

GHANA BETWEEN THE SECOND AND THE THIRD REPUBLICAN ERA:
RECENT CONSTITUTIONAL DEVELOPMENTS AND THEIR RELATION
TO TRADITIONAL LAWS AND INSTITUTIONS*

Jenny Goldschmidt

I. INTRODUCTION

The main purpose of this article is to review recent developments in constitutional law in Ghana.¹ Since independence in 1957, the constitutional scene has changed frequently.² From 1957 until 1960 Ghana retained the queen of England (represented locally by a governor) as titular head of state. The first Republican Constitution of 1960 changed Ghana into a republic under the presidency of Kwame Nkrumah. The rule of the first president and his Convention People's Party (CPP) became more and more despotic (albeit in most respects formally 'legal'), and a military coup d'état ended this period in February 1966.³ The ensuing National Liberation Council (NLC),⁴ promised a return to civilian rule within 3 years. The proposals for the new constitution were published in 1968⁵ and the NLC handed over power to a civilian government in 1969. The Constitution of the Second Republic, a voluminous document comprising 177 articles, divided the executive power between the president and the cabinet headed by the prime minister. The powers of the president were, however, far less important than under the 1960 Constitution, while the prime minister wielded the real executive power.⁶ Another reaction to the later despotism of the First Republic is the firm guarantees of human rights and freedoms, embodied in the Fourth Chapter of the 1969 Constitution.

The 1969 elections were won by the Progress Party, led by Dr. K. A. Busia, with an overwhelming majority. Perhaps this majority was one of the causes of his downfall, making it too easy to be insensitive to criticism and to ignore the opposition in and outside of Parliament. While plagued by economic and political troubles the short period of the Second Republic was full of vitality as far as constitutional law is concerned, as judges and lawyers began to make energetic use of the new possibility of judicial review.⁷ But its demise came too early for it to be possible to make a final judgment on the constitution or on the Busia government.⁸ In January 1972 another coup d'état instituted the National Redemption Council (NRC) led by General Acheampong. The National Redemption Council (Establishment) Proclamation, 1972, established the NRC, dismissed the ministers of the Busia government, dissolved the National Assembly and suspended the 1969 Constitution. In all of its essentials the NRC copied its constitutional structure from the NLC. The NRC was empowered "For such purposes as they may think fit to make and issue Decrees which

shall have the force of law in Ghana." The courts were continued in existence with the same power, duties, functions and composition as they had before the coup.

In October 1975 the NRC was replaced by the Supreme Military Council. This mini-coup reinforced the power of Acheampong, now chairman of the SMC and head of state, and consolidated the position of the armed forces. The SMC became the highest legislative and administrative authority in Ghana, while the NRC (comprising all SMC members and some additional Commissioners of State appointed by the chairman of the SMC and the commanders of the First and Second Infantry Brigade) was charged with the "day-to-day administration of the Government of Ghana under general direction of the SMC."⁹

Not long after the NRC had taken power it became clear that the military could not fulfill the promises it had made when assuming power. On the contrary, the economic situation of the country rapidly declined. A precarious situation existed in which some parts of the country even suffered from famine. Opposition to and protest against the NRC and later the SMC increased and this led to a series of repressive measures on the part of the military government.¹⁰ It turned out to be difficult to impose silence upon the protesters, who combined a call for amelioration of the economic situation with a call for return to civilian government.

Once again human rights were seriously curtailed in Ghana. There were several political trials between 1975 and 1978, mostly on charges of subversion.¹¹ This crime was defined so vaguely that every protest against the military was punishable. The jurisdiction of the courts was seriously curtailed in favour of military tribunals, whose procedures often denied the basic rights of the defense. Meanwhile the state-controlled press was transformed into a propaganda machinery for the NRC/SMC generally and head of state Acheampong especially. Independent and more critical press organs were suppressed by the Newspaper Licensing Decree of 1973¹² or they were simply banned (as in the case of the Ashanti Pioneer in May 1978).

The gathering opposition was led by the professional bodies, among whom the Bar Association played an important role. In 1976 the Association had accepted a resolution urging a return to civilian government and abolition of the military tribunals. In May 1977 protest demonstrations of the students at all three universities of Ghana demanded both economic and political changes. The government reacted by closing the universities. Some professional bodies called for a strike and the government reopened the universities but dismissed the chief justice,¹³ two medical professors and other important appointees. This resulted in an almost general strike of the professional bodies, including a shutdown even of hospitals in support of a demand for an immediate return to civilian government and the resignation of the SMC by July 1, 1977.¹⁴

On July 1, 1977 Acheampong announced a time-schedule for return

to civilian rule to be based on the new concept of union government. This form of government had first been proposed by Acheampong in October 1976. No one was clear exactly what it entailed, except that union government, based on 'no party politics,' excluded political parties, and that some formal role for the military and the police was contemplated.¹⁵ The committee which had been appointed in January 1977 to study the establishment of union government was required to report before October; a referendum on union government would then be held within 6 months and a constituent assembly would be established to draft a new constitution, under which elections were to be held. On July 1, 1979 power would be assumed by the newly elected civil government.

