

CONSTITUTIONALISM, CIVIL LIBERTIES AND DEVELOPMENT

A Case Study of Ghana since Independence

UNIVERSITY OF GHANA.

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Introduction

All over the developing world, matters are in a state of flux. Many of the political institutions with which the independent nations of Africa entered the post-independence era have been changed. In many of these states, the story run the same course: independence ushered in a brief period of "constitutional government" modelled on the governmental institutions of the imperial country, then gave way to one-party rule and finally the military ended the scenario with a coup d'etat. In addition to the afflictions brought on these nations by political instability, the nations are also experiencing massive social change. At the same time, the leaders of these states have had to embark on programmes designed to bring the benefits of modern technology to their fellow-countrymen. It is commonly asserted these days that the lot of developing countries in spite of (or perhaps because of it) their attempts to modernise themselves has been turmoil, warfare, political chaos and economic stagnation.

The resulting situation has given scholars a field day. Various explanations have been given for this state of affairs in the developing world. The failure of constitutional government in the developing world in Africa is often attributed to cultural diversity between the developing countries and the western European countries from which most of the governmental institutions had been borrowed.¹ According to this view, the crisis in constitutional government in Africa can be explained away by the differences in the cultures of Europe and Africa. The developing countries in Africa inherited alien governmental structures from their colonial masters. The institutions being alien, it was not surprising that the leaders were unable to keep the system running smoothly. Thus, Professor Shils suggests that Parliamentary institutions, institutionalised dissent and all the paraphernalia of modern constitutionalism are "alien to the traditional image of the world of public decisions..."²

One is uncertain about the extent to which the cultural diversity theory offers an adequate explanation of the difficulties constitutional government faces in the developing countries. But a fuller examination of this theory is outside the focus of this paper. Perhaps, however, it is worthwhile to observe that too much room

has been given to deductions from "traditional society" in the discussion of the problems concerning the governing process in the developing countries than would appear justifiable. For the fact is that the eighty-odd years of colonial rule experienced by most of these countries has transformed their societies in such a way that explanations based on "tradition" alone are often useful only as a historical analysis. Neither Ghana in 1957 nor Nigeria in 1960, for example, was a reflection of the Ashanti or Hausa-Fulani empires of old.

Another reason often given is that the citizens of these states usually do not give their first allegiance to the nation – the problem of ethnic allegiance. In the struggle for independence, so this view goes, the different ethnic groups, unite to fight against the common enemy, the colonial master. Once the impostor is driven off, the bond that keeps them together is broken. Inter-ethnic rivalries come to the fore. The Ibo thinks of himself more as an Ibo than as a Nigerian; the Ewe thinks of himself more as an Ewe than a Ghanaian. The heterogeneity of the peoples making up the citizenry of these countries is thus postulated as an important obstacle to constitutional government. Often, of course, the argument is foot-noted with the explanation that the size of the ethnic problem varies from country to country.

But while it is arguable that having to live together for a long time has blurred the ethnic diversities of the different peoples in Western Europe, the fact remains that a Scot is different from an Englishman and, on occasion, is as likely to emphasize his "Scotness" rather than his "Britishness" just as the Ashanti of Ghana; in Belgium, several years of living together appears to have only exacerbated the unease with which the Dutch and French segments of the country live together. Yet few people will deny that Great Britain and Belgium operate the constitutional governmental system quite admirably! Whether ethnic allegiance promotes or discourages constitutionalism appears to need re-examination.

In more recent years, greater emphasis has been placed on the development needs of the developing countries. According to this view, the development needs of the developing countries require us to postpone the expectation of the arrival of constitutional government and the realisation of civil liberties in these countries. The leaders of these countries have to modernise their countries, "

process in which economic development occupies a central place. They have to bring the benefits of modern technology to the doorstep of their fellow-countrymen. President Nyerere of Tanzania suggests, for example, that this task of development creates 'a continuing state of emergency' in the developing countries and justifies the one-party system.³

In many cases, the resources these countries have at their disposal for the achievement of their development objectives are slender. Yet develop they must. Besides, development is one of the issues on which the leaders cannot drag their feet. For the slow pace or absence of development had been used by them as one of the justifications for calling upon the "masses" to join hands in throwing off the colonial yoke.

Not only did the leaders have to embark on development, they had to do it within the shortest possible time. They cast envious glances in the direction of Russia and China who within a quarter of the time it took the developed nations of the West to reach their present standards of living had made comparable efforts. The Russian 'miracle' had been possible within the short time it took largely because its leaders paid little attention to the rules of constitutionalism, or at least, so it is claimed. This further lured the leaders of the developing countries away from the strictures of constitutional government. The fact that socialism and communism mean something different to these leaders, not only as between themselves but also from the sense in which these terms are understood in Russia and China is often noted.⁴ But this does not deter them from employing the term.

As for civil liberties, following the lead of some Western scholars who characterise them as "bourgeois luxuries" designed to protect "capitalist interests" and to deflect these countries from their development courses, the leaders of the developing countries appeal to their fellow-citizens to accept their postponement in the short term until some future time. Freedom is thus presented as if it were an enemy of the material development of the individual.

