 307, (1951) 2G. & G.72.
15. Order in Council, Part V (1957), *reprinted in* S. GYANDOH & J. GRIFFITHS, 1A SOURCEBOOK OF THE CONSTITUTIONAL LAW OF GHANA Part 1, at 132-134 (1972).
16. Ghana (Constitution) Order in Council, Part V. § 31(2) (1957).
17. *Id.* § 31(3).
18. Id. § 34.
19. Id. § 33.
20. Id. § 35.
21. Id. § 32.

tional court of Germany, though a judicial body, is outside the regular court system.

The first opportunity for the exercise of the power of judicial review by the Supreme Court under the 1957 Independence Constitution occurred in the case of *Lardan v. Attorney-General (No. 2).*[22] Lardan had been served a deportation order. He sought an injunction to prevent his deportation. It was held that Article 31(1)which empowered Parliament to make laws for the peace, order and good government conferred plenary powers the due exercise of which could not be called into question except by Parliament itself.

Article 31(5), then, empowered the Supreme Court to decide issues where "the validity" of an enactment was called into question. There appears nothing inherent in the meaning of the word "validity" which restricts its ambit to the areas suggested by the learned judge. It is submitted that Article 31(5) was sufficiently wide to enable the Courts under the 1957 Constitution to decide whether or not an enactment, which had been duly passed, could in fact be considered as being for the peace, order and good government of the country. It is even arguable that the enactment in question here could have passed an enquiry along these lines.

The second occasion for giving teeth to the constitutional power of judicial review under the 1957 Constitution arose in the case of *Ware v. Ofori Atta* which held that the Statute Law (Amendment) (No. 2) Act, 1957 was mainly concerned with the custody of Stool property and that it directly affected Chieftancy. As far as the Court was concerned the only criterion was whether a Bill directly affected the traditional functions and privilege of a Chief. If it did, then the procedure laid down in section 35 had to be followed, whatever other purpose the proposed legislation might have. Applying this standard to the case at hand the Court came to the conclusion that the plaintiff was entitled to his declaration. Accordingly, the Court declared the Statute Law (Amendment) (No. 2) Act, 1957 and the Ejisu Stool Property Order invalid.

One final interesting observation that can be made about the 1957 Independence Constitution is its silence on the judicial power of the State. Nowhere in the Constitution does one find a provision expressly vesting this power in the judiciary. Apart from Article 31(5) which gives the Supreme Court original and exclusive jurisdiction over questions of constitutionality, the whole document is surprisingly quiet about the repository of the judicial power of the State.

REPUBLICAN CONSTITUTION OF 1960

Ghana became a Republic in July 1960. The 1957 Independence Constitution was repealed and a new Constitution drafted in its place. The power of judicial review, however, was retained. The relevant constitutional provisions of judicial review are to be found in Articles 41(2) and 42(2).[23] Article 41(2) vests

22. (1957) 2G. & G. 98; see *Lardan v. Atty. General (No. 1)* (1957) 2G & G.96.

23. *Id.* § 41(2):

> Subject to the provisions of the Constitution, the judicial power of the State is conferred on the Supreme Court and the High Court, and on such inferior courts as may be provided by law.

Article 42(2):

> The Supreme Court shall have 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, and if any such question arises in the High Court or an inferior

the judicial power of the State in the judiciary and Article 42(2) gives the Supreme Court original jurisdiction to determine questions of constitutionality.

Article 55(4) extended this power of judicial review to Legislative instruments made by the first President under Article 55.[24]

The wording of Article 42(2) appears to have the effect of prohibiting the Supreme Court from making pronouncements on the constitutionality of enactments except where such a decision is necessary for the disposal of a concrete dispute. For as has been pointed out by Rubin and Murray, the words "where the question arises" reasonably interpreted must mean that the Supreme Court can give neither advisory nor speculative opinions.[25]

The same authors also suggest that the wording of Article 42(2) limits the Supreme Court's power of judicial review to only the enactments passed by the Republican Parliament.[26] They argue that the power is to be exercised where a question arises "whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution." So that in their opinion the Supreme Court's power of judicial review under the 1960 Constitution did not extend to enactments that were in existence before the coming into force of the Constitution. The problem of the scope of judicial review under the 1960 Constitution will be dealt with fully when we come to discuss the judicial attitude to its exercise. It need only be pointed out here that the words of Article 42(2)need not be given so restricted a meaning; particularly since the Constitution was supreme to any other law.

It is interesting to note at this point that even though the Article conferring the judicial power of the State on the judiciary was entrenched, the one granting review was not. Whether or not this would have affected the power of the courts to pronounce on questions of constitutionality was, however, never determined before the Constitution as a whole was suspended in 1966 after the military take-over. It would, of course, have been interesting to see whether the Supreme Court of Ghana would have adopted the *Marbury v. Madison* reasoning if the occasion had arisen.

What was the scope of the power of judicial review provided in the 1960 Constitution? This question and many others were considered by the Supreme Court in the controversial case of *Re Akoto and Seven Others*.[27] The appellants

court, the hearing shall be adjourned and the question referred to the Supreme Court for decision.

24. *Id.* § 55. Article 55 reads:

(1) Notwithstanding anything in Article Twenty of the Constitution, the person appointed as First President of Ghana shall have, during his initial period of office, the powers conferred on him by this Article.

(2) The First President, may whenever he considers it to be in the national interest to do so, give directions by legislative instrument.

(3) An instrument made under this Article may alter (whether expressly or by implication) any enactment other than the Constitution.

(4) Section (2) of Article Forty-two of the Constitution shall apply in relation to the powers conferred by this Article as it applies in relation to the powers conferred on Parliament.

(5) For the purposes of this Article the First President's initial period of office shall be taken to continue until some other person assumes office as President.

(6) The power to repeal or alter this Article during the First President's initial period of office is reserved to the people.

25. L. RUBIN AND P. MURRAY, THE CONSTITUTION AND GOVERNMENT OF GHANA 197 (2d ed. 1964). F. BENNION, THE CONSTITUTIONAL LAW OF GHANA 172 (1962).

26. E. BENNION, *supra* note 25, at 172.

27. (1961) G.L.R. 523 (1961) 2 G. & G. 183.

had appealed against the refusal of Sarkodee-Addo J. (as he then was) to grant them habeas corpus. The appeal was fought on many grounds. For the present discussion, however, the most relevant contention of the appellants read thus:

> The Preventive Detention Act, 1958, by virtue of which the appellants were detained, is in excess of the powers conferred on Parliament by the Constitution of the Republic of Ghana with respect to Article 13(1)[28] of the Constitution, or is contrary to the solemn declaration of fundamental principles made by the President on assumption of office.[29]

The resolution of the substantial issue of constitutionality raised by the appeal necessitated that the court determine the effect of Article 13(1) and the scope of judicial review under the 1960 Constitution.