II. THE UNION GOVERNMENT PROPOSALS¹⁶

The Ad Hoc Committee on Union Government reported in September 1977. Its proposals devote much attention to the rationale of the union government concept.¹⁷ Union government is defined as:

A form of representative Government of the people, having as its philosophical foundation the concepts of national unity and consensus, and selecting its functionaries from all levels and sections of the community on a basis other than membership of an institutionalised political party or parties.¹⁸

This definition only includes one of the characteristics of union government as proposed by the committee: the no-party state. The other characteristic entailed redefinition of the role of the military in government, and some form of formal participation of the armed forces.¹⁹ The arguments used to support the no-party state and the participation of the military are described as historical and the importance attached to history is emphasized: "Unless due cognizance is taken of the people's culture, history and temperament....institutional transplantation will either fail entirely or undergo an unduly long period of gestation."²⁰ The new constitutional system is to be based on distinctly Ghanaian experiences and concepts of democracy. These principles are to be derived from the political traditions of the country, that is, those of the indigenous constitutional systems. Although these systems are not deemed capable of in themselves supporting a society which is partly the creation of a money economy, some "unimpaired resources" thereof might be useful.²¹ Party politics are seen as an "accident of colonial history"²² with negative consequences. The "integrational model" which is the basis of African traditional politics is defended against the "conflict model." Party politics belongs to the "conflict model" and should therefore be abolished. As to the military, it is emphasized that the traditional societies knew no strong distinction between military and political functions. These societies had no separate professional armed force and administrators had both political and military tasks. In Ghana's recent past the military had also turned more and more into a political body. Such change necessitates a redefinition of the role of the

military which can be based on the traditional amalgamation of military and political responsibilities.

Many objections can be raised to the arguments the Ad Hoc Committee drew from the traditional constitutional structures in Ghana. Here it suffices to emphasize that the arguments were in fact a rationalization of a pre-determined outcome. Traditional and recent national constitutional history could just as well provide arguments against no-party state or a formal role of the military and police in government as for them.²³ Invocation of the traditional constitutional systems as providing a possible framework for a modern constitution is unrealistic because it suggests that nothing has changed since the imposition of British institutions upon the various more or less independent societies which now constitute Ghana. The colonial institutions and the subsequent constitutions of Ghana are as much part of Ghana's past as the traditional systems. The fact of imposition itself also provides no reason for a breach with the recent past since some of the traditional systems are themselves impositions of foreign systems upon pre-existing structures.²⁴

The essence of the union government proposals were an executive president to be nominated by a presidential electoral college, who would be head of a non-parliamentary cabinet; strong representation of the armed forces in the most important advisory bodies such as the Council of State, the Military Advisory Council and the National Security and Defense Council; a single chamber legislature to be elected in constituencies on a no-party basis; the enshrinement of legally enforceable human rights, except the right to associate for the purpose of forming a political party; an independent judiciary; the establishment of an ombudsman institution; and representation of traditional authorities in local government councils.

Although immediately after the publication of the report the press was filled with acclamation and enthusiastic commentaries, there was also a good deal of criticism of the proposals. Instead of supporting the free discussion it had recommended, the SMC suppressed criticism, e.g. by the promulgation of the Union Government (Civil Proceedings) Decree, 1977²⁵ granting immunity to union government supporters who had forcibly disrupted a meeting organised by the Professional Bodies Association. (Protests brought about the subsequent repeal of this decree).²⁶ After some general intimidation of opponents of union government the situation worsened daily with a succession of protests and suppressions thereof, while the economic crisis was aggravated by the increasing unrest. The referendum on union government was held on 30 March 1978. Less than 50% of the registered voters came to the ballot box. Union government was supported by 56% of these, and this less than overwhelming support was further impugned by the disappearance and subsequent dismissal of the electoral officer and the retrospective modification of the procedure for counting votes.²⁷ Nevertheless, Acheampong behaved as if his proposal had received massive support. This, together with the arrest and detention of several hundreds of his opponents (often well-known former politicians) and the reclosure of the universities, were all

causes for his downfall.

On July 5, 1978 Acheampong was forced to hand over power to Chief of Defence Staff General F.W.K. Akuffo. At the same time the centre of power was transferred from the chairman of the SMC to the council as a whole and a new SMC was constituted.²⁸ Most political detainees were released. Akuffo promised to hand over power to a national civil government on July 1, 1979, as scheduled. He reconstituted the Constitutional Commission, established by Acheampong in May 1978 to draft a constitution pursuant to the referendum on union government, increasing its membership from 27 to 56.²⁹ Although Akuffo agreed with the opponents of union government that there should be no institutional representation of the armed forces and the police in government, he continued to insist upon the absence of political parties, at least for a certain period. The Constitutional Commission was instructed to make proposals for a transitional government for a period of not less than four years.

III. PROPOSALS FOR THE CONSTITUTION OF THE THIRD REPUBLIC

In November 1978 the proposals of the Mensah Commission were published. The proposals reflect to only a very small extent the proposals of its predecessor, the Ad Hoc Committee on Union Government. The introduction to the Draft Constitution expresses a deep admiration for the 1969 Constitution and the commission based much of its work on that document. The philosophy behind the constitution of the Second Republic is the point of departure for the new constitution. I shall discuss here only the new ideas embodied in the proposals. Repetitions of or minor changes to the 1969 Constitution will not be dealt with. The most important innovation is the institution of an executive president instead of the parliamentary executive of the 1969 Constitution. (It will be remembered that the union government proposals also contemplated an executive president.) The proposed executive presidency is an innovation and cannot be equated with the presidency of Ghana's First Republican Constitution, which had many characteristics of a parliamentary executive. By way of argument in favor of the choice of an executive president the commission refers to the separation of powers, the unique character of the Westminster model as it works in Britain, and the existence under the 1969 Constitution of a powerful cabinet ("nominally responsible to Parliament but, in fact, hardly subordinate to any other body except perhaps to the Central Committee or the National Executive or National Conference of the ruling political party"). The new constitution must "make it impossible for a combination of the executive and the legislature to trample upon the freedoms and legitimate rights and expectations of the individual and of minorities." The separation of powers must therefore be taken further than in the 1969 Constitution by means of an executive president. The aim is to prevent tyranny of the cabinet. The directly elected president and the ministers he selects are not to be members of the also directly elected parliament. The terms of office of president and parliament are fixed in the constitution and are completely independent from each other. The president cannot dissolve parliament, nor can parliament dismiss the president or any of