Constitutional government and civil liberties are thus presented as incompatible with the need to develop which is felt to be and ought to be the primary concern of developing countries. To be sure the incompatibility theory is not accepted by all. Some scholars, even while recognising the importance of development, have

implicit faith in the constitutional scheme as perhaps the best atmosphere in which development can be achieved. Such scholars have concentrated their efforts on building models of a constitution within which the development need can be accommodated.⁶

Some or all of the views noted about the alleged teething problems of constitutionalism, civil liberties and development above find strong support in the great national debate going on around us about the future direction of our constitutional life. Besides the debate, we also have a deliberative body currently sitting, which has been given the task of helping us produce the constitutive document with which to embark on a new political life, a life which has been described by the government as "constitutional rule".⁷

Forecasts of the prospects for constitutionalism and civil liberties in developing countries usually end on a pessimistic note.⁸ Perhaps, pessimism is unavoidable if we try to find out how far the structure of government in Ghana conforms to that of Great Britain. It is submitted that such an approach is fundamentally wrong. The weakness in that approach is that it masks the fact that the acknowledged constitutional governments of our contemporary world employ different structures to achieve constitutional rule. A more meaningful approach will, in my humble opinion, be to focus on the main principle embodied in these ideas and let those principles guide and inform both our thinking on the matter and our efforts at translating our thinking into reality. It seems hardly justifiable to insist that developing countries adopt the particular structures, institutions or vehicles of any constitutional government. That choice in itself would prove extremely difficult. For which is to prevail, American, British, Swiss, Dutch or French institutions? Wholly or partially?

We need then to reduce the key words constitutionalism, civil liberties and development into digestible form to enable us make both an informed appraisal of our constitutional past and to approach the current exercise in an intelligent manner, free from avoidable lapses. This will be followed by a brief account of the constitutional life of Ghana since independence. Finally, I will take the liberty of inflicting some personal views of mine on the ladies and gentlemen herein assembled. I have chosen constitutionalism, civil liberties and development because, in my opinion, judging

from what has so far been contributed to the national debate as well as the thinking of government, they stand out clearly as “the good things” everyone wants for Ghana.

Constitutionalism

What then is “constitutionalism”? What do we mean when we refer to a government as “constitutional”?

In the best tradition of scholarship, perhaps, I should start by saying what is not constitutionalism. A preliminary issue which is a constant source of confusion in discussions about this concept is its relationship with democracy. It is often said, and to some extent accurately, that there is probably no other word in the language of politics about whose meaning so much uncertainty exists as the term ‘democracy’. While there is room for disagreement between two people about whether the government of the German Democratic Republic is a *democracy* or whether capitalist society is truly *democratic*, however, most people would agree with Professor Nwabueze that a government is a democracy if it is popularly based, rests on the consent of the governed, which consent is given in universally free elections, and which provides a mechanism for the governed to change the governors in the event of dissatisfaction with their performance.¹⁰

But care has to be taken not to confuse a popularly elected and responsible government with a “*constitutional*” one. For there are in our modern society many governments whose popular basis appears unquestionable but which any informed scholar would hesitate to describe as “constitutional”. The point being made here is that a constitutional government and a democracy are not necessarily the same thing. A constitutional government in modern times will also be democratic but a democratic government is not necessarily constitutional.¹¹ The democratic institutions such as elections, parties etc. are only tools for constitutionalizing a government.

A further point is also called for. Constitutionalism does not merely require the existence of a Constitution. Constitutionalism has *indeed* come to presuppose the existence of a *Constitution* and anyone embarking on constitutionalising a government or establishing constitutional rule today must need start with one. A country then, it must be understood, can have a constitution without constitutionalism, particularly, in situations where the constitution

is only an enabling act which sanctions governmental fiat.

What then is *Constitutionalism*? It may be roughly defined as the art of providing a system of effective restraints on the exercise of governmental power.¹²

Government is necessary for the effective running of ordered society. Yet long before Lord Acton's famous aphorism about the corruptive nature of power, man was alive to the arbitrariness inherent in the power of government. Constitutionalism then recognises the necessity for government while seeking to curb this inherent arbitrariness. As Carl Friedrich put it neatly:-

"...(it) embodies the simple proposition that the government is a set of activities organised by and operated on behalf of the people, but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing."¹³

It involves the idea that government must be carried out according to pre-determined rules which at the same time restrain governmental activity. This idea of restraints developed from medieval notions of natural law superior to any human laws and the Christian doctrine of personality, which, by emphasising the worth of the individual, opposed any despotic exercise of political authority.¹⁴

Accordingly, it does not matter very much whether the structure of the government is unitary or federal, though the federal organisation of society can be considered an important way of entrenching the restraint principle central to the idea of constitutionalism.

If then the essence of constitutionalism is the existence of limitations or restraints on governmental power, the question arises how to make these restraints effective. It is in relation to this, that the existence of a written constitution becomes very relevant and important to the concept of constitutionalism.

Ever since the lead given by France and the United States in the eighteenth century, the view has become firmly established that the restraints on the exercise of governmental power to be effective must be embodied in a supreme written document, preferably enforceable, by parties before a judiciary which is independent of the other organs of government. The written constitution ensures, as Chief Justice Marshall of the U.S. Supreme Court pointed out in

Marbury v. Madison,¹⁵ that the limitations placed on government are known and, therefore, excursions outside these limits can be more easily checked. There is, however, no uniformity in practice about whether the 'policing' of the Constitution should be performed by the judiciary, or simply by hoping that the organs of government will restrain themselves and keep within the boundaries of their constitutional powers.¹⁶ Perhaps, the boldest one can get in this area is to assert that some countries rely on the judiciary as well as the legislature to keep the boundaries of governmental power undisturbed, while others leave everything entirely to the good sense of legislators.

One more thing ought to be said about the 'Constitution'. No country, in my opinion, has a wholly 'written' or wholly 'unwritten' constitution. Any one wanting to study 'the law of the constitution' of any country should go beyond the existence of a written document. An appraisal of constitutionalism in a country, with one written document called *the constitution*, will be sadly deficient if it only focused on the constitutional document. There must also exist in the ethos of that particular society belief in the idea that the power of government ought to be restrained.