For the appellants, it was argued that it is of the essence of government under a written constitution that the various organs of state are limited in their powers by the constitutional document.[30] The Parliament established by the 1960 Constitution was therefore not sovereign in the sense in which that word is employed to characterize the supremacy of the British Parliament. Parliament in the exercise of the legislative power granted it under the Constitution could not pass any laws that contravened the Constitution either expressly or impliedly. Therefore, in the exercise of its legislative powers, Parliament was subject to the declaration of fundamental principles embodied in Article 13(1), as much as it was limited by other provisions of the Constitution. The P.D.A., however, authorized the President, if he was satisfied, to order the detention of a person without trial. This, in the contention of counsel for the appellants, was an exercise of judicial power by the Legislature. And yet Article 41(2) has vested the judicial power of the State in the Courts. This purported exercise of judicial power was therefore invalid and the Courts must so hold.

Besides, so counsel for the appellants contended, the P.D.A. provided for discrimination against people for their political views; it limited freedom of speech, movement and association-all important freedoms which the President in

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28. Article 13(1) provided:

> 13(1) Immediately after his assumption of office the President shall make the following solemn declaration before the people—
> On accepting the call of the people to the high office of President of Ghana I . . . solemnly declare my adherence to the following fundamental principles—
> That the powers of Government spring from the will of the people and should be exercised in accordance therewith.
> That freedom and justice should be honoured and maintained.
> That the union of Africa should be striven for by every lawful means and, when attained, should be faithfully preserved.
> That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity.
> That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.
> That Chieftaincy in Ghana should be guaranteed and preserved.
> That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country.
> That subject to much restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.
> That no person should be deprived of his property save where the public interest so requires and the law so provides.

29. 2G. & G. 183 (Submissions of Counsel for the appellants, Dr. J.B. Danquah).

30. It is obviously a mere generalization to say that limitability is of the essence of the powers of various organs under written government. It is true that most states that have written constitutions provide for limitations on the authority of the various State organs in the written document. It is possible for a State in a written Constitution to give unlimited power to one organ or to some organs of the State.

his solemn declaration under Article 31(1) undertook to uphold. It was therefore urged on the Court to rule the P.D.A. unconstitutional because the President could not have assented to an Act which was clearly in violation of his solemn constitutional undertaking.

The P.D.A., though enacted before the adoption of the 1960 Constitution, had been expressly continued in force by the Constitution (Consequential Provisions) Act, 1960. Article 40 of the Constitution also included it in the laws of Ghana. The appellants contended that the Constitution (Consequential Provisions) Act, 1960 could not continue in existence a law that had been "silently destroyed by the enactment of the Constitution."[31] Surprisingly, it was not urged on the Court that, insofar as the 1960 Constitution (Consequential Provisions) Act purported to continue in force an enactment which was inconsistent with a provision of the Constitution, it was itself unconstitutional.

A number of arguments were put up on behalf of the Republic also. The Attorney-General, who appeared for the State, argued strenuously that the scope of judicial review under the 1960 Constitution was not the same as prevailed in other countries which also had written Constitutions. This was because the Republican Parliament was sovereign. He argued that the only limitation on Parliament's powers was to be found in Article 20.[32] Therefore, examples of the practice of review elsewhere should not be followed in Ghana. Granted the supremacy of Parliament, Article 13(1) could not be said to limit it in any way. In the contention of the Attorney-General, Article 13(1) was nothing more than "a solemn statement of principles intended to prevent any person who cannot subscribe to them becoming President of Ghana . . . the object of the declaration is to impose on every President a moral obligation. Article 13(1) provides . . . a political yardstick by which the conduct of the President can be measured by the electorate. If the President departs from any of the principles set out in the declaration, the people have a remedy, not through the use of the courts, but through the use of the ballot box."[33]

31. 2G. & G. 183 (Submissions of Counsel for the appellants, Dr. J.B. Danquah).

32. Article 20 reads:

20(1) "There shall be a Parliament consisting of the President and the National Assembly.

(2) So much of the legislative power of the State as is not reserved by the Constitution to the people is conferred on Parliament; and any portion of the remainder of the legislative power of the State may be conferred on Parliament at any future time by the decision of a majority of the electors voting in a referendum ordered by the President and conducted in accordance with the principle set out in Article One of the Constitution.

Provided that the only power to alter the Constitution (whether expressly or by implication) which is or may as aforesaid be conferred on Parliament is a power to alter it by an Act expressed to be an Act to amend the Constitution and containing only provisions affecting the alteration thereof.

(3) Subject to the provisions of Article Two of the Constitution, Parliament cannot divest itself of any of its legislative powers;

Provided that if by any amendment to the Constitution the power to repeal or alter any existing or future provisions of the Constitution is reserved to the people, Section (2) of this Article shall apply in relation to that provision as if the power to repeal or alter it had originally been reserved to the people.

(4) No Act passed in exercise of a legislative power expressed by the Constitution to be reserved to the people shall take effect unless the Speaker has certified that power to pass the Act has been conferred on Parliament in the manner provided by section (2) of this Article; and a certificate so given shall be conclusive.

(5) No person or body other than Parliament shall have power to make provisions having the force of law except under authority conferred by Act of Parliament.

(6) Apart from the limitations referred to in the preceding provisions of this Article, the power of Parliament to make laws shall be under no limitation whatsoever.

(7) The power to repeal or alter this Article is reserved to the people.

33. 2G. & G. 163 [Submission by the Atty. Gen., Mr. G. Bing, Q.C.].

It was a major contention of the Attorney-General, therefore, that outside the limitations imposed on Parliament by Article 20, it was not limited in any other way by any other provision of the Constitution. The P.D.A., in his opinion, was not only valid in terms of the Constitution but was necessary for the maintenance of constitutionalism in a country, like Ghana, which was changing from a state of dependence to independence.

The Court thus rejected the broad scope argued for brilliantly by Dr. Danquah. Judicial review under the 1960 Constitution would therefore appear to have been limited by the Supreme Court to cases where a violation of Article 20 of the Constitution can be proved. It is submitted that it was not necessary to restrict the scope of judicial review in order to come to the specific conclusion it reached in the *Akoto* case. For it seems arguable that Article 13(1) did not give rise to any justiciable rights. Even if some of the provisions concern fundamental human rights, the only way these can be enforced is by a selective process of a sort. But the Constitution gives no guidance as to how this selective process is to work.

As was argued by the Attorney-General some of the provisions of Article 13(1) give rise to much difficulty if Article 13(1) were held to be justifiable. For example, how was the provision that every citizen be entitled to a fair share of the national produce to be enforced? It is submitted, therefore, that the actual holding that Article 13(1) did not give rise to a legally enforceable right is defensible though the reasoning of the court did not sufficiently analyze the constitutional issues raised.

Of course the absence of any guidelines in the constitutional document as to how the rights contained in Article 13(1) were to be enforced is not conclusive as to whether they *could* have been enforced by a selective process. Any one familiar with the work of the U.S. Supreme Court, particularly in the area of the Bill of Rights of the U.S. Constitution, would probably argue that the absence of any guideline from the constitutional document did not, *per se*, preclude the Court from fashioning out its own doctrinal basis for the enforcement of any of the declarations embodied in Article 13(1).