his ministers (some of whom constitute the cabinet). The existence of president and parliament as "cognate authorities with equal constitutional guarantees and security of tenure" and clearly defined rights and duties is supposed to result in a stable and effective government while at the same time minimizing accumulation of power in the hand of one person or group, and without sacrifices of freedoms and liberties.

The second new proposal of the Mensah Commission is the incorporation in the constitution of "a set of guiding principles articulating certain basic and fundamental objectives which the government will be enjoined to promote by utilizing the powers and procedures provided for in the Constitution." On this point the Mensah Commission has taken a fundamentally different point of view from its 1968 predecessor which had defined a constitution as a legal document rather than a "charter" and had refrained from a declaration of directive principles. According to the Mensah Commission, however,

...a set of directive principles in a constitution can be useful without necessarily providing a fertile ground for constitutional litigation. Such directive principles should set forth certain fundamental objectives to which governmental agencies should direct their actions and programmes and by reference to which the citizens and the courts may assess and evaluate the extent to which these agencies and their programmes and actions conform to the spirit of the Constitution.

Proposed is a chapter on directive principles of state policy in the constitution. The proposed principles deal with a limited number of issues: national integration and unity should be promoted by, e.g., facilities for free mobility and decentralization. Economic policy should be directed toward maximum and just welfare for all Ghanaians through planning and the equal distribution of resources. Social policy should serve a great number of purposes such as human rights, health, equal pay and impartiality. In the educational field adequate and equal opportunities is the most important aim. Finally, the directive principles include a fundamental and express adherence to the rules of international law and diplomacy and the charters of the U.N. and O.A.U.

An effective system of public accountability is another important aim of the proposed constitution. This is elaborated in the proposed code of conduct for public officers. This code applies to all higher public offices and deals mainly with prohibition of acceptance of gifts or the holding of a multiplicity of public offices, and the obligation to provide on request a declaration of assets. The commission accepts the fact that corruption and other undesirable conduct of officers cannot definitively be stopped by any law or constitution but hopes that the existence of a constitutional code of conduct might "serve as a deterrent and a standing warning and reminder to all public officers." Complaints against public officers are to be taken to the ombudsman. The declaration of assets is obtained by a procedure with appeal to a court of law to prevent improper or frivolous requests.

After a period of frequent retroactive legislation it is not surprising that the Mensah Commission proposes a provision declaring such an act outside the power of parliament. In the same way the protection of human rights is firmly guaranteed (as far as it can be guaranteed with constitutional means) by the re-enactment of the relevant entrenched provisions of the 1969 Constitution. Only minor modifications are proposed which reflect a change in policy on certain issues. Thus the rights of mothers and children are no longer combined but are dealt with in separate provisions. The argument for this change reflects a remarkable interest in the emancipation of women, although the commission does observe that "any attempt to give women special rights would be as unjustifiable and unacceptable as the attempts in the past to deny them equal rights." The freedom of the press receives special attention. After a careful weighing of the arguments for and against a state-owned press, the Mensah Commission proposes a press commission independent of the government, but provided with adequate financial resources. This commission supervises and appoints managing boards of state-owned press institutions. These boards, in turn, appoint the editors. Although the press commission has powers to control administration and policy of the boards, it cannot interfere directly in the production of organs of mass communication. The licensing of newspapers is explicitly forbidden in the proposed constitution.

Pursuant to the commission's terms of reference, the election or appointment of persons to public offices on the basis of political parties is expressly prohibited. The commission gives a narrow interpretation to no-party government, holding that this does not necessarily imply a non-party state: only the right to use political parties for sponsoring or supporting candidates is suspended for the period of the proposed interim constitution (four years). Nor does the Mensah Commission follow the Ad Hoc Committee on Union Government in the suggestion for a centre for public education. The Ad Hoc Committee had proposed such a body "to provide a platform for political, civil and moral education of the Ghanaian public." It was meant to fill the gap created by the absence of political parties. The Mensah Commission's proposals explicitly prohibit the passing of a law "establishing any movement or body having the right or power to formulate or propagate a common programme, or set of objectives, for the whole country."

The other feature of union government, the representation of the armed forces and police, is also rejected. Only the limited possibility of establishing "Development Units" by the Armed Forces Council to give recognition to the possible role of the army in the promotion of development is opened. To prevent the armed forces from being used as "instruments to promote the partisan political objectives of particular Governments," on the other hand, the professional independence of the forces is safeguarded in the proposed constitution, by vesting basic responsibility in organs of the armed forces themselves, with the president as ultimate source of authority. Only in the Council of State, one of the advisory organs to both the president and parliament, are the chief of defence staff and inspector-general of police represented. The former was also a member of the Council of State under the 1969

Constitution. An innovation in this council is the membership of the runner-up at the presidential election. This is suggested as an attempt "to promote national reconciliation and unity and enable the country to utilize as much of the talents available as possible."