If we may summarise, the key concern of constitutionalism is the division of governmental power, in such a way that there is an effective restraint on the arbitrariness inherent in power so that the individual in society will be the beneficiary. Such a system of restraints may be embodied partly in a written document and partly left to be enforced by the force of tradition. But it is important that these restraints be legal, that the government so restrained be under law and that these restraints be enforceable before an independent body of arbiters in the event of a claim by an individual of their violation. Separation of Powers, Rule of Law, Judicial Review, to mention only a few of the key ideas which constitute the Constitutional lawyer's merchandise, are only a breakdown into smaller proportions of the basic idea of Constitutionalism.

Civil Liberties

In the preceding section, we said a governing process is 'constitutional' if the rulers are subject to a body of rules and principles, which limit the exercise of their power. The most important set of legal restraints on governmental action concern those rules and principles which protect 'civil liberties.'¹⁷

The idea of 'civil liberties' contains two elements described by Professor d'Entreves as 'negative' and 'positive liberty' in his book *The Notion of a State*.¹⁸ That is to say 'civil liberty' has both positive and negative attributes. Indeed whenever we talk of building an 'open' and 'self-governing' society we are referring to these two attributes of 'civil liberty'.¹⁹ Again, these two sides of the idea are what we refer to in our discussions about a 'liberal' and a 'democratic' society; the English concept of the 'rule of law' also expresses essentially the same idea although its emphasis seems to be more on 'negative liberty'.

Included in the contemporary understandings about civil liberties are certain rights described as "social and economic rights" on which emphasis is placed by developing and socialist countries. These rights, which are indeed an offshoot of positive liberty, embody the belief that the collective power of the state should be used to achieve egalitarian ends. By advocating state intervention for the equalising of society, the proponents of these rights hope to make it possible for the individual to enjoy his liberty in a meaningful way.

In both aspects of the expression, the focus of civil liberty is the individual, his relationship to the state and to his fellows. In the negative sense, it is concerned with carving for the individual an area immune to the power of the state. Individuals must be free to do the things not regulated, in the sense of prohibited, by law. It calls for a careful balancing of law and the dictates of order. This essentially negative outlook of liberty is often criticised on the ground that it pays insufficient attention to the problem of how power is to be exercised and by whom.

How power is to be exercised and by whom is what d'Entreves characterises as 'positive liberty'. Positive liberty gives a popular basis to the civil liberty concept. It derives from the belief that everyone should be his own master, or at least, should have a say in all decisions that affect him. In modern times, it is expressed as popular sovereignty.

The negative and positive elements of the concept of civil liberty have not always been bed-fellows and even now tension is discernible between them.²⁰ It was feared by well-meaning persons that 'positive liberty' was a threat to negative liberty. By justifying the participation of all in the governmental process, it was argued

that the individual will be subjected to the 'tyranny of numbers'. Secondly, positive liberty, it was thought, would result in a 'levelling of values', a denial of the role of self-differentiation. Finally, the worst danger seen in positive liberty was that it could be used to destroy liberty altogether. We just need to reflect on the many ways in which plebiscites, referenda and other forms of direct appeals to the electorate have been used to establish regimes which have engaged in activities completely inimical to individual rights to understand this fear.

Negative liberty has also been used as a cloak for exploitation.²¹ Negative liberty dressed as laissez-faire, in its advocacy of free enterprise, was used to defend existing inequalities in many societies. It is interesting to note in this context that in the celebrated Ghanaian case of *Re Akoto*,²² the Attorney-General (the late Geoffrey Bing) in urging that American practice should not be used as a guide in the determination of the constitutionality of the Preventive Detention Act of 1958, emphasised the fact that in 1905 the U.S. Supreme Court had, in *Lochner v. New York*,²³ by upholding freedom of contract, thwarted the efforts of the New York legislature to improve on the lot of the worker.

Civil liberties whether in the positive or negative sense are usually depicted as a piece of 'bourgeois ideology'. This is hardly accurate. It is true that the concept has seen much elaboration in the writings of political theorists in the societies usually referred to in contemporary times as 'bourgeois' or 'capitalist'. Indeed some of the notable parents and defenders of the concept will seem to confirm this view: Hobbes, Locke, Rousseau, Mill and Montesquieu. However, modern evidence with regard to the concept makes a large hole in that characterisation. The 1954 Constitution of the Peoples Republic of China and the 1977 Constitution of the Soviet Union both have provisions embodying the civil liberties idea.²⁴ Perhaps, as some commentators have suggested, these provisions are only for propaganda.²⁵ These countries are the leading non-bourgeois states today. The fact that they have found it necessary, for whatever motive, to include these ideas in their constitutions should make us hesitate to claim that civil liberties are the product of a particular historical period, abstract theory or a particular type of economic and social organisation. Rightly has it been maintained that there is nothing in

the concept of civil liberties which makes it intrinsically opposed to state action

“directed to removing obstacles to the full development of human personality, or to the effective participation of all citizens in political life, when such obstacles are due to their particular economic or social condition, or to the privileged position of certain groups within the state.”²⁶

Civil liberty, then, includes, political, social and economic rights. Politically it involves freedom of conscience, thought, expression, press, association, assembly and religion. The social and economic rights include the right to property, to work, to a decent standard of living, to education and to equal treatment.²⁷

How are these Liberties secured? It is true, as Learned Hand wrote, that:

“Liberty lies in the hearts of men and women; when it dies there no constitution, no law, no court can save it; no constitution, no law, no court can do much to help it.”²⁸

However, it has been realized that depending only on the good sense of human beings is not enough. Consequently, in our contemporary society, vast energies have been spent and continue to be expended on finding the best formula for the protection of these liberties and for their maximisation.

Two basic methods are currently in use. The first technique, exemplified by British practice, leaves the protection of civil liberties to the operation of the ordinary laws of the country, e.g. criminal law, contract, torts etc. and the provision of effective judicial remedies.

The second method involves the formal identification of these liberties in a written constitution, care being taken to ensure that the dynamic nature of liberty is not thereby lost. However, the realisation of the potentially precarious nature of the first approach, whose effectiveness depends considerably on the human factor in government, has led, since the French and American revolutions, to widespread use of the second method.