One observation worth commenting on is the Court's argument that the word "should" was used in the declaration where, if intended to be legally enforceable, one would have expected the word "shall". This argument is surprising in view of the provisions of section 27 and 28 of the Interpretation Act, 1960 (C.A.4) which was in force at the time of the *Akoto* judgment.[34] Assuming that the Interpretation Act is not considered unconstitutional, since it appears to be exercising the judicial power of the State by providing presumably mandatory interpretations of various words, the two sections seem to make the distinction between the effect of "shall" and "should" no longer necessary in Ghana. This argument was, of course, not put to the Court. Neither did it advert its attention to it. Given the narrow scope the Court was prepared to give judicial review, it is not inconceivable that, if made, such an argument would have been rejected.

34. Section 27 Provides:

> In an enactment made after the passing of this act, "shall" shall be construed as imperative and "may" as permissive and empowering;

Section 28 provides:

> Where a word is defined in an enactment other parts of speech and gramatical variations of that word must have corresponding meanings.

See also Memoranda to the Acts of Ghana. Vol. 1.

One peculiarity about the language in which the constitutional grant of the power of judicial review in the 1960 Constitution was couched may be pointed out. Article 42(2) talks of whether an enactment was made *in excess* of the powers conferred on Parliament by order under the Constitution. . . . This would appear to suggest that judicial review under the 1960 Constitution was limited to the application of the *ultra vires* doctrine. Did the Supreme Court have jurisdiction to determine the issue of conflict between a constitutional provision and an Act of Parliament where Parliament was acting within its authority? Article 42(2) may be contrasted with Article 31(5) of the 1957 Constitution. Article 31(5) grants the power of judicial review to the Supreme Court "in all proceedings in which the *validity* of any law is called in question. . . ." If one is to give any significance to the difference in the language employed in the two provisions, it seems that the conclusion is that the 1957 Constitution contained a broader grant of review power than the 1960 Constitution. In terms of judicial attitude to the power of review, our discussion of the few cases concerned so far shows clearly that, under the 1957 Constitution, judicial review was given a broad view though it was shortlived.[35] Under the 1960 Constitution the courts themselves narrowed severely the scope of their power of judicial review. The *Akoto* opinion assigned a kind of mechanistic role to the courts in their exercise of review power.

THE 1969 SECOND REPUBLICAN CONSTITUTION OF GHANA

The last constitutional document to be considered in this discussion is the 1969 Constitution. It was promulgated upon the return to civilian rule in Ghana after a three-year spell (February 24, 1966-August 1969) of military rule. If that document as a whole can be considered as a reaction against the 1960 Constitution, it is submitted that the provisions regarding judicial review evince an even greater degree of over-reaction against the Supreme Court's decision in *Re Akoto*.

After a survey of the various attempts at planting judicial review in Ghana, the Constitutional Commission which drafted the 1969 Constitution could not help concluding that the picture it discovered was blurred and dismal. The Commission therefore proposed:

> That the Judiciary should keep watch and ward over the Constitution. As the guardian of the Constitution the Supreme Court, the highest Court in Ghana, will have the power to adjudicate on the constitutionality or legality of all laws passed in Parliament.[36]

It was not surprising therefore that the 1969 Constitution contained the most impressive and elaborate provisions for the exercise of judicial review that has been included in any of the Ghanian constitutions. The over-reaction against the *Akoto* decision was understandable. The constitution-makers gave the Judiciary broad review powers under the 1969 Constitution as part of the weapons designed to prevent the emergence of a one-party state in Ghana.

The decree which set up the Constitutional Commission had emphasized that the Commission's proposals should incorporate the doctrine of separation of

35. In 1958, the Constitution (Repeal of Restrictions) Act, 1958 (Act No. 38 of 1958) was passed. The effect of this Act was to make any part of the Constitution amendable by an Ordinary Act of Parliament. Thus no Acts of Parliament could be invalidated on grounds of unconstitutionality.

36. *The Proposals of the Constitutional Commission for a Constitution for Ghana*, Para. 324 (1968).

powers. It was to include provisions for a "separate and independent" judicial organ and to ensure "that the said Constitution provides an effective machine for the protection of individual freedoms."[37]

The relevant provisions in the 1969 Constitution with respect to judicial review are Articles 1(2); 2; 102(1)(3); 106; and 126(5).[38] Roughly speaking, these Articles established the supremacy of the Constitution over all other law, vested the judicial power of the State in an independent judiciary and provided for the vindication of alleged infractions of constitutional provisions. Finally, the Supreme Court was clothed with the power to deal with issues of constitutionality.

In addition to the specific provisions referred to in the immediately preceding paragraph, there were some provisions that embodied principles relevant to the determination of questions of constitutionality: The Preamble of the Constitution embodied the philosophical underpinnings of the Constitution. The principles therein contained may be considered as the "spirit" of the Constitution. Chapter Four of the Constitution embodied the fundamental human rights provision and expressly made those rights justifiable. Article 28 provided that they are enforceable at the suit of an aggrieved party. Article 169 provided an amendment mechanism that left one in no doubt that the Constitution was something more than an ordinary enactment. This mechanism also placed serious limitations on the legislative power of Parliament.

37. 1966 Constitutional Commission Decree, Para. 4 (N.L.C.D. 102).

38. For easy reference they are reproduced here:

Article 1(2): This Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void and of no effect.

2(1) Any person who alleges that an enactment of anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of, any provision of this Constitution may bring an action in the Supreme Court for a declaration to that effect.

2(2) The Supreme Court shall, for the purposes of a declaration under the provisions of the preceding clause, make such orders and give such directions as it may consider appropriate for giving effect to or enabling effect to be given to the declaration so made.

102(1) The judicial power of Ghana shall be vested in the Judiciary of which the Chief Justice shall be Head, and accordingly no organ or agency, of the executive shall be given any final judicial power.

(3) In the exercise of the judicial power of Ghana, the Judiciary in both its judicial and administrative functions shall be subject only to this Constitution and shall not be subject to the control or direction of any other person or authority.

106(1) The Supreme Court shall, save as otherwise provided in Article 28 of this Constitution, have original jurisdiction, to the exclusion of all other courts,

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution; and

(b) where any question arises whether an enactment was made in excess of the powers conferred upon Parliament or any other authority or person by law or under this Constitution.

(2) Where any question relating to any matter or question as is referred to in the preceding clause arises in any proceedings in any Court, other than the Supreme Court, that Court shall stay the proceedings and refer the qeustion of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.)

126(5) Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall not be affected by such commencement; and accordingly the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Constitution, or otherwise to give effect to or enable effect to be given to any changes effected by this Constitution.