The provisions relating to commissions of inquiry (bodies appointed to investigate any matter of public interest and vested with special powers) differ on certain points from the corresponding provisions of the 1969 Constitution. The Mensah Commission proposes the granting of a right of appeal to the court of appeal to persons adversely affected by a commission of inquiry since adverse findings or recommendations of a commission of inquiry may result in disqualifying a person from public office.

Finally, the commission learned from previous experiences with constitutions which had provided for the establishment of certain basic institutions, such as the ombudsman and the press commission, but contained no provisions to guarantee that establishment. The constitutional proposals therefore provide that the competent body of authority shall establish the provided institutions within a specified period.

The provisions concerning local government and chieftaincy, which also show some interesting new aspects compared with previous constitutions and constitutional proposals, will be dealt with below.

Shortly after accepting the proposals of the Mensah Commission, the SMC lifted on January 1, 1979 the ban on political parties which had been in effect since the NRC coup d'état in 1972, and thereby the return to party politics was effectuated. The continued protest against the proposed no-party government led to the abandonment of this idea for the new constitution. Another reason for Akuffo's change of policy was provided by the local council elections held in November, 1978. These elections, the first local elections for more than 20 years, clearly showed that people vote along party lines, even if officially no parties exist, since many candidates were well-known former members of either the CPP (Nkrumah's party) or the PP (Busia's party) and were often associated with parties they had belonged to. Moreover, the low poll was also largely attributed to the absence of political party campaigning.

Shortly after the ban was lifted the Political Parties Decree³⁰ ruled that no party could bear the symbols or name of any of the previously banned parties. Intended as a limitation on the old parties and a stimulus for fresh ideas, the only consequence of the decree was that new names and symbols adorned the old party leaders, in formations largely identical to the old parties. As was already clear in the local council elections of 1978 the major cleavage in Ghana politics is still that between the former CPP and the former PP. Many leaders of the new Peoples National Party (PNP) are former ministers of Nkrumah and still support his ideals, and can be sketched as moderately socialist. Its main opponent is the social democrat Popular Front Party (PFP) embracing Busia's ideals of liberalism and human

rights and comprising former Busia ministers. Not all former PP members, however, joined the PFP. A number joined the United National Convention (UNC), counting among its leaders William Ofori Atta, an experienced politician, and former head of state during the NLC regime, General Afrifa.

Almost all parties had leadership problems. These were largely a consequence of enactments disqualifying from the presidency persons found guilty by a commission of inquiry of holding illegal assets, defrauding the state, misusing office or willfully acting in a manner prejudicial to the interest of the state,³¹ subject to appeal to an especially appointed review tribunal. This provision excluded many senior politicians from the scheduled elections.

A constituent assembly was set up on December 1978 and completed its work in May 1979. Of the 136 assembly members, 61 were elected by district councils, 33 were nominated by the SMC and the remainder were chosen by organizations like trade unions and professional bodies.

Discussion of the constitutional proposals was not restricted to the members of the constitutional assembly. The first topic of discussion and criticism was the proposed introduction of executive presidency. With the tyranny of the later Nkrumah period in mind, many both within and outside the constituent assembly strongly opposed the proposed executive presidency. The constituent assembly, however, voted in favour of an executive president.³² Another decision of the constituent assembly which was subject to strong criticism was its adoption of a provision indemnifying all members of the SMC, NRC and NLC. Although defensible on practical grounds and not meant to free the military rulers of responsibility for crimes or misdeeds committed while in office, the indemnification was conceived by many as a legalisation of military coups and as an implicit permit to corrupt military rulers to keep their ill-gotten gains. This discontent at the mild attitude towards the former rulers who were considered the chief causes of economic and political decline in Ghana was aggravated by the release of General Acheampong in May 1979. Although charged with economic and other offences against the state, the former head of state was not brought to trial, but he was stripped of all retirement benefits, divested of all honours acquired during his tenure of office, reduced to "Mr." Acheampong because forbidden to use any military rank, and restricted to his native village, risking five years imprisonment if he entered any military base. Although put forth as a part of the "house-cleaning" operation the SMC had promised to undertake before the hand-over to civilian rule, the treatment of Acheampong was widely interpreted as an act of nepotism meant also to protect other (former) SMC/NRC members whose practises would have been uncovered in an open legal process.

In May 1979 Flight-Lieutenant Jerry Rawlings led an attempted coup against the SMC, alleging that corruption was so widespread that there was need for a real housecleaning operation. On June 4, 1979, exactly two weeks before the parliamentary and presidential elections

for the new civilian government were to be held, Rawlings escaped from military custody and this time he succeeded in overthrowing the SMC, be it after heavy fighting. How he could escape, and how many people died in the fighting, remain unclear. Rawlings drew his support mainly from the lower army ranks and junior officers who wanted to rehabilitate the reputation of the army. The sole stated objective of the coup was the completion of the housecleaning exercise, which the SMC had failed to do. In broadcasts Rawlings emphasized that the country had been economically and politically mal-governed over the past years. A 14-member Armed Forces Revolutionary Council (AFRC) was set up, headed by Rawlings, including lower army commanders and retaining some SMC commissioners including K. Afreh, Commissioner for Information, and the Attorney-General, former Dean of the Law Faculty, Justice A. Amissah. The AFRC assured the nation that it did not want to retain power. The elections, scheduled for June 18, would go on and the hand-over to a civilian government would only be postponed from July 1 to October 1, 1979. The new constitution was promulgated on June 14.³³

The AFRC lost no time in starting the "housecleaning" operation. A week after the coup military tribunals were set up to try "the men who had plundered the country." Persons found guilty were to be shot by firing squad. Among the first persons arrested was former head of state Acheampong. After being found guilty he was executed on June 16, together with the former Border Guard Commander, Major-General E.K. Utuka.