The second method involves not only the embodiment of these liberties in the constitutional document. It also involves making these liberties “justiciable”, that is to say enforceable in the courts at the instance of an aggrieved individual. A further development of the second approach is the attempt to internationalise the

protection of these liberties. The U.N. Declaration of Human Rights of 1948 is one example. But by far one of the most important developments in this area is the European Convention on Human Rights adopted in 1950. This is because the Convention does not only outline standards which should be striven for by national governments but also provides an enforcement machinery which can be used by a dissatisfied national of most of the signatory states. This provides "a remedy in reserve – a long stop to catch the failures of the domestic system."²⁹

The embodiment of these rights in the constitution does not necessarily mean that all the rights should be made justiciable. This is because a close analysis of some of the rights embodied, especially in the idea of positive liberty, will disclose that they deal with matters which cannot be properly resolved by the machinery of the judicial process. There is the need, therefore, to draw a distinction, in the constitutional document, between those rights which are meant to be enforced through the courts and others, which, though no less important, are intended only to inform governmental activity, or to be enforced through processes other than judicial.³⁰

The difficulties involved in not drawing such a distinction can be illustrated by one of the clauses in Article 13(1) of the 1960 Constitution of Ghana. The clause provides:

"That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country."

Now, if one takes the view that this clause contains a justiciable right, certain problems immediately arise. Can an individual, for example, then arrest the budget of the government on the grounds that it denies him a "fair share of the produce yielded by the development of the country"? How is a court to solve the problems of the *size* of the national cake and *the share* which, in respect of a particular litigant is to be considered *fair*? Perhaps, it was for reasons such as this that the Supreme Court ruled in *Re Akoto* that Article 13(1) was not justiciable. I must point out, though, that the Court could have decided to enforce these rights selectively.

Development

I propose to attempt no comprehensive definition of the term 'development'. Suffice it to say that the word is used to denote change politically, socially and economically. It is used to express the need for a transformation of society in a progressive, positive

and desirable sense.

Development does not only involve the changing of society by the improvement of living conditions, the generation of wealth and the opening up of employment avenues, the provision of educational facilities and ensuring that a rational basis exists for the distribution of the 'national cake'. In a developing country, such as Ghana, it means, above all, the attainment of these ends within the shortest possible time. The late Prof. Bentsi-Enchill put it thus:

"...the gathering momentum of technological development in the advanced countries is leaving us further and further behind, and ... we have no choice, but to adopt urgent and radical, even revolutionary tactics for speeding up the acquisition of the required know-how if we are serious in our determination to achieve general emancipation as a self-respecting people"³²

The need to develop and become respected resulted in the main emphasis on development, in the Third World Countries, being placed on economic development. In this choice also we were victims of time. We had attained nation-hood at a time when economic development had become the major concern of modern society. Economic development was elevated to "the status of a major criterion of the world's judgment of any particular country."³³ Economic progress became more precious in the eyes of the world than any other values. It became the gate-way to international respectability and acceptance. That, in part, explains Brazil's present stature in the world community.

The focus on economic development is, moreover, not irrational. For economic development increases wealth, and wealth increases the range of human choice.³⁴ Economic development augments the supply of essentials for life and enables us actually to enjoy life. It provides the wealth necessary for improvement in health facilities which, in turn, extends man's life span. It enables the state to provide more goods and services; it enables society to minimize inequalities. In other words, by embarking on economic development, we will be able to eradicate, or at least minimise the effects of poverty, ignorance and disease, which are among the most debilitating afflictions in our countries.

The development needs have been perceived by some as requiring a change of the ideological base of society; in particular, we have been advised that having been liberated and redeemed

without our being in sight of the end to our woes, our salvation lies only in socialism.

The appeal of socialism for some is understandable. First, there is the success story of rapid development of Russia under socialist ideology. Secondly, Marxist-Leninists (or Maoists) by their persistent opposition to colonialism have endeared themselves to many of the people in the Third World. Besides, developing countries which see their development in terms of wresting their economies from over dependence on selfish Western economic interests, find socialism's denunciation of the exploitative nature of the 'capitalist economies' of the West very comforting. It is hardly surprising to see that, in the Third World, a good number of people who are alive to the problems in their countries and who speak out against them consider themselves, or are considered by those in authority as *communists*.

Ghana, 1957-1975

We will now make an appraisal of our Constitutional past in the light of the foregoing analysis.

It is now a notorious fact that Ghana became independent in 1957. Between 1957 and now, we have experienced two bouts each of civilian and military rule. In the process we have acquired three "*constitutions*" and two quasi-constitution military Proclamations,³⁵ a record which should recall to our mind the famous story reported by Gyandoh and Griffiths in the Introduction to their book "A Sourcebook of the Constitutional Law of Ghana" about the French Constitution. According to the learned authors, an eager student's attempt to purchase the latest French Constitution from a London book-seller was met with the curt announcement: "Sir, in this Bookshop we do not sell periodicals."³⁶

The first of the three civilian Constitutions was the Independence Constitution of 1957. This structured the government after British ideas of responsible parliamentary government. It provided for a Legislature, a Cabinet and a Judiciary with a power of review; the judiciary was also sufficiently insulated against executive interference to assure it some measure of independence and security. By far the most important check on governmental power was the provision requiring the establishment of Regional

Assemblies to which certain measures affecting the Constitution were to be referred and whose consent was necessary for the validity of such measures. These provisions were inserted in the Constitution to assuage the fears of regions which felt uneasy about the possibility of their interests being disregarded by the majority and who had been agitating therefore for a federal structure of government immediately before independence. However, the passage in 1958 of the Constitution (Repeal of Restrictions) Act swept these checks away.

