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CONSTITUTIONAL LAW OF GHANA

Francis Bennion

PART I - THE REPUBLICAN CONSTITUTION

CHAPTER 2

THE CREATION OF THE REPUBLIC

1. Legal Difficulties

Ghana was the first member of the Commonwealth to provide herself with a republican Constitution without having had the means for doing so expressly indicated by United Kingdom legislation. Both India and Pakistan, Ghana's precursors as Commonwealth republics, had been provided with Constituent Assemblies by the Indian Independence Act, 1947. Burma is in a different category, having become overnight a republic outside the Commonwealth by virtue of a treaty made between the British Government and the Provisional Government of Burma and of the provisions of the Burma Independence Act, 1947.* Since no Constituent Assembly had been provided for by the Ghana Independence Act it became necessary to give careful consideration to the means whereby a republican Constitution could be enacted. Not even the existence in the first place of a Constituent Assembly with unchallengeable powers had saved Pakistan from acute constitutional difficulties in trying to turn herself into a republic and it was felt that every care must be taken to avoid the possibility of doubt arising as to the validity of Ghana's new Constitution. At first it was assumed that the Constitution could be enacted by the Parliament of Ghana in the same way as an ordinary Act. It would no doubt be desirable to avoid embodying the usual enacting formula, with its reference to the Queen, in the Constitution itself but this could be done by the use of a device such as the inclusion of the Constitution in a Schedule to the Act bringing it into force. An examination of the provisions relating to the powers of the Parliament of Ghana however gave rise to doubts as to whether it would be wise to follow this course.

The powers of the Parliament of Ghana derived from the First Schedule to the Ghana Independence Act, 1957 and s. 31 of the Ghana (Constitution) Order in Council, 1957. The First Schedule

[1] See Halsbury's Laws (3rd Edn.), Vol. 5, p. 458.

contained six paragraphs.[1] The first three reproduced, with the same wording apart from consequential alterations, ss. 2 and 3 of the Statute of Westminster, 1931. By these it was provided that the Colonial Laws Validity Act, 1865[2] would not apply to laws made by the Parliament of Ghana, that such laws would not be inoperative on the grounds of repugnancy to the law of England or any existing or future British Act, and that the Parliament of Ghana had full power to repeal or amend British legislation forming part of the law of Ghana and to make laws having extraterritorial operation. The fourth and fifth paragraphs contained minor consequential amendments to the Merchant Shipping Act, 1894 and the Colonial Courts of Admiralty Act, 1890. The final paragraph withheld the power to alter the 1957 Constitution otherwise than in the manner specified in that Constitution. Section 31 of the 1957 Constitution stated:

> " Subject to the provisions of this Order, it shall be lawful for Parliament *sc.* the Ghana Parliament constituted by the Order] to make laws for the peace, order and good government of Ghana."

The Order contained several provisions expressly limiting the legislative power. Section 31 (2) and (3) and s. 34 restricted the power to make laws imposing disabilities on racial grounds, or depriving persons of freedom of conscience or religion, or providing for compulsory acquisition of property. Sections 32 and 33 restricted the power to make laws altering the constitutional provisions, or changing regional boundaries, by requiring such laws to be passed by a special procedure. It will be seen that, whatever the political intention behind the enactment of these provisions, they were in form somewhat removed from a clear grant of full legislative sovereignty. The provisions of the First Schedule were mainly negative in form while the legislative power conferred by the 1957 Constitution was clearly limited. By using the special procedure laid down by ss. 32 and 33 of the 1957 Constitution the Ghana Parliament in 1958 removed those very sections from the Constitution, and also repealed paragraph 6 of the First Schedule to the Ghana Independence Act.[3] The other restrictions remained, although there is a strong argument for

[1] See Appendix A, p. 467, *post.*
[2] See p. 18, *ante.*
[3] See p. 69, *ante.*

saying that after the modification effected by the **1958 Act** they could have been repealed by ordinary Act of Parliament.

It could be argued, though not very convincingly, that the words " Subject to the provisions of this Order " in s. 31 of the 1957 Constitution referred not merely to the provisions mentioned above, but also to s. 20(1), which provided:

> "... there shall be a Parliament in and for Ghana which shall consist of Her Majesty the Queen and the National Assembly."