Two days afterwards the elections were held. Despite active campaigning, there had been little ideological debate: "Both the people's National Party and the Popular Front Party seem to be telling us more of what their departed leaders did than what the surviving followers themselves can do...."³⁴ The poll was extremely low (about 35%). The PNP obtained the majority of seats in parliament (71 out of 140), the PFP got 42 seats, the UNC 13, the Action Congress Party (APC) led by Colonel Frank Bernasko (former Commissioner of Agriculture and claiming to be the candidate of the progressive intelligensia) won 10 seats and the TUC-sponsored Social Democratic Front (SDF) 3; one seat was won by an independent candidate. In the presidential elections, no candidate succeeded in obtaining the required absolute majority, so that a second round had to be held on July 9, 1979 between the two leading candidates: Dr. Hilla Limann (PNP) and Mr. Victor Owusu (PFP). A remarkable feature in the election results of June 1979 is that on the whole they show a rejection of the old well-known political elite in favour of relatively unknown candidates. This has been suggested as a possible reason for the success of the PNP, where the old guard stood more in the background.

Meanwhile the AFRC continued its "housecleaning" exercise. More civilians (among whom many Lebanese and Indian traders and army officers) were arrested. On June 26, 1979 six more officers, among whom the two former heads of state Generals Akuffo and Afrifa, were executed in public after having been found guilty by a newly established special military court. Answering criticism from foreign governments and the International Commission of Jurists, Rawlings said, "I don't believe

in taking a man's life because I can't make one, but if shedding blood is the only thing that will make the Ghanaian change his greedy character, then I will do it."³⁵ Reactions to the executions differed: unlike the international protests and appeals from the bar association and others to stop secret trials and executions, public reaction to the executions in general seemed rather positive. Yet, Rawlings asserted that he was willing to listen to advice, and declared that he would stop the executions; his decision may have been influenced by Nigeria's oil boycott.³⁶

The unique situation in Ghana during the summer of 1979, when a military coup d'état, public executions and elections for a civilian government followed one another in swift succession gave rise to the statement of West Africa that "the future of Ghana now depends more on what Flight Lt. Rawlings and his colleagues decide to do than on whom the Ghanaian voters have decided to elect."³⁷ Nevertheless, the Ghanaian voters went to the poll again on July 9 and elected Dr. Hilla Limann as their future president. Ghana's new president is not very well-known among his own people nor abroad. He is 45 years old, and studied economics in London and Paris. He has occupied political posts before: as chairman of a district council and as a member of the Constitutional Commission which drafted the proposals for the 1969 Constitution. He is a career diplomat, having represented Ghana at international organisations and conferences.³⁸

Limann assumed office on September 24, 1979, inaugurating the third period of civilian rule in Ghana since independence in 1957. The task awaiting him is not an easy one. He has already promised that the "housecleaning operation will continue under his government." But confidence in "the men in power" has been badly damaged and it is doubtful whether the drastic "housecleaning" exercise of the ARFC can change this. The economic situation looks no more bright. Whether caused by corrupt politicians (as Rawlings says) or not, inflation and low production have brought Ghana's economy to a very bad state. The reduction of the prices of daily food by the AFRC is a stop gap. Unpopular measures will be necessary to face the economic crisis in a country where the shops are almost empty and the few goods for sale are too expensive for "the man in the street." The knowledge that behind the scenes the armed forces are always waiting to take over the reigns of government will make governing Ghana resemble rope-dancing.

The broad lines of the 1979 Constitution conform to the proposals of the Mensah Commission. Some changes were necessary because of the return to a party-state. Art. 42 deals with the organization of political parties. The participation of political parties is guaranteed, and provision is made to prevent the formation of tribal, ethnic or religious parties, and to guarantee an open, fair and impartial internal organization of political parties. As in the 1969 Constitution, a one-party state is forbidden in Art. 3 of the constitution.

The importance of the Directive Principles of State Policy is emphasized by the provision of Art. 6(2) obligating the government to

report every year on the realization of these principles. The influence of the armed forces and police has been diminished by the abrogation of the ex officio membership of the chief of defence staff and the inspector-general of police in both the National Security Council and the Council of State. The membership of the runner-up at the presidential election in the Council of State has also been cancelled. A remarkable innovation is Art. 148, which forbids non-Ghanaians who do not bring sufficient foreign capital into Ghana, to participate in business in Ghana. The power of the president in appointments is limited in some cases by substituting for the duty to act after consultation of another body by a duty to act in accordance with the advice of such other body. After his retirement from office a president needs the permission of parliament to hold any office or profit or emolument other than under the state.