The existing law comprised the written and unwritten laws of Ghana in force before the coming into effect of the Constitution. It also included any enactments which were to come into operation simultaneously with the Constitution or on a date after the Constitution had come into effect.

It provided a tripartite division of the provisions of the Constitution: there were the entrenched provisions which could not be amended at all by Parliament. Included in this class are Article 169(3)(4), Chapter One, which contained the Supremacy Clause and provisions for the enforcement and defences of the Constitution; Article 127 prohibiting taxation otherwise than under the authority of an Act of Parliament; Article 149 prohibiting the establishment of an armed force except under the authority of an Act of Parliament; and Article 153 guaranteeing the institution of Chieftancy. Then there were a second set of provisions which could only be amended by being enlarged. These included Chapter Four which dealt with the Liberty of the individual (the human rights provisions); Chapter Five which dealt with representation of the people; Article 29 establishing the right of every citizen of sound mind and 21 years of age to be registered as a voter and to vote, Article 33 providing for elections and referenda to be by secret ballot and Article 35 prohibiting the formation of political parties on sectional basis. Finally came the provisions which could be amended only by a procedure so tortuous as to ensure that only amendments which were absolutely necessary would be embarked upon. Significant in this procedure, apart from the requirement of *Gazette* publication for the proposal and the bill for the amendment, was the requirement that the amendment be passed by two Parliaments. That is to say, the Constitution envisaged a mandatory dissolution of the first Parliament to pass the amendment and then the amendment had to be approved by the succeeding National Assembly in order for it to become effective.

The Supreme Court was given exclusive jurisdiction to determine questions of constitutionality under the 1969 Constitution. That, however, seems to have been the only resemblance that the regime of review under the 1969 Constitution had with earlier Ghanian Constitutions.

A few other observations are worth making on the provisions for judicial review under the 1969 Constitution. Article 102(1) which ends in the words ". . . no organ or agency of the executive shall be given any final judicial power" presents a perplexing query. Did it imply that "final judicial power" could have been validly vested in an organ or agency of Parliament? Fortunately for the courts (but perhaps unfortunately for the constitutional lawyer) the occasion for the resolution of this difficult problem never arose before the Constitution was overturned by an armed insurrection.

The protection of human rights was entrusted in the hands of the High Court with a right of appeal to the Court of Appeal and then to the Supreme Court under Article 28. This would suggest that as far as the enforcement of the human rights' provisions was concerned the High Court had power to declare unconstitutional any act that violated the provisions of Articles 12-27 inclusive. This interpretation is further strengthened by the wording of Article 106(1) which, as we have noted above, gives the Supreme Court exclusive and original jurisdiction in all matters of constitutionality "*save as otherwise provided in Article 28 of this Constitution.*" It is respectfully submitted that the only reasonable interpretation that takes account of the wording of Articles 28 and 106(1) is that the High Court also had powers, albeit limited to Articles 12-27, to annul enactments.

The interpretation and enforcement of the Constitution, as the wording of Article 106 suggests, can only be embarked upon in a concrete case. This means of course, that the Supreme Court could not, *suo motu*, exercise this function. The wording of Article 2 also leaves one in no doubt that the declaratory relief can

only be sought in a concrete case. The Constitutional Commission had recommended that the Supreme Court be given authority to render advisory opinions on the constitutionality of statutes prior to final enactment. But this was rejected by the Constituent Assembly which promulgated the Constitution.

The impact of these provisions was too plain to be lost on any one. The power of the judiciary to adjudicate on questions of constitutionality was left in no doubt. Parties involved in lawsuits were offered the opportunity to raise constitutional issues and the remedies were made clear. With such detailed and explicit constitutional provisions, problems were bound to arise. In the face of such clear referral procedure the Supreme Court could hardly avoid confronting questions of constitutionality. It was thus forced to grapple with such problems long before it had developed any avoidance techniques along the lines of the U.S. Courts and the German and Italian Courts.

Not unexpectedly, counsel felt free to raise issues of constitutional validity. The Supreme Court was suddenly being flooded with claims by counsel in various suits that some constitutional provision had to be interpreted. One case, *Sallah v. Attorney-General*[39] raised more furor than any other constitutional law decision in Ghana since independence. Mr. E.K. Sallah who was a Manager of the Ghana National Trading Corporation(a State establishment) was dismissed from his post. His letter of dismissal stated that he had been dismissed in accordance with Section 9(1)[40] of the First Schedule to the 1969 Constitution (Part IV). Mr. Sallah brought this action for

> a declaration that on a true and proper interpretation of the provisions of section 9(1) of the First Schedule to the Constitution (Part IV) the Government of Ghana was not entitled to terminate (his) appointment as a Manager in the Ghana National Trading Corporation.

The question to be determined was whether the plaintiff, Mr. Sallah, held an office "established" by or under the authority of the National Liberation Council or in pursuance of a Decree of the National Liberation Council. The plaintiff contended vigorously that the office he held fell in none of the categories contemplated by Section 9(1) of the Transitional Provisions. The State's argument was based entirely on Kelsen's *Pure Theory of Law*. It was argued that the *coup d'etat* of February 24, 1966 had destroyed the legal order in existence before then, and with it the existing law. A new legal order was established from which all law derived its validity. Consequently, the plaintiff was caught squarely by section 9(1) of the Transitional Provisions.

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39. (1970) 2G. & G 493. The Prime Minister Dr. K.A. Busia, in a radio and television broadcast, shortly after the Court had announced its decision, severely criticized the decision. The total number of dismissals purported to have been done under Section 9(1) of the Transitional Provisions was 568. Apart from Mr. Sallah none of the other persons affected brought an action.

40. Section 9(1) of the Transitional Provisions contained in Schedule 1 provides as follows:

> 9(1) Subject to the provisions of this section, and save as otherwise provided in this Constitution, every person who immediately before the coming into force of this Constitution held or was acting in any office established,
>
> (a) by or in pursuance of the Proclamation for the Constitution of a National Liberation Council for the administration of Ghana and for other matters connected therewith dated the twenty-sixth day of February, 1966, or
>
> (b) in pursuance of a Decree of the National Liberation Council, or
>
> (c) by or under the authority of that Council, shall, as far as is consistent with the provisions of this Constitution, be deemed to have been appointed as from coming into force of this Constitution to hold or to act in the equivalent office under this Constitution for a period of six months from the date of such commencement, unless before or on the expiration of that date, any such person shall have been appointed by the appropriate appointing authority to hold or to act in that office or some other office.

The Court rejected the Kelsenite argument. As far as it was concerned the question was the meaning to be given to the word "established." Did it mean create or continue in existence? The Court was satisfied that the word had been used in the Constitution to mean create, in the sense of bringing into being. It found that the office held by Mr. Sallah had been in existence before the *coup d'etat* of 1966. The majority therefore held that Mr. Sallah was not holding such an office as was contemplated by Section 9(1).[41] Apaloo, J.A. who read one of the majority opinions said, "To permit a thing to continue is to acknowledge its prior existence and it is an abuse of language to say that the person who permitted its continuance in fact created it."[42]

The point of interest about the *Sallah* decision was that with one exception (Anin J.A.) the rest of the judges refused to be drawn into considering broad jurisprudential issues. They did not see their duty to interpret Section 9(1) of the Transitional Provisions as leading any where into the realm of broad constitutional and other legal considerations.