Indeed the story of the death of the Regional Assemblies so typifies the lack of understanding in our society about what a constitutional government involves that perhaps it needs to be re-told here. The parties in opposition to the C.P.P. boycotted the elections to the Regional Assemblies. The C.P.P. thus won control of all the Regional Assemblies. The cynic may consider it one of the abiding epitaphs to the C.P.P.'s respect for constitutional forms that the C.P.P.-dominated assemblies met only once and transacted one solid business: namely, they resolved to DISSOLVE themselves. Thus, whatever check the Regional Assembly mechanism was to exercise over governmental activity was lost. Needless to point out that a round was thereby lost in the quest for constitutionalism in Ghana.³⁷

Three years after independence, Ghana became a republic and adopted a new Constitution, the 1960 Republican Constitution. This Constitution, which was meant to put our sovereignty beyond the pale of doubt, established a government which was a blend of the Presidential and parliamentary systems.

It provided for a President, Parliament and a Judiciary in which the executive, legislative and judicial powers were respectively vested. It also had the unique feature of vesting the Presidency with limited legislative power.³⁸ An amendment to the Constitution in 1964 gave the President discretion to dismiss Judges of the Supreme and High Courts for reasons which appeared to him sufficient.³⁹ Another amendment adopted at the same time made Ghana a one-party state. Whatever else could be said of the Constitution either in its original or amended form, no informed scholar ought to say that it established "constitutional government". We have, of course, often heard that whatever charges could be levelled against the C.P.P. era, its leaders could not be accused of non-constitutional

behaviour. We must now consider such assertions as uninformative as well as ridiculous.

In fairness to the C.P.P. government, it must be noted that that government, although it used the law as a tool for oppression, always ensured that all its acts were backed by legislation, and were consistent with the Constitution. But as we have already observed, government according to a constitution is not necessarily equal to constitutional government.

Various organs of government under the 1960 Constitution as amended failed to perform their tasks in a way as to constitute them into the checks on governmental power they were designed to be. John Kraus's general picture of Parliament in the last four years of the Nkrumah regime can hardly be bettered:

"It was manipulated, often adulatory, uncritical, uninformed and unprepared, in part due to the governmental propensity to attach certificates of urgency to bills..."⁴⁰

The 1960 Constitution thus established a government which bore no relationship to notions of good government in our traditional system of government and did not accord with prevailing understandings about constitutionalism.

In 1966, the Armed Forces in conjunction with the Police unlawfully put an end to the oppressive rule of the C.P.P. They accused the government of betraying the trust of the people.⁴¹ Under a Proclamation passed a few days after the coup d'état in 1966, the military and police leaders established themselves in government.⁴² The National Liberation Council so established was vested with the legislative and executive powers of the State. The judiciary were left substantially with their pre-coup powers.

In line with its caretaker image, the N.L.C. took steps to return the country to '*constitutional rule*'. A Constitutional Commission was appointed to make proposals for a new Constitution because the 1960 Constitution was rightly looked upon as having facilitated dictatorial rule. The Commission's proposals were later modified and promulgated by a Constituent Assembly. This was the 1969 Constitution. Late in 1969, elections were held under this Constitution. The Progress Party, led by the late Dr. K. A. Busia emerged dominant, winning 105 of the 140 Parliamentary seats at stake. Designed to prevent the rise of a dictatorial regime, the 1969 Constitution was the most ambitious attempt to date to be informed

by the basic concerns of Constitutionalism.

Laudable though these efforts were and in spite of its generally acknowledged commitment to constitutional government, Dr. Busia's government was overthrown before it was three years old. Its austere economic measures dictated by the fall in the world market price for cocoa and the worsening external debt situation are said to be the principal factors which brought it down. There is evidence also that cuts in the Defence budget caused that government's downfall.⁴³ However, we must not lose sight of the fact that the Busia government, whatever else is claimed for it was politically naive, arrogant, and generally not as dedicated to constitutionalism in practice as its rhetoric suggested.⁴⁴

Since 1972 Ghana has been administered by a military regime. In October 1975, the military authorities tried to introduce some order into the administration. They formulated rules which, though unsatisfactory in many important respects, appear to be an attempt to ensure that government will be conducted according to predetermined rules. But those rules unwisely gave to the office of the Chairman of the Supreme Military Council created in 1975 just as many powers as the President under the 1960 Constitution. It is a sad commentary on the competence of those who served in the S.M.C. until the overthrow of its Chairman on July 5, 1978 that they dared accuse the former Chairman of running a "*one-man show*". For the perceptive reader quickly discovers, upon reading the Decree which established the S.M.C. in 1975, that the structure of the government was designed to lead to just this type of *one-man show*.⁴⁵

CIVIL LIBERTIES

If we turn to the course of civil liberties during the period under examination, we will observe that the two techniques, we have earlier pin-pointed, were employed for their protection. From 1957 to 1969 and since 1972 the protection of civil liberty has followed generally the British idea of entrusting the task to the operation of the ordinary laws of the land.

The 1957 Constitution did contain a few provisions on civil liberties. These provisions guaranteed freedom of conscience or the right to freely profess, practise or propagate any religion; property was not to be taken compulsorily without compensation and racial discrimination was outlawed. The 1960 Constitution in its Article 13(1) required the President to declare his commitment to the protection of certain rights. Any speculation that these declarations constituted a bill of enforceable rights was quickly dispelled by the Supreme Court in *Re Akoto*. The period up to 1969 saw, in many respects, some of the worst abuses of civil liberties. Through detentions without trial, harassment by members of the notorious Special Branch, interference in the judicial process, the C.P.P. government reduced Ghanaians to a band of frightened people who trembled at the coming of the radio news at one o'clock in the afternoon every day (nowadays it seems to be 2.00 p.m.) and who lived in constant fear of that dreadful dawn knock on the door. This period demonstrates sharply the danger in leaving the protection of our liberty to the politicians and the lawyers.