IV. THE POSITION OF TRADITIONAL INSTITUTIONS IN A NEW CONSTITUTION

The proposals of the Ad Hoc Committee and the Mensah Commission provide reasons for a closer look into the position of traditional institutions in the Ghanaian constitutional framework. I have already rejected the conception that the traditional systems could be used as a framework for a national constitution. "The" traditional structure is nonexistent. Apart from the question whether it would even be possible to adapt the constitutional framework of one of the traditional systems in Ghana so that it could be transplanted to the national level, it would obviously be politically undesirable to try this. Such a constitution would never work for the very reason that it did work in one of the traditional systems: it would give one constitutional arrangement a special position in the nation which the others could not accept. Furthermore, as noticed above, the traditional systems themselves have been influenced and remodelled by the colonial and national institutions superimposed upon them. And an important question thus remains whether these changes must also be included in the "national traditional" structure: if not, one adopts a system almost as foreign even to the people of the transformed system as any imported system! For these reasons, the idea that "the" or "a" traditional system can be recreated in the larger context of the modern nation state cannot be supported.

But if one supports the view of the Ad Hoc Committee that the traditional systems are elaborated and well-balanced systems of great value with elements providing for stability in the relevant societies, one might ask what can be done to preserve these assets in the national system. The system of indirect rule was one answer to this question. But indirect rule has only resulted in a corruption of the traditional institutions, because, on the one hand, the chiefs and their councils obtained from an external constitutional tie more and different powers than their internal legitimacy permitted and, on the other hand, this internally illegitimate power was accompanied by an equally increasing external intervention in the procedures for selecting and dismissing them. The final consequence of indirect rule is paradoxical: an institution "recognized" because of its independent authority becomes

dependent for its power on "recognition" by the national government. One of the most remarkable features of the proposals of the Mensah Commission, as adopted in Art. 177(2) of the 1979 Constitution, is the express abolition of power "to accord or withdraw recognition as a condition for the right of a person to enjoy the status, or perform the function of a chief in Ghana." The commission has rightly seen that such a guarantee is essential to the preservation of the institution of chieftaincy. The opportunities for manipulation of succession disputes both by the government and by the chiefs can thus perhaps be limited.

It must be emphasized, however, that no constitutional provision withdrawing government recognition of chiefs can erase the fact that the whole chieftaincy system has been influenced by the tradition of government recognition dating from colonial times. It seems hardly possible to withdraw government recognition without any additional measures, because that institution has already left its marks. What, for example, happens to those chiefs who are in office now thanks to the recognition of a previous government? Their position will immediately be contested by their rivals who claim to have (traditionally) more rights to the stool. The institution of chieftaincy is not served by the situation of uncertainty which will persist for years, or even generations, after derecognition. Such a situation existed after the enactment of the Chieftaincy (Amendment) Decree, 1966 (NLCD 112), meant to annul destoolments and enstoolments performed contrary to customary law under the Nkrumah regime. The result was an even more confusing situation.⁴⁰ A similar situation existed in Dagomba when the NLC revoked a Legislative Instrument of Nkrumah, which had provided a pragmatic solution to the Yendi Skin dispute, thereby yet further aggravating the dispute.⁴¹ By the long tradition of government recognition, in some parts of Ghana for more than a century now, the state has become profoundly implicated in the political life of the traditional constitutional systems. Derecognition is therefore a profoundly disturbing event and cannot be carried out as easily as the Mensah Commission seems to believe. Furthermore, quite apart from the difficulties of derecognition, the new situation of non-recognition is not nearly so simple as the Mensah Commission Report suggests. The problems to be anticipated can be compared with those entailed by the separation of church and state: for example, the courts will be confronted with property disputes which can only be settled by determining who the stool or skin incumbent actually is, and in doing so enormous tact and skill will be needed to avoid, in a new form, the evils of indirect rule.⁴²

In order to stimulate the selection of chiefs according to the applicable customary laws the proposals contain a provision that the National House of Chiefs must publish "a list of all principal stools and skins, the applicable customary law thereto and the systems of succession by the respective families and lineages." Considering previous experience with attempts to require the House of Chiefs to codify customary law, and notwithstanding the proposed one-year term, I am rather sceptical as to the implementation of the provision. Furthermore it

will often be impossible to lay down the applicable law because different groups of the community will give different versions, reflecting competing interests. One may also wonder whether the very obligation to codify the rules of customary law respecting chieftaincy does not effect the law because it will be almost impossible to exclude external influences (e.g., the professional conceptions of lawyers) on such a codification. Moreover it can be questioned whether the House of Chiefs is the appropriate institution to codify customary law: Why is this task not left to the specific group to whom the law to be codified applies? Another danger of codification is that it makes rigid what is flexible in character.

The proposals of the Mensah Commission do not support abolition of the national and regional houses of chiefs. The commission recommends the continued existence of the houses and wants to increase their status by recommending that only paramount chiefs (or appropriate divisional chiefs if there are not enough paramount chiefs in a region) can be elected as members. This should end the practice of literate lower chiefs being preferred to illiterate paramount chiefs. Here one sees reflected one aspect of the perennial constitutional conflict between the chiefs and the new educated elite.

This conflict has also played an important role in the discussion on local government in Ghana. In the longstanding debate concerning the extent of decentralization, all possibilities from a highly centralized state to a federal state have been supported at a certain moment by some group. The position one holds is among other things (e.g., whether one happens at the moment to control government) closely bound up with one's attitude toward granting power to the traditional authorities. Until 1959 the representation of traditional authorities in local councils was maintained, be it that since 1951 the elected members had formed a majority.⁴³ The Ad Hoc Committee gave only scant attention to the organisation of local government. It recommended a return to the pre-1969 situation of a merger of traditional political institutions and national institutions by providing for some representation of traditional constitutional officeholders in otherwise elected district and regional councils.