In *Benneh v. The Republic*[43] we see the Full Bench of the Court of Appeal showing a greater interest in the broader issues of constitutional litigation. The facts were briefly as follows:

The plaintiff-appellant was found to have acquired assets unlawfully while in public office by a Commission of Enquiry. In September 1969 the National Liberation Council promulgated the Investigation and Forfeiture of Assets (Further Implementation of Commissions' Findings) (No. 3) Decree, 1969 NLCD. 400 to get for the State all assets declared to have been unlawfully acquired. Pursuant to NLCD 400, the State initiated attachment proceedings in the High Court against the plaintiff. The plaintiff brought an action in the High Court to stop the State from proceeding against him. He complained that no judgment had been recovered against him by the State and prayed the High Court to restrain the latter from proceeding with its attachment process.

The State, while conceding that no action had been recovered against plaintiff, contended that its action was based on NLCD 400 and therefore lawful. The plaintiff countered by saying that NLCD 400 violated Articles 12 and 18 of the Constitution which debarred the State from depriving him of his property without compensation. He therefore invited the High Court to strike down NLCD 400 as unconstitutional.

The learned High Court judge declined the invitation. His view was that the action could only be properly entertained by the Supreme Court. The plaintiff appealed to the Court of Appeal. The ordinary bench of that Court heard the appeal. It concluded that the High Court had jurisdiction to entertain the suit, but it declined to remit the suit to the High Court. It based itself on Section 13 of the State Proceedings Act, 1961 (Act 51) and argued that the injunctive relief which the plaintiff-appellant sought could not be validly granted against the State.

The plaintiff further appealed to the Supreme Court. That appeal was heard by the Full Bench of the Court of Appeal which had succeeded to that jurisdiction of the Supreme Court after the latter had been abolished. The question which the

41. The decision was by a majority of 3-2. The State had made an attempt to remove some of the judges from the case. After an unsuccessful attempt Mr. Justice Siribee announced his withdrawal from the case and so did not write an opinion.

42. (1970) 2G. & G. 493, 509.

43. (1974) 2 G.L.R. 47.

Full Bench had to determine was the validity of NLCD 400. The majority of the Court (Azu Crabbe C.J. dissenting) held, per Apaloo J.A., that NLCD 400 did not offend Articles 12 and 18 of the Constitution. In the opinion of the majority, NLCD 400 was promulgated to implement the findings of Commissions and to provide a convenient machinery for getting in assets and moneys found to have been unlawfully acquired. It was not the enactment that divested plaintiff-appellant of his property. Our immediate concern however is not with the actual decision but with the reasoning by which it was arrived at.

Significantly, and in line with the approach to constitutional litigation which we have noticed in the earlier cases, the Full Bench in this case considered the litigation as raising purely a problem of statutory interpretation. The majority opinion described the Court's constitutional role as being "interpretory." But it is at least heartening to notice that here the Court showed some awareness of other competing constitutional and social policy interests involved and the role of these interests in constitutional litigation. The majority opinion made it unmistakably clear that where the legislature takes steps to establish probity in public life, and the Constitution also contains provisions designed to achieve the same end, the function of the judiciary must be to lend a helping hand by putting liberal construction on the enactments to achieve this end.[44]

The plaintiff-appellant had also argued that the main features of NLCD 400 usurped "judicial power" vested by the Constitution in the judiciary, and therefore the Decree should be nullified. That argument did not impress the majority. They found nothing "judicial" in the declared aim and effect of the legislation. As far as the majority of the Court were concerned, the unlawfully acquired assets had become vested in the State before the promulgation of NLCD 400. NLCD 400 was merely designed to bring in what had already been effectively vested in the State.

It would be recalled that in the discussion at the earlier part of this section, it was suggested that the High Court had power of a limited nature under Article 28 of the Constitution to review enactments found to be inconsistent with Articles 12-27 inclusive. The opinion of the majority lends some support for this viewpoint. The majority, however, seemed to have been of the view that questions of interpretation would have had to be referred to the Supreme Court even where the High Court was acting under Article 28. It is difficult to see why this should be so. Article 28 is, in our opinion wide enough in terms to clothe the High Court with jurisdiction to interpret the Constitution. It is therefore submitted that where the High Court is adjudicating a case in which a party claimed that Articles 12-27 were being violated in relation to him, the High Court had power under Article 28 to interpret and nullify legislation if that was necessary for the resolution of the litigation.

The *Benneh* case, however, further confirms the impression which we have gathered from our reading of earlier cases decided under the Constitution. Namely, that our judges considered their role, where called upon to exercise their power of judicial review, as merely involving delving into the intricacies of statutory interpretation. As we have noted, however, there was a welcome change in the beat of the song. The Courts appeared prepared to give some role to other broad policy considerations.

44. *Id.* at 75-77, 89, 95-96.

THE HIGH COURT AND REVIEW UNDER THE 1969 CONSTITUTION

We may now consider what I characterize as a peculiar practice of some of the High Court judges under the 1969 Constitution. It would be recalled that the constitutional provisions on judicial review, in particular, Article 106(2), required lower Courts "to stay proceedings and refer the question of law involved to the Supreme Court for determination where a question of constitutionality arose before the lower Court." In a number of cases, however, in the face of the clear and mandatory provisions, the High Court refused to refer the issues to the Supreme Court and proceeded to nullify provisions in certain enactments on the grounds that such provisions violated the Constitution. A few examples will express our concern in this respect.

The first of such cases was the *Republic v. Boateng, Ex parte Adu-Gyamfi II*.[45] In that case a preliminary objection was taken to the jurisdiction of the High Court. The argument was that section 52 of the Courts Act, 1971 (Act 372)[46] had ousted the jurisdiction of the High Court in Chieftaincy matters. It was further argued that this view was fortified by Articles 154 and 155 of the Constitution.[47] The cumulative effect of these provisions, so it was contended, was to divest the High Court of jurisdiction in Chieftaincy matters. After due consideration of Articles 102, 113 and 114 of the Constitution, the learned judge held that section 52 of the Courts Act, 1971 (Act 372) could not oust the jurisdiction of the High Court or the Court of Appeal. The learned judge therefore held the purported ouster inoperative.

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45. (1972) 1 G.L.R. 317.

46. Section 52 provides: Notwithstanding anything to the contrary in this Act or any other enactment of the Court of Appeal, the High Court, a Circuit Court and a District Court shall not have jurisdiction to entertain either at first instance or on appeal any cause or matter affecting Chieftancy.

47. Article 154 of the Constitution reads:

154(1) There shall be established a National House of Chiefs.