Having experienced a period of rule during which the law itself was used to destroy our rights, we made our most impressive effort to date, to ensure not only that government was conducted according to law but also that a strict limit was set to the type of laws the government could make, in the 1969 Constitution. Seventeen Articles were devoted to a detailed statement of the content of civil liberties guaranteed. The circumstances under which very carefully circumscribed derogations could be made from them were clearly delineated. Further, in the Amendment Clause, it was provided that these rights could not be detracted or derogated from. The amending process itself was heavily circumscribed to deter frivolous amendments.

The rights so identified were made justiciable. Articles 1(2) and 2, more or less, made every citizen a watch-dog over the Constitution. The judiciary were empowered to ensure that governmental behaviour, whether legislative or otherwise, was within constitutional prescriptions. Finally, the security and independence of the judges were secured against governmental excesses.

The Busia government, by and large, respected these rights. Its dark corners, as far as civil liberties were concerned, were the passage under a certificate of urgency of the Criminal Code (Amendment) Act by which it sought to stem the revival of any

interest in Nkrumah and the C.P.P. Many people were also disturbed by the then Prime Minister's politically unwise reaction to the Supreme Court's decision in the *Sallah case* because it was thought to be a subtle attempt to put pressure on the judiciary. Mention must also be made of the Industrial Relations Act by which the government sought to weaken and/or infiltrate the Trade Union Movement; the dismissal of the Editor of the state-owned newspaper, the Daily Graphic, apparently for opposing the Prime Minister's views on dialogue with South Africa; and the harassment of journalists opposed to the government with criminal prosecutions. If people tended to magnify these aberrations, and I am not suggesting for a moment that they were of no consequence, it seems to be largely because the government failed to realise the wisdom in the biblical belief enshrined in the motto of one of our Halls of Residence that "to whom much is given much is expected."⁴⁶ Given the rhetoric of key members both before going into government and after, the Progress Party government should have realised that for many Ghanaians even an angry reaction to an admittedly provocative situation would be considered a mortal sin by their fellow countrymen.

The least said about the period under military rule, perhaps, the better. First, the very existence of military rule with its ideas of government with unlimited power to use law for the attainment of any ends is itself more than a threat to civil liberties. Secondly, the effort to subject the majority of us non-military men to military discipline through, for example, the Subversion Decree is to say the least unconscionable. Thirdly, the widespread practice of "protective and preventive custody", by which an individual can be kept for many days in detention without trial, the general lack of respect for legal strictures which seems to be the peculiar affliction of soldiers in power, the muzzling of free speech, all pose the gravest threat to liberty. In fairness to both the N.L.C. and N.R.C./S.M.C. regimes, though, it must be said that the degree of derogations from constitutionalism and civil liberties fall far below what we hear of military regimes elsewhere and is not too violent departure, in substance, from the record of civilian regimes in this country since independence.

Development

Development for Ghana, irrespective of the strategy employed, has meant rapid transformation of our society, the eradication of poverty, disease and ignorance, the elimination of the over-dependence on the cocoa crop, industrialisation and the laying of the necessary infrastructure for the economic take-off. Certain impressive strides have been made in this regard. The building of the Akosombo Dam has made available cheap hydro-electric power, although it seems in the main to benefit only the capitalist organisation, VALCO. Increases in the educational facilities coupled with liberal educational policies have made education possible for many of us. We now have more health facilities than before independence. A reasonably wide network of roads and other communication facilities have been built. And though the fruits of development such as exist have been unevenly distributed, some efforts have been made to improve the lot of the country's rural population.

Lest I am misunderstood, the point I am trying to make is that anyone who left this country in 1956 and returned this year will be impressed by what has been done development-wise. If Ghana is considered a failure in this regard, this is because many feel that given its available resources, with a little bit of realism in development planning, optimum use of its facilities, the eradication of corruption and the willingness of the planners to learn and understand what makes our economy tick, more could have been done.

Ghana's experiences here call for one comment. The attempt to put the blame of the slow pace of development on the constitutional governmental schemes with which the developing countries entered the post independence era must be considered as ex post facto rationalisation. For, in Ghana, the evidence is quite strong that the lowest periods for constitutionalism and civil liberty coincided also with the least development. This is clear if one compares the development between 1950 to 1960 with that between 1961 to 1978.

Conclusions

What are the prospects for the future? If we are to adequately provide against the evil moments of our past life we have to learn the right lessons. First, it must be quite clear from the foregoing analysis that we have hardly experienced constitutional rule in this

country. There is the uninformed tendency to assume that our civilian regimes were constitutional. They were not. The Busia period was, for this purpose, too short for any meaningful conclusions to be drawn. If the signs it gave are anything to go by, there was a strong likelihood that it would have degenerated into government only according to the constitution.

Secondly, we have a crisis of role definition. One often hears the assertion that trying to run the affairs of the state is not the proper role for our military. Implicit in this assertion is the assumption that governing is not the job for soldiers in Ghana. Perhaps, this is so. The evidence in our traditional constitutional system does not seem to square with this. We see traditional office-holders in our institution of Chieftaincy who are military officers in that system. It is often difficult to determine whether they hold their political offices by virtue of their importance militarily to the state or vice versa. The Ghanaian soldier is not brought up in Britain, France or the United States. We cannot, therefore, assume that the role of the Ghanaian soldier is or must be the same as that of the British, French or American soldier. Even if we want to ensure that the soldier does not seize power, we have to work out this consciously. The conclusion that power has been usurped by the military only because they have the guns is easy but not enough.