The Mensah Commission attached more weight to a sound system of local government, which it considered as one of the most important features of the proposals. The commission suggested the abolition of local councils as too small to constitute viable units for effective administration. The basic unit should be the district, municipal or city council with village, town and area committees supplementing the councils and providing the link between the councils and their administrative machineries on the one hand, and the people of the local communities, on the other. The councils are proposed to be given express powers to generate revenue. Representation of the traditional authorities (to a maximum of one-third of the members of the council) is favored. To promote interaction between the local and the central levels of government a member of parliament should be an ex officio member of the councils in his constituency. The same motive lies

behind the proposals for a regional minister of state in each region. These proposals are adopted in the 1979 Constitution. The importance attached to local and traditional authorities is further emphasized in an increase of their functions: an amendment of the constitution must be accepted by two-thirds of all local government councils, and the chiefs are represented in the Lands Commission and the regional police committees.

It appears to me that there is a contradiction between the proposals of the Mensah Commission on chieftaincy and on local government. If one holds the view that government involvement in the institution of chieftaincy endangers the survival of that institution one should apply the same rule at the local level. Corruption of traditional authority and its manipulation by people from within and outside the traditional polity are just as possible on the local as the national level. One might ask what position should then be given to traditional institutions, if they may neither be subjected to, incorporated in or used as a blueprint for central or local government? How can one still insist that traditional institutions are valuable, important and indispensable in the constitutional framework of modern Ghana? The "solution," I believe, is to accept that there exist two kinds of constitutional structures in Ghana: the national system on the one hand and the traditional systems, with all their resemblances and differences, on the other.⁴⁴ The two spheres often overlap, which may result in conflict requiring great care and statesmanship to handle without damaging the integrity of either one, but there are also many areas where they supplement each other and here lies the potential importance of the traditional structures for the national constitutional framework. No constitution can work if it is not understood and experienced by the people (and not only by the small class of politicians). The traditional structures are the best machinery for ensuring the involvement of the people in the public life of the country. The participation of the people in the political process, a necessary condition in all constitutional structures, at least in the democratic ones, must in a country like Ghana rely much on the traditional lines of communication and political education. Recent research has also shown that the traditional structures play an important role in the modern constitutional structure by enlarging the participation of the people.⁴⁵ Further research in this field seems very important. I want to emphasize that this function of the traditional constitutional structures can only be preserved if these structures are left free to develop along their own lines. Of course this cannot mean that such a development takes place in a political vacuum: both the national and traditional structure mutually affect each other.

NOTES

- * I would like to acknowledge here that this review would probably not have been written without the stimulating comments and encouragement of Prof. J. Griffiths. Of course he is in no way responsible for the results. I highly appreciated the help of Catherine Crisham who suggested improvements in the style and presentation of the English.
- ¹ The article was based on the situation as it was on October 1, 1979. Materials on the political and constitutional developments have been collected from the periodicals Africa, West Africa and the Legon Observer.
- During their first year of office the president and parliament of the Third Republic have been searching for a solution to the prevailing economic crisis and resulting social unrest, eagerly watched by Rawlings and his supporters. Under these circumstances the Third Republic of Ghana has not yet become solidly rooted in its constitutional soil.
- ² The constitutions of Ghana from 1925-1977 can be found in: S.O. Gyandoh, Jr. and J. Griffiths, A Sourcebook of the Constitutional Law of Ghana, Vol. I. (Part I) (1972), and S. O. Gyandoh, Jr., J. Griffiths and C. Flinterman, supplement to Vol. I (Part I), The Constitutions: 1972 to the Present (1977).
- ³ On the constitutional developments until 1964 see W. B. Harvey, "A Value Analysis of Ghanaian Legal Developments since Independence," 1 UGLJ 4. (1964); W. B. Harvey, Law and Social Change in Ghana (1966). For the Republican Constitution see F. A. R. Bennion, The Constitutional Law of Ghana (1962). On constitutional and political developments until 1972 see D. A. Apter, Ghana in Transition (2nd ed. 1972).
- ⁴ Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana and other matters connected therewith, amended 1966, 1967 and 1969.
- ⁵ The Proposals of the Constitutional Commission for a Constitution of Ghana (1968).
- ⁶ B. O. Nwabueze, Constitutionalism in the Emergent States (1973), p. 92.
- ⁷ See, e.g., Sallah v. Attorney-General (1970) 2 G+G 493; People's Popular Party v. Attorney-General (1971) 1 GLR 138; Awoonor-Williams v. Gbedemah (1969) 2 G+G 438; Republic v. Maikankan (1971) GLR 473; Republic v. Boateng, ex parte Adu Gyamfi III (1972) GLR 317. The cases are discussed in E. V. O. Dankwa and C. Flinterman, "Judicial Review in Ghana," 14 UGLJ 44 (1977).
- ⁸ On the 1969 Constitution: G. Gunther, "The Constitution of Ghana: An American's Impressions and Comparison," 8 UGLJ 2 (1971); S. O. Gyandoh, "The Role of the Judiciary under the Constitutional Proposals of

- Ghana," 5 UGLJ 133 (1968); S. O. Gyandoh, "Discretionary Powers in the Second Republic," 8 UGLJ 1 (1971).
- ⁹ National Redemption Council (Establishment) Proclamation Amendment Decree, 1975 (NRCD 360). On the character of this decree and its relation to the National Redemption Council (Establishment) Proclamation, 1972, see C. E. K. Kumado, "The National Redemption Council (Establishment) Proclamation Amendment Decree, 1975 (NRCD 360): An Exercise in Revolutionary Constitutionalism?" 12 UGLJ 124 (1975).
- ¹⁰ For a short survey of the measures taken against the opposition from 1972-1978 see Ghana, Review (I.C.J. Report No. 20, pp. 1-5, 1970).
- ¹¹ Subversion Decree, 1972 (NRCD 90) as amended by Subversion (Amendment) Decree, 1976 (SMCD 26).
- ¹² Newspaper Licensing Decree, 1973 (NRCD 161).
- ¹³ Judicial Service (Amendment) Decree, 1977 (SMCD 101).
- ¹⁴ For an appraisal of the government of the NRC and SMC and a survey of the developments preceding the return to civil rule, see J. Kraus, "The Decline of Ghana's Military Government," 3 Current History 214 (1977).
- ¹⁵ As an opponent put it "unigov was indeed a process of handing over Government from Acheampong to Acheampong and thereby investing him with legitimacy," 11 The Legon Observer, p. 226 (1979).
- ¹⁶ Report of the Ad Hoc Committee on Union Government (1977), to be called hereafter: U.G. Report.
- ¹⁷ U.G. Report, Part One.
- ¹⁸ U.G. Report, paragraph 112.
- ¹⁹ U.G. Report, paragraphs 124-128 and 203-210.
- ²⁰ U.G. Report, paragraph 57.
- ²¹ U.G. Report, paragraph 103.
- ²² U.G. Report, ibid.
- ²³ For an enumeration of the political arguments pro and contra see S. M. Asante, "The Conflict Caused by Parties," and A. A. Boahen, "Plea for a 'No' Vote," West Africa, 20 March 1978, pp. 545-550.
- ²⁴ The confusion implicit in the idea that European law has in some unique sense been "imposed" is explained by J. Griffiths in his review of E. A. B. van Rouveroy van Nieuwaal, A la Recherche de la

- Justice (Leiden 1976), in 15 African Law Studies 100, 107 (1977) who holds that "imposition of foreign law is as African as millet beer."
- 25 SMCD 139.
- 26 Union Government (Civil Proceedings Repeal) Decree 1977, SMCD 141.
- 27 Electoral Commission (Amendment) Decree, 1978, SMCD 160 and Electoral Commission (Amendment) (No. 2) Decree, 1978, SMCD 163.
- 28 Supreme Military Council (Establishment) Proclamation (Amendment) Decree, 1978 (SMCD 168).
- 29 Constitutional Commission (Amendment) (No. 2) Decree, 1978 (SMCD 173).
- 30 Political Parties Decree, 1979 (SMCD 208).
- 31 Representation of the People (Amendment) Decree, 1979 and Presidential Elections Decree (1979). A list has been published of 105 names of persons who may thus not be elected or appointed to a public office. It must be noted that those people are only excluded from public office and not from political activity so that they can set up parties and wield power therein.
- 32 On the significance of the vote in the Constituent Assembly as representative of general public opinion see K. G. Folson, "The Vote on the Executive Presidency," 11 The Legon Observer 104 (1979).
- 33 Constitution of the Third Republic of Ghana (Promulgation) Decree, 1979 (A.F.R.C.D. 8).
- 34 11 The Legon Observer 124 (1979).
- 35 Cited in West Africa, 25 June 1979.
- 36 "Ghana: The Self-limiting Revolution," in Africa, no. 96, August 1979, pp. 14-17. It is suggested that Rawlings tried to prevent the executions, initially without success. "The Council [AFRC] had to recognize the force of popular feeling, even though some members on the Council, notably Rawlings, were opposed to the executions from the start." (p. 15)
- 37 25 June 1979, p. 1103.
- 38 West Africa, 25 June 1979, p. 1107.
- 39 The Constitution of the Third Republic of Ghana (Promulgation) Decree, 1979 (AFRC D 24) enacted the new constitution, thereby repealing AFRC D 8 (see note 33 above), and stated that the constitution would come into force on the 24th day of September 1979.

- 40 See A.K. Mensah Brown, "Chiefs and the Law in Ghana," 13 JAL 57 (1969).
- 41 M. Staniland, The Lions of Dagbon: Political Change in Northern Ghana, pp. 149 ff. (1975).
P. Ladouceur, "The Yendi Chieftaincy Dispute and Ghanaian Politics," 6 Can.JAS 106 (1972).
- 42 A problem rising in this context is the possibility of a conflict on traditional constitutional issues cumulating in a situation which cannot be tolerated in a national state. I refer to the situation wherein the parties to such a traditional conflict seek to solve their dispute by arms. The state will, most probably, have to intervene in the interest of national peace and order. But it is often impossible to intervene in a neutral way without directly or indirectly supporting either side.
- 43 But local government has never really worked in Ghana. The local council elections held in November 1978 were the first in more than twenty years.
- 44 This is also argued by Griffiths (see note 24 above) be it in another context.
- 45 See B. J. Callaway, "Transitional Local Politics: Tradition in Local Government Elections in Aba, Nigeria; Keta, Ghana," 15 African Studies Review 403 (1972). This investigation points out that although the voter turnout at the elections was low, the participation was high because of the involvement of the people in the selection of candidates by means of traditional procedures.