(2) The House of Chiefs of each Region shall elect as members of the National House of Chiefs five Chiefs from the Region.

(3) The National House of Chiefs shall, subject to the provisions of clause (3) of article 105 of this Constitution

(a) have appellate jurisdiction in any matter relating to Chieftaincy which has been determined by the House of Chiefs in a Region from which appellate jurisdiction there shall be on appeal, with the leave of the Supreme Court or of the National House of Chiefs to the Supreme Court; and

(b) advise any person or authority charged with any responsibility under this Constitution or any other law for any matter relating to or affecting Chieftaincy.

(4) Subject to the provisions of clause (2) of article 126 of this Constitution, the National House of Chiefs

(a) shall undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law; and

(b) shall perform such other functions, not being inconsistent with any function performable by the House of Chiefs or a Region, as Parliament may, by or under an Act of Parliament, confer on it or otherwise refer to it.

Article 155:

(1) There shall be established in and for each Region a House of Chiefs which shall

(a) have original jurisdiction in all matters relating to a paramount Stool or the occupant of a paramount Stool;

(b) hear and determine, subject to the provisions of clause (3) of article 105 of this Constitution, appeals from the highest Traditional Councils within the area of authority of the Traditional Authority within which they are established, in respect of the nomination, election, installation, or deposition of any person as a chief;

(c) perform in and for the Region such other authority of an Act of Parliament.

(2) Subject to the provisions of this Constituion, the House of Chiefs of a Region existing immediately before the coming into force of this Constitution shall be deemed to have been established from the coming into force of this Constitution as the House of Chiefs of the Region.

It was also argued that, as a question of interpretation or enforcement of the Constitution had been raised in the proceedings, the High Court must refer the issues to the Supreme Court in accordance with Article 106(2). The learned judge drew a distinction between "enforcing" and "applying" the Constitution. In the former case, the learned judge agreed that the proper forum was the Supreme Court but not in the latter case. The learned judge found support for his refusal to refer the issue to the Supreme Court in the dicta in the *Maikankan case* to which we have already alluded. What was clear here, however, was that the learned judge expressly nullified a provision in an enactment as being inconsistent with a constitutional provision. This was an exercise of power which the Constitution declared was the exclusive preserve of the Supreme Court.[48]

A more blatant violation of constitutional injunctions by the High Court, however, was to be found in the case of *Shalabi v. The Republic*.[49] The plaintiffs in that case sought a declaration that they were entitled to operate a transport business notwithstanding the provisions of the *Ghanaian Business (Promotion) Act*, 1970 (Act 334). In arriving at his decision that the plaintiffs were Ghanaian citizens, the learned High Court judge made the following categorical pronouncements:

> Section 1 of the Ghana Nationality Act, 1971 (Act 361), insofar as it purports to affect to their detriment the position of persons who were Ghanaian citizens before the coming into force of the Constitution is ineffectual. The new definition of citizen in the new Act is void and of no effect, insofar as it seeks to restrict citizenship within narrower limits than those prescribed in the Constitution.

A clearer case of a court exercising jurisdiction it does not have can hardly be made out. Here admittedly the High Court was faced with a right which appeared to have been vested. It is regrettable that the learned judge thought that the best way to protect a vested right was to assume a jurisdiction he clearly was not clothed with. This and other confusing pronouncements characterized the attitudes of some of the High Court judges to judicial review under the 1969 Constitution.[50]

Clear and detailed though the constitutional provisions were on the power and scope of judicial review under the 1969 Constitution, the practice in the Ghanian Courts hardly gave one something to look to. After a careful study of all the cases which the courts considered as raising constitutional issues one finds hardly a single case in which the reasoning did not suggest that dictionaries and cannons of statutory interpretation were enough to resolve apparently difficult constitutional issues. The courts never showed that they felt called upon to choose between competing principles of constitutional law. We are given no insight as to how the process of choosing even between competing dictionary meanings of a word works. Our Supreme Court, in its exercise of judicial review under the 1969 Constitution, never reached the dizzy heights of constitutional statesmanship that the U.S. Supreme Court displays in its exercise of judicial review on decidedly less firm grounds than our Court had. The performance of the U.S. Supreme

48. *See* Johnson, *Power to Declare an Enactment a Nullity;* 1 R.G.L. 41, 50. *See also* Ofoni Boateng, *Chieftancy Matters* and Proceedings, G.R.G.L. 93 (1974) (view of the decision of *Ex Parte Adu-Gyamfi*).

49. (1972) 1 G.L.R. 259.

50. *See* (Abban J's Judgment) Republic v. Military Tribunal, ex parte Ofosu-Amaah, (1973) 2 G.L.R. 227 (decisions in which a High Court purported to annul an enactment).

Court under the "equal protection clause," the "due process" clause and the way Marshall turned the "Supremacy Clause" into the bastion of judicial review in the United States have won the respect of all knowledgeable constitutional lawyers the world over. Our Supreme Court, however, allowed the appearance of the word "interpretation" in Article 106 to blindfold it into narrowing the scope of perhaps one of the most commendable attempts so far made in the world to enshrine the power of judicial review in a written constitutional document.

Clearly, then, the courts had not grasped the enormity and complexity of the powers granted the judiciary under the 1969 Constitution. In a sense the narrow view the Supreme Court took of its review power was understandable. The positivist judicial attitude to constitutional adjudication, the "strict statutory construction" approach to the constitutional instrument—the search for legislative "intent" in the words of the Constitution and the impression created that the words themselves have a plain and absolute meaning that can be found with the aid of a dictionary—all these tendencies have become characteristic of judges in the Commonwealth. By their common law training they equate adjudication in the constitutional law field with adjudication in the normal private law courts deciding private litigation between private parties.[51]

REVIEW UNDER THE MILITARY REGIMES OF GHANA

The last aspect of post-independence judicial review of legislation to be considered in our discussion is review of legislation under our military governments. Twice in our constitutional experience, we have had a situation where the Armed Forces seized the reigns of government, dismissed the executive and suspended the Constitution.[52] One characteristic of the two military regimes we have had in Ghana has been that the Constitution was not abrogated but "suspended." The military authorities then enacted a Proclamation in which they generally sought to keep the powers of the judiciary under the suspended Constitution intact subject to the *Proclamation* and such other enactments as the military government decreed from time to time.[53]

A convenient starting point would be a dictum of Edusei J. in the *Republic v. Chairman, Commission of Enquiry* (State Fishing Corporation, Accra); *Ex parte Bannerman*.[54] The learned High Court judge made the following definitive statement in that case:

> I wish to make it abundantly clear that the National Liberation Council may occupy a dual capacity in that it has powers to enact decrees which have the force of an Act of Parliament, and it also occupies an executive position such as the deposed President occupied. . . . I have taken pains to bring out clearly the dual capacity of the National Liberation Council because if the Council exercises its legislative function by promulgating decrees I am of the view that the *ultra vires* doctrine cannot be used to question the validity of a decree. . . .[55]

51. E. MCWHINNEY, *supra* note 1 at 22-30.

52. These occurred in February 1966 when the Military remained in power until August 1969 and again in January 1972 when the Armed Forces again toppled the civilian government which had succeeded the military government that reigned between 1966 and 1969. Ghana is presently under military rule.