Thirdly, we have to realise that the governmental machinery we have operated at the center has in a way been responsible for some of our woes. It cuts out a large number, shall we say the majority, of our citizenry from participating in the governing process. If one ponders seriously over our political life since independence, in particular if one directs one's mind to the traditional governmental process, one will be struck or ought to be struck by one realisation – namely, that while constitutional government has been in crisis at the center, the traditional governmental system has remained entirely constitutional throughout this period. The difficulties it has experienced have been largely due to the interference of the politicians at the center. This has been so because in part the people have been vigilant. We need to fashion principles of governance which make the large majority of our people relate to the power at the center in the way they relate to their chiefs.

Fourthly, it must be clear that institutionalisation of constitutional government, the enjoyment of liberty, our need to develop – all these aspirations cannot be entrusted to lawyers,

economists and the like. Lawyers as judges, legal advisers to government, politicians etc. have had a hand in the battles lost to constitutionalism and liberty in this country. The *Re Akoto* decision was the work of lawyers; the Protective Custody Decree and the Subversion Decree were the work of lawyers. As the government statement on the dismissal of Azu Crabbe as Chief Justice made clear, interferences with the judiciary such as the abolition of the Supreme Court appear to have been at the instigation of the lawyers association.⁴⁷ Whatever may be the pretensions to power of our current military leaders, a good number of people will not be subjected to unjustified detentions without trial if the judges will show some imagination in their handling of Habeas Corpus applications that come before them. It is not enough after the lawyers have helped to create the mess and instal a dictator to turn round and appear to be in the fore-front of the battle against tyranny.

Our economists must stop their drift towards what the late Schumacher described as "the abandonment of wisdom". They must realise that "small can be beautiful". I get the impression as I listen to our economists that although they may have, by I.M.F. standards, impeccable qualifications, they have no business managing the Ghanaian economy. They simply do not appear to understand what makes the Ghanaian economy bleed. If that continues we will stagger from the debilitating effects of one devaluation to another. Ghana deserves better than that.

Our rulers must realise that upon a close examination, the very negation of the concepts of constitutionalism and liberties plays a large role in the failure of performance to match development objectives. For planning to be effective, there is need for popular involvement in the planning process itself. Objectives must be fixed in the full knowledge of existing facilities. This calls for exchange of ideas. The plan that emerges must result from what the late Mr. Justice Holmes of the U.S. Supreme Court described as "the competition of the market of ideas."⁴⁸ We cannot afford to ignore or suppress the ideas of some of the skilled personnel available as we have tried to do. While such views may only have nuisance value, there is a good chance that such views will force the planners to lower their sights and to plan realistically.

For us as a nation, there is an additional reason why we should cherish liberty of the individual. We are a nation of different

peoples. That is a fact. It may be true that decision-making in the traditional African political systems was based on consensus. But it must be remembered that the consensus was possible because of the ethnic homogeneity. When two or more ethnic groups are brought together into one nation, the prospects for consensus politics might be more difficult. That will suggest that we should place a high premium on constitutionalism and liberty for our survival as a nation than we have done in the past.

Now, the view has been expressed in recent times that the whole search for a new government is a wasted effort. In particular, it has been pointed out that a lot of people who appeared before the Ad Hoc Committee on Union Government were concerned with bread and butter matters. As a student of constitutional history, however, I cannot subscribe to the view that the search for a new form of government is a wasted effort. For history is replete with situations where, confronted with the problems we have encountered in the past, other people had taken a hard look at their institutions and changed them even radically. The Americans did it in the 18th century and early in this century, the Russians also. So the search in my opinion must continue. What should not happen is that we should not succumb to the tendency to be intolerant of positions we find unacceptable. Society's known approach for changing the economic base has been the alteration of the political system and not vice versa.

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References

1. See generally Edward Shils, *The Fortunes of Constitutional Government in the Political Development of the New States*, in John H. Hallowell (ed.), *Development: For What?* (Duke University Press, 1964) pp. 103-143; Maxwell Owusu, *The Search for Solvency: Background to the fall of Ghana's Second Republic, 1969-1972*, AFRICA TODAY Vol. 19. No. 1 (1972) pp. 52-60 at 54; Opeyemi Ola, *The Cultural Basis of the Crisis of Parliamentary Democracy in Africa*, CIVILISATIONS Vol. 22 Nos. 3 & 4 (1972).
2. Edward Shils, opcit., 123. (I am extremely grateful to Professor Shils who drew my attention to this article when I was a participant in a seminar he conducted at Leiden University).
3. Quoted in Nwabueze, *Constitutionalism in the Emergent States*, (London, 1973) p. 168.
4. For the various meanings given to "socialism" in the developing countries in Africa, see William H. Friedland and Carl G. Rosberg Jr. (eds.), *African Socialism* (Stanford University Press, 1964).
5. Roger Garaudy, *Peut-on être Communiste aujourd'hui?* (Paris, 1968); especially his Chapter 2, *Songes et Mensonges de la liberté*, offers a persuasive argument of the 'capitalist veneer' of the supposedly libertarian movements such as the French Revolution of 1789.
6. A good example is Apter and Doornbos, *Development and the Political Process: A Plan for a Constitution*, in David E. Apter, *Political Change*, (London, 1973) pp. 118-146; it is also to be found in AFRICA REVIEW, vol. 1 No. 1 (1971).
7. On 30th April 1978, a 23-man Constitutional Commission under the chairmanship of Dr. T. A. Mensah was appointed to draft proposals for a new Constitution to be considered by a Constituent Assembly to be increased to 55 and it now has this task of drafting a Constitution for the Transitional National Government proposed by the Supreme Military Council as part of its phased programme of return to civilian rule. See S.M.C.D. 164 as amended by S.M.C.D. 173.
8. Shils, op.cit., note 1 supra, esp. pp. 142-143; cf. Ake, *Explaining Political Instability in New States*, JOURNAL OF MODERN AFRICAN STUDIES, vol. 11 No. 3 (1973) pp. 347-359, esp. p. 353.