The introduction of a republic of course involved the repeal, or at least the amendment, of s. 20(1). While s. 20(1) remained in the Constitution in its original form it might be said that the power to make laws was subject to its provisions and therefore did not include power to make a law removing the Queen as one of the organs of Parliament. The words " Subject to the provisions of this Order " could not be repealed (so the argument ran) since a power cannot be effective to remove its own limitations. The argument was weakened by the fact that the Order itself originally contemplated that s. 20 might be repealed, this being one of the sections included in the Third Schedule as subject to a special procedure for their amendment or repeal. This fact is perhaps not of great weight, since s. 20 contained other provisions, relating to the composition of the National Assembly, which it was clearly within the competence of the Parliament of Ghana to amend or repeal. A more convincing objection is that this construction would really have involved the proposition that the legislative power was insufficient to amend *any* provision of the 1957 Constitution—an absurdity contradicted by s. 32, which expressly contemplated such amendment.

Another possible limitation of legislative power related to the repeal of provisions contained in the Ghana Independence Act itself. A law converting Ghana into a republic could not be brought into force without the repeal of at least one provision of this, namely that part of s. 1 which states that the territories comprised in Ghana "... shall as from [6th March, 1957] together form part of Her Majesty's dominions ". Had the Parliament of Ghana power to effect this repeal? Paragraph 2 of the First Schedule to the Act provides that

> " . . . no law and no provision of any law made on or after [6th March, 1957] by the Parliament of Ghana shall be void or inoperative on the ground that it is repugnant to the law of

> England, or to the provisions of any *existing or future* Act of the Parliament of the United Kingdom."

This follows precisely the wording of paragraph 1 (2) of the First Schedule to the Ceylon Independence Act, 1947, which in turn was derived from s. 2(2) of the Statute of Westminster, 1931. Doubt exists as to whether the reference to any existing or future Act includes a reference to the Act in which it appears. It is tempting to say that there is no receptacle between the present and the future which, at the moment when an Act comes into operation, is large enough to accommodate the Act. The Act at this moment must either be an existing Act, because it has just come into existence, or (if it has not just come into existence) it must be future Act. This reasoning was not followed by the British Parliament when it enacted the Indian Independence Act, 1947, s. 6(2) of which prevents any law made by the legislature of either of the new Dominions created by that Act from being invalid on the ground that it is repugnant to " *this* or any existing or future Act of Parliament of the United Kingdom ". This difference in the wording of the two Independence Acts of 1947 gave rise to considerable comment, though the general view seems to have been that it did not indicate a difference in substance. Thus Professor K. C. Wheare said:

> " In the Ceylon Act, as in the Statute of Westminster, the powers conferred relate to ' any existing or future Act of Parliament '. This raises a controversy. Does the difference in wording amount to anything? Does it mean that Ceylon cannot amend its Independence Act, just as, it has been maintained, the Dominions cannot amend the Statute of Westminster? Is the Independence Act or the Statute an ' existing ' Act of Parliament? If it is—and the case for this view seems sound— why was it thought necessary to include ' this ' in the Indian Independence Act? If, ' this ' was put in to resolve doubts for India and Pakistan, why was it not done for Ceylon also? Is some limitation intended upon Ceylon's legislative competence? These questions have aroused some discussion in Ceylon. It may not console the people of Ceylon to know that the difference is probably due to nothing more than a difference of draftsmen."[1]

Again, Geoffrey Marshall finds the distinction " insignificant " and goes on to remark that nothing in the legislative intention of the United Kingdom Parliament seems to justify the conclusion that the Parliament of Ceylon is unable to legislate

[1] *Journal of Comparative Legislation,* 3rd Series, Vol. XXX, p. 80.

repugnantly to, or to amend, the Ceylon Independence Act.[1] Despite these doubts the United Kingdom Parliament enacted the " repugnancy " provisions for Ghana in exactly the same terms as for Ceylon. This may be taken to indicate that Parliament thought the doubts so trivial as to be beneath notice or that it wished to indicate that there was a difference of substance between the Indian and Ceylon provisions. Either view is possible, but the former seems more likely to be correct. It had indeed been already acted on in Ghana, the Constitution (Repeal of Restrictions) Act, 1958 (No. 38) having repealed paragraph 6 of the First Schedule to the Ghana Independence Act.[2]

In the light of these difficulties there seemed to be three different methods of procedure open. These were:

1. To disregard the doubts and proceed to pass the republican Constitution as an ordinary Act of Parliament.

2. To pass an Act of Parliament under the procedure laid down by s. 1 (1) (a) of the Ghana Independence Act by which the Parliament of Ghana requested and consented to the enactment by the Parliament of the United Kingdom of an Act confirming that the Parliament of Ghana had since its inception possessed full legislative power, including power to withdraw Ghana from Her Majesty's Dominions and to remove the Queen as an organ of Parliament.