53. *The Proclamation* currently in force is the *National Redemption Council (Establishment) Proclamation*, 1972.

54. (1967) C.C. 124, (1967) 2 G. & G. 293.

55. (1967) C.C. 124, 196, (1967) 2 G. & G. 293, 295, *supra* at 196; 295.

The learned judge thus posited his view that the decrees of the National Liberation Council (the First Ghanaian military government) could not be constitutionally questioned in the sense in which an enactment of Parliament under a written Constitution would be subject to review. He would ascribe to the National Liberation Council sovereign legislative powers.[56] In *Republic v. Director of Prisons, ex parte Salifa*,[57] however, the question which had to be decided was whether a document which did not comply with the requirements of sub-paragraphs 6, 7, 9, 10 and 11 of paragraph 3 of the *N.L.C. Proclamation* as amended by paragraph 16(a) of the *N.L.C.* (Consequential and Transitory Provision) Decree, 1966 (NLCD 73), was a decree.[58] It was contended on behalf of Salifa, who had brought an application for *habeas corpus*, that the document produced before the Court could not be a valid decree because it bore no number and had not been published in the *Gazette*. The court was therefore invited to declare his detention unlawful, as not having been authorized by any valid enactment.

In granting the application for *habeas corpus*, the learned judge made a number of observations which must be of considerable interest to the constitutional lawyer. He ruled that a document in violation of the provisions of the *Proclamation* could not be a valid decree. A document that was not promulgated or published (in the sense of being made public in the *Gazette*) would not be a valid decree. The learned State Attorney had argued that sub-paragraph 4 of paragraph 3 gave the National Liberation Council unlimited power.[59] Relying on the Preamble to the *Proclamation*,[60] however, the learned judge concluded that the National Liberation Council had come into power to eradicate "illimitability of power in Ghana". It could not therefore assume a power it was and must be deemed committed to eradicate.

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56. For a similar judicial opinion of the N.L.C.'s legislative powers, *see Awoonor-Williams v. Gbedemah*, (1960) 2 G. & G. 436, 444.

57. (1968) 2 G. & G. 374.

58. Those subparagraphs provide as follows:

(6) Every Decree made by the Council shall, as soon as practicable after it is made, be published in the *Gazette*.

(7) A Decree made by the Council shall, unless otherwise provided in that Decree, come into force on the date of the publication of that Decree in the *Gazette*.

(9) Decrees made by the Council shall be numbered consecutively from the commencement of this Proclamation in accordance with the order in which they are published and the numbering shall not begin afresh at the commencement of a calendar year or any other period.

(10) A Decree made by the Council shall bear at the head a short title and the citation of the short title of a Decree or the number alloted to it on publication shall be sufficient to identify the Decree.

(11) Any document purporting to have been printed or published by the Government Printer and purporting to be a Decree of the Council (including this Proclamation) duly made in accordance with the provisions of this Proclamation shall be *prima facie* evidence of the due making thereof and of its terms and number.

59. The relevant provisions reads:

3(4) Any decree made by the National Liberation Council may be amended or revoked or suspended by another decree of the Council.

60. The Preamble to the Proclamation provides:

WHEREAS . . . the Armed Forces of Ghana assumed the Government of the Republic of Ghana in the interest of the people of Ghana;
AND WHEREAS it is expedient that due provision should be made by law for the proper administration of the country and for the maintenance of law and order;
NOW THEREFORE KNOW YE ALL MEN that by virtue of the said assumption of the Government of Ghana this Proclamation is made with effect from the 13th day of January 1972.

That, however, was not to be the end of Salifa's troubles. He was rearrested immediately after leaving Court pursuant to Anterkyi J's ruling. His second application for *habeas corpus* came before Mr. Justice Charles Crabbe.

The case was entitled this time as the *Republic v. Director of Special Branch, Ex parte Salifa*.[61] The question was again the lawfulness of Salifa's detention under a document purporting to be a decree which had not complied with the provisions on the procedural requirements of the *Proclamation*. Apart from a change of personalities on the respondent's side, the arguments addressed to Charles Crabbe J. were the same as those that had been considered by Anterkyk J: The legality of the purported decree was again in issue.

Charles Crabbe J. came to the contrary conclusion that the document in question was valid as a decree. He concluded from his reading of the relevant provisions that a decree could become operative and acted upon before its publication. He found nothing in the purported decree which suggested that it was not to be published and could therefore not declare it invalid.

The conclusions reached by the two judges on the same facts and materials presented special problems. But it is important to note that running through both opinions were sentiments to the effect that under certain circumstances decrees of the N.L.C., passed in the exercise of its supposedly unlimited legislative powers, could be subject to review, even if only on grounds of formal validity. We are therefore emboldened into postulating the broad constitutional proposition that even under military regimes, judicial review of legislation is possible. The dictum in *Ex parte Bannerman* cannot be considered to have had the last say on the point.

To bring down the curtain on our discussion, we may now look at the *Republic v. Military Tribunal, Ex parte Ofosuamaah*.[62] This has been the most important decision on review of legislation since the National Redemption Council came into power in January 1972. The applicants, together with others, had been convicted by a military tribunal of subversion under the *Subversion Decree*, 1972 (*NRCD* 90). They had also been convicted of conspiracy to commit subversion. They sought an order of certiorari to quash the conviction on the conspiracy charge on the grounds that the military tribunal which tried them did not have jurisdiction to try them on the conspiracy charge. The respondents raised a preliminary objection to the jurisdiction of the High Court to entertain the action. The respondents contended, *inter alia*, that the High Court was precluded by the provisions of section 20 of the Courts Act, 1971 (Act 372) from exercising its supervisory powers over military tribunals. To the applicants' argument that section 20 of the Courts Act was invalid because it was inconsistent with Article 114[63] of the 1969 Constitution, the respondent replied that the High Court did not have the power to declare upon a military enactment and must therefore refer that issue to the Court of Appeal.[64] Section 20 of the Courts Act, 1971 (Act 372) reads:

61. (1968) 2 G. & G. 378.

62. (1973) 2 G.L.R. 227.

63. Article 114, in spite of the suspension of the Constitution, had been contained in force by the *NRC Proclamation*. It provides:

> The High Court of Justice shall have supervisory jurisdiction over all inferior and traditional courts in Ghana and any adjudicating authority and in the exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs or orders in the nature of *habeas corpus, certiorari, mandamus,* prohibition and *quo warranto* as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers.

64. The Courts Act (Amendment Decree) NRCD 101 abolished the Supreme Court established under the 1969 Constitution and transferred its powers to the Court of Appeal.