9. For a detailed consideration of this concept, see Carl Friedrich, *Constitutional Government and Democracy*, revised ed. (Massachusetts, 1950); Nwabueze op.cit., note 3 supra; de Smith. *The New Commonwealth and its Constitutions*, (1964). The reader is asked to note that "constitutionalism" and "constitutional government" are used interchangeably throughout this essay.
10. Nwabueze op.cit., pp. 1-2; Friedrich, op.cit., pp.31-32.
11. See works cited in note 9 supra; see also Wheare, *Modern Constitution* pp.138-140.
12. Nwabueze, op.cit., p.5.
13. Friedrich, op.cit., p.35.
14. ibid. pp. 26-27.
15. 1 Cranch 137 (1803).
16. Ybema, *Constitutionalism and Civil Liberties* (Lieden, 1973), suggests in his Introduction that the best approach perhaps might be one that makes for an interplay between the judiciary and the legislature.
17. In modern times "civil liberties" are more likely to be referred to as "fundamental human rights" to emphasise their importance to the body politic.
18. A. P. d'Entrevés, *The Notion of a State*, (Oxford, 1967) pp. 201-221.
19. Lusky, *The Unwritten American Constitution*, 2 Columbia Law Alumni Observer Part 1, Nov. 1, 1972; Part II, December 15, 1972.
20. d'Entrevés, op.cit., note 18 supra, pp. 215-217.
21. Garaudy, op.cit., note 5 supra, is one of the most telling exposes in this area.
22. Gyandoh.Jr. and Griffiths, *A Sourcebook of the Constitutional Law of Ghana*, Vol. 2 Part 1, 160-187. The learned Attorney-General's submissions are to be found on pp. 160-168. The particular point is at p. 166.
23. 198 U.S. 45 (1905).
24. Ian Brownlie, *Basic Documents on Human Rights*, (Oxford, 1971) Part 1, Chapters 6 & 8. The Soviet Union adopted a new Constitution in October, 1977.
25. E. L. Johnson, *An Introduction to the Soviet Union Legal System* (London, 1972)pp. 96-105; Nwabueze, op.cit., pp.2-3.
26. d'Entrevés, op.cit., p. 209; Sir Humphrey Waldock, *The Legal Protection of Human Rights; National and International*, in Vallat (ed.), *An Introduction to the Study of Human Rights* (Europa, London, 1970) at pp. 87-88 makes the same point. Professor Klein makes a similar point in his article on the constitutional protection of the equality principle in the Federal Republic of Germany, see T. Koopmans (ed.), *Constitutional Protection of Equality* (Leiden, 1975) pp. 102-103.
27. Koopmans, op.cit., note 26 supra, gives an extremely useful insight into the comparative treatment of the equality principle in the constitutional systems of Russia, U.S., Canada, West Germany and France.
28. Quoted in Ybema, op.cit., note 26 supra, p. 251.
29. Sir Waldock in Vallat, op.cit., note 26 supra, p. 91.
30. The Indian Constitution of 1949 is instructive in this respect. It contains one set of rights described as "Directive Principles" designed to inform the formulation of state policy and also a set of justiciable rights, see Brownlie, op.cit., note 24 supra, pp. 29-45.
31. For a detailed treatment of this subject, see Foster and Zolberg (eds.), *Ghana and the Ivory Coast: Perspectives on modernization* (Chicago, 1971); Lofchie

- (ed.), *The State of the Nations: Constraints on Development in Independent Africa* (1971); Hallowell (ed.), *Development: For What?* (Duke University Press 1964).
32. K. Bentsi-Enchill, *Institutional Challenges of our Time*, (J. B. Danquah Memorial Lectures; Fourth Series (February, 1971, Accra) Third Lecture, p. 21.
 33. Shils, op.cit., note 1 supra, p. 117.
 34. Schatz, *Implications of Economic Development*, in Hallowell, op.cit., note 31 supra, p.57.
 35. For the texts of these documents, see Gyandoh Jr. and Griffiths, Volume 1 (Part 1).
 36. ibid. volume II (Part 2) p. IX.
 37. See generally Bennion, *Constitutional Rule of Ghana*.
 38. Article 55. The power was only to be exercised by the first President and did not inure to the benefit of his successors.
 39. Gyandoh and Griffiths, op.cit., note 35 supra, p. 171.
 40. In Foster and Zolberg, op. cit., note 31 supra, p. 49.
 41. J. A. Ankrah, *The Future of the Military in Ghana*. AFRICAN FORUM, vol. 2 No. 1 (1966) pp.5-16. It must be added that the military were also dissatisfied with the whittling away of most of their amenities.
 42. Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana, and for other Matters connected therewith, see Gyandoh and Griffiths, op.cit., note 35 supra. For the claim that the administration so established was an "interim" one, see Hayfron-Benjamin J. (as he then was) in SHALABI v. ATTORNEY-GENERAL (1972) 1 G.L.R. 259.
 43. Maxwell Owusu, op.cit., note 1 supra. See also the dialogue which that article engendered between Dr. Owusu and Professor Segal in AFRICA TODAY (1972) vol. 19 No. 2, pp. 74-80.
 44. Three examples will be enough for our present purpose: (1) The propensity of the Government to attach certificates of urgency to Bills. (2) The handling of the Odumase Farms issue. (3) The failure of Parliamentarians to declare their assets in accordance with the Constitution and the dragging, before the Bar of Parliament, of students for merely demanding that the Constitution be respected and complied with.
 45. National Redemption Council (Establishment) Proclamation (Amendment) Decree, 1975 (N.R.C.D. 36). See my comment on this legislation under the title "N.R.C.D. 360: An Exercise in Revolutionary Constitutionalism?" in (1975) 12 U.G.L.J. 124.
 46. Legon Hall.
 47. Ghana Press Release No. 194/77.
 48. Holmes dissent in ABRAMS v. U.S. 250 U.S. 616 (1919).



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