3. To make the new Constitution " autochthonous " by basing it firmly on the will of the people. This could be done by the holding of a referendum on the instructions of the Cabinet and the subsequent enactment by the National Assembly, as a Constituent Assembly deriving its authority from the verdict of the people in the referendum, of the new Constitution.[3]

The second course was ruled out on political grounds. The third was felt to involve too great a danger of matters getting out of control: the referendum would not be conducted under the authority of any Act, and it might not therefore be possible to

[1] *Parliamentary Sovereignty and the Commonwealth,* Oxford, 1957, p. 126.

[2] The wording was changed in the Nigeria Independence Act, 1960, to read: "... repugnant to the law of England, or to the provisions of any Act of the Parliament of the United Kingdom, including this Act (Sch. I, para. 2).

[3] On the question of autochthony see Wheare, *Constitutional Structure of the Commonwealth,* Chap. IV; Robinson, *Constitutional Autochthony in Ghana,* the Journal of Commonwealth Political Studies, 41.

make secure provision with regard to the keeping of order during voting in the referendum and for other matters connected with it, such as the nomination of candidates.

Attention was therefore turned to the first course mentioned above. No difficulty was contemplated in securing the actual passing of the Bill by the National Assembly, but it was necessary to consider whether, in view of the doubts as to legislative capacity, the Governor-General could properly assent to the Bill. Section 42 of the 1957 Constitution provided that no Bill should become law until the Royal Assent had been given and that when a Bill had been passed by the Assembly it should be presented to the Governor-General " who may assent thereto in Her Majesty's name or refuse such assent ". By virtue of s. 4(2) of the Constitution, the functions of the Governor-General relating to assent to Bills were to be exercised in accordance with the constitutional conventions applicable to the exercise of similar functions in the United Kingdom by Her Majesty, with a saving withdrawing any action of the Governor-General from question on the ground that these conventions had not been observed.

The constitutional convention relating to the exercise of the Crown's prerogative of withholding assent to Bills seems to be established in a form which requires the withholding of assent to be done only on advice by the Queen's Ministers.[1] The convention has not had to take account of a case where the Queen has been advised to assent to a Bill which exceeds the powers of Parliament. This situation has, however, arisen in the Dominions. In South Africa, for example, the Governor-General assented to the Separate Representation of Voters Bill, 1951 and the High Court of Parliament Bill, 1952 although these Bills had not been passed by the required two-thirds majority.[2] H. J. May remarks that, notwithstanding its possible invalidity, "it is submitted that the Governor General should assent to the Bill." He goes on to add:

> "... even where the Governor-General is required to sign a document which would create an illegality, the responsibility is not his but that of the Ministers."

Although these problems of legislative capacity required to be investigated, and caused some difficulty because of the limited

[1] See Jennings, *Cabinet Government* (3rd Edn.), p. 400. The learned author reviews the development of the convention and ends: " The con clusion seems to be that the Crown cannot refuse assent except on advice."

[2] H. J. May, *The South African Constitution* (3rd Edn.). p. 185.

time available for the preparation of the Constitution, they were rendered of small account by the prevailing political conditions. There might be much dispute in Ghana as to the form a new Constitution should take, but there was a unanimous view that Ghanaians were since independence free to choose their own form of government.[1] Nor was any dissenting voice to be heard from the United Kingdom, where the authorities were sympathetic to Ghana's aspirations and ready to assist their fruition. The political realities were overwhelmingly in favour of brushing aside legalistic doubts and pursuing a straightforward course. In the end the course actually followed was a combination of the first and third procedures mentioned above.

2. THE CONSTITUENT ASSEMBLY AND PLEBISCITE ACT

Under the 1957 Constitution the constitutional conventions attaching to the British Crown were expressly applied to Ghana.[2] Whether or not these conventions can be said to include the doctrine that fundamental legislation should not be enacted without a " mandate " from the electorate, this doctrine was in fact recognized as valid in Ghana. Sir Ivor Jennings has pointed out that the doctrine is not limited to the United Kingdom:

> " President de Valera declared in 1932 that the Dail could not deal with the question of separation from the British Commonwealth of Nations because, though his Government had a mandate for removing the oath from the Constitution and for suspending the payment of the land annuities, it had no mandate to create a republic."[3]

The Ghana Government had no mandate at the beginning of 1960 to create a republic, and readily acknowledged the fact. As Mr. Ofori Atta, the Minister of Local Government, put it in the National Assembly:

[1] Speaking in the debate on the draft republican Constitution, Mr. J. A Braimah, who had transferred from the United Party to the C.P.P., said: " In rising to make my humble contribution to this debate, my mind automatically goes back to the Atlantic Declaration of August, 1941, which stated among other things that the signatories ' respect the right of all peoples to choose the form of government under which they will live '. In the exercise of this undoubted right, Ghana has therefore decided to choose the form of government under which her people will live and no one, in or outside this country, can quarrel with that desire." *(Proceedings of the Constituent Assembly,* 19.)

[2] By s. 4 (2).

[3] *The Law and the Constitution* (4th Edn.), p. 165.

> " The present Members of Parliament were however not elected by the people for the purpose of enacting a republican constitution and the question of a republic was not an issue at the last general election. At that election, of course, certain constitutional principles were settled. The people voted for a unitary form of government and rejected a federal form of government. Nevertheless, it cannot be said that this House, as at present constituted, has a mandate from the people to adopt or make on their behalf, any particular form of republican constitution."[1]

The Government decided to seek a mandate, and took the view that the people should be asked to vote not merely on the simple question of whether Ghana should become a republic or not, but also on the broad principles to be adopted in framing the new Constitution. It was also thought desirable, assuming the people would support a change to republican status, to find a means of enabling them to choose the person they wanted as the new head of state. Furthermore there was the question on whom the mandate to enact a new Constitution was to be conferred. The United Party, who constituted the official Opposition, took the view that there should be a Constituent Assembly which would be

> "... an entirely new body elected and appointed freely to represent all the interests of the country, i.e. the Members of Parliament, Chiefs, the University Colleges (Legon and Kumasi), the Churches, the Muslim Council, the Professional Associations, the Chambers of Commerce, the Farmers' Unions, the T.U.C., the Co-operative Societies, the Ex-servicemen's Organisations, the Ghana Women's Federation or Council and the political parties."[2]

However, in the Government's opinion, which prevailed, the existing Members of Parliament themselves were best fitted to form the Constituent Assembly:

> " They were chosen by the people at the last general election to represent them in making laws for Ghana and it is therefore right that Members of Parliament and not other persons who have not been so chosen should constitute the Constituent Assembly."[3]

The Constituent Assembly and Plebiscite Bill was accordingly introduced into the National Assembly on 23rd February, 1960. Of the two main clauses, which were not altered during the passage

[1] Pari. Deb. Official Report, Vol. 18, col. 7 (23rd February, 1960).
[2] Pari. Deb. Official Report, Vol. 18, col. 46.
[3] *Ibid.*, col. 7 (speech of Mr. Ofori Atta).

of the Bill, the first (clause 2) authorised the National Assembly

> "... to resolve itself from time to time into a Constituent Assembly with full power to enact such provisions for or in connection with the establishment of a new Constitution as it thinks fit, including provisions whereby Ghana is established as a republic."

This is believed to be unique. Although *ad hoc* Constituent Assemblies are commonly set up to make new constitutions and frequently, as in the case of India and Pakistan, to exercise the functions of an ordinary legislature at the same time, no previous example was known to the Ghana Government of an existing legislature being given this double personality. It would of course have been just as effective to confer constituent powers on the National Assembly as such but it was felt that the dignity and importance of the proceedings would be enhanced if Members of Parliament had first to resolve themselves into a Constituent Assembly.[1]

Clause 2 went on to provide that:

> " a Bill for a new Constitution, any Bill containing provisions consequential on or supplemental to the new Constitution, and any other Bill passed by the Constituent Assembly under this Act shall become law notwithstanding that Her Majesty has not given Her assent thereto."

By this, s. 42 of the 1957 Constitution (which provided that no Bill should become law until the Queen's assent had been signified) was made inapplicable to Bills of the Constituent Assembly. Again the reason was more one of impression than substance, it being strongly felt that Ghanaians could not be said to be giving themselves a Constitution if what they produced had to be submitted to the Queen's representative and had to receive his assent, however freely given. This feeling was expressed by Mr. J. A. Braimah as follows:

> " We all know that the Governor-General assents to Bills on behalf of Her Majesty the Queen and we all know that the Governor-General has never turned down any Bills passed by this House; besides, the Governor-General acts on the advice of the Ministers. Why then not let the people have the real thing? "[2]

Apart from removing the need for Royal Assent, this provision

[1] For similar reasons the Bills, order papers and minutes of the Con stituent Assembly were printed on pink paper instead of the usual blue and its proceedings were separately reported.

[2] Pari. Deb. Official Report, Vol. 18, col. 31.

also served to indicate that the powers of the Constituent Assembly were not limited to enacting a Constitution, as indeed was shown by the words " or in connection with " in the opening passage of clause 2. If the powers had been so limited, argument might have arisen as to what provisions were within the scope of a Constitution and in any case it was already the intention of the Government to introduce a number of other Bills of a constitutional nature apart from the Constitution itself.

Clause 2 went on to provide that the existing law governing the National Assembly (except s. 42 of the 1957 Constitution) should apply with any necessary modifications to the Constituent