> The High Court of Justice shall have supervisory jurisdiction over all inferior Courts in Ghana and any adjudicating authority *other than a military Court or tribunal* and in the exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs or Orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers.

Abban J. overruled the jurisdictional objection based on section 20 of the Courts Act. He came to the conclusion that section was inconsistent with Article 114 of the Constitution inasmuch as it sought to limit the wide supervisory jurisdiction conferred on the High Court by the Constitution. In his opinion the Courts Act was enacted under the authority of the suspended Constitution and its provisions could not therefore amend, limit or take away any jurisdiction conferred by the said Constitution on the High Court. The words "other than a military court or tribunal" were clearly inconsistent with the provisions of Article 114. Therefore, in his opinion, they were to be considered inoperative from the day the Courts Act came into effect.

It would be recalled that the respondent had argued that even if section 20 was invalid the High Court had no jurisdiction to nullify it and that the issue should be referred to the Court of Appeal which alone had the power to declare an enactment a nullity. The learned judge replied thus:

> I concede that the power to make such a declaration is now reserved for the Court of Appeal. But I must point out that all that this Court has done in the present case amounts only to construing the provisions of section 20 of Act 372 "with modifications" in order that full effect can be given to the provisions of article 114 of the Constitution which article . . . forms part of the *Proclamation*. And this is within the spirit of section 2911 of the said *Proclamation* which provided that "any enactment in existence immediately before the commencement of this *Proclamation* shall be construed with such modifications as may be necessary to give effect to the provisions of this *Proclamation*.[65]

The learned judge considered it a "sheer waste of time" to refer the matter to the Court of Appeal in a case like this one where the statutory provision was so patently invalid and cited the *Maikankan* and the *Ex parte Adu-Gyamfi* opinions in support of his holding.

One can therefore say with a certain degree of assurance that even under military rule and in the absence of a Constitution against which enactments can be measured, the Courts will rely on both those provisions of the suspended Constitution that have been continued in force and the general provisions of the Proclamations establishing military rule as affording them guidelines to determine the validity of enactments. Admittedly, the scope for review of legislation under such a scheme would be limited. Its exercise, however, will serve as a salubrious check on what is usually considered the unlimited legislative authority of the military governments.

In concluding as we have, we are not unmindful of *dicta*, though *obiter*, in the *Gredemah* case which we have already discussed, suggesting that legislative enactments of the National Liberation Council were unreviewable. For a closer reading of the judgment brings out clearly what the Court meant in those cases.

65. (1973) 2 G.L.R. 227, 229.

The Full Bench here was unmistakably referring to substantive constitutionality. There being no Constitution, the Full Bench, it is submitted, was right in saying that no enactment could have been struck down, during the N.L.C. inter-regnum, as unconstitutional. The Decrees were inviolable as far as their substance was concerned. The opinion made no reference to review on procedural irregularity.

Furthermore, there was nothing like section 29(1) of the *N.R.C. Proclamation* in its predecessor, the *N.L.C. Proclamation*. Therefore the scope for judicial review under the *National Redemption Council Proclamation* could be said to be wider than under the N.L.C. period. Consequently, it is submitted that nothing contained in the two judgments subverts the general view expressed here that, even under our military governments, our Courts still possess the power to review legislation.

CONCLUSION AND RECOMMENDATIONS

In this paper, we have considered judicial review of legislation in Ghana since independence. The picture that unfolded itself was not altogether one to make it possible for a confident forecast of the future of review in the constitutional law of Ghana. A number of reasons have been advanced for the present attitude of the courts in Ghana to review of legislation. These have to a large extent been attributed to the myopic view of and a possible under-estimation of the potential of the power of review demonstrated by our courts. It has been suggested that part of the problem stems from the legal training received by most of the judges who occupy the superior Bench in Ghana. We have also noted the rather disturbing practice by some judges of declaring enactments null and void in the face of clear constitutional provisions denying them such power. It has been urged on the courts that the discordant notes must be harmonized.

The preceding discussion has all been done within the context of the type of judicial review we have adopted since independence. To what extent has our choice been efficacious in promoting review? How much of the failure of the judges can we attribute to the system employed by our post independence constitutions? These are questions which need serious attention and to which we shall attempt some brief replies. Our discussion has clearly shown that the principle of the supremacy of the constitution and its consequences do not give rise to much dispute. A fundamental problem, however, is that of the proper means for ensuring this supremacy. Hitherto we have entrusted the task of determining the constitutionality of enactments to the highest court of the land at any given time, without a clear-cut guideline as to the role to be played by the lower courts. This has given rise to the unsatisfactory practice, we noted under the 1969 Constitution, of some High Court judges declaring acts a nullity where it seemed very clear that they did not possess the power so to do. The question therefore remains: how do we enforce the Supremacy of the Constitution in the future?

Scholarship demands that we admit that the failure to judicial review in Ghana so far is attributable in part to the system we have employed. It is therefore necessary that the system be modified. Given our experiences, it is submitted that the best solution is probably one that enables all courts in our judicial system to resolve questions of constitutionality when raised before them by parties in litigation. The other alternative is the creation of a Special Court outside the

regular system as obtains in Western Germany. But the drawback on this approach is that after the Special Court has determined the constitutional issue, the court before whom the point was raised has to act in accordance with that ruling. The time spent in the process does not appear justified in our opinion. In our considered view it should be possible for all courts in the judicial system to entertain and dispose of constitutional issues. There would be some saving in the cost of litigation if this suggestion is adopted.

One other thing the framers of a future Constitution for Ghana have to guard against is the kind of detailed provisions that the 1969 Constitution contained on judicial review. The opportunities for raising questions of constitutionality were far too many and accounts for part of the unenlightening performance of our judges as they tried to get themselves out of the complex situation in which the Constitution had placed them. It is understandable that framers of Constitutions in Ghana would for a long time be haunted by the *Akoto* opinion and would strive to avoid such a situation recurring. Care, however, must be taken to ensure that we do not over shoot our mark as we appeared to have done with the 1969 Constitution.

In the long-run view, whether or not judicial review takes root effectively in Ghana would depend also, to a large extent, on the willingness of the people of Ghana to allow constitutionalism to flourish. As Gunther rightly pointed out, "making a constitution work is a difficult, subtle, complex process,"[66] which cannot be achieved by courts alone; nor can the mere existence of a written constitution make it succeed. The constitutional language and judicial actions, and perhaps, most importantly the behavior of political leaders and of all participants in the political process are all necessary.[67] It implies an implicit faith in the constitutional ideal. Without this, neither the best disposition of the judiciary nor the most elaborate constitutional provisions would make judicial review take off from its starting block in the direction in which courts, elsewhere in the world, have been admirably performing.

It is the basic hope and belief of the present writer that the future looks bright if only we can learn from our past efforts and improve upon our tools for review.

66. Gunther, *The Constitution of Ghana—An American's Impressions and Comparisons*, 8 U.G.L.J. 2, 26 (1971).

67. *Id.* at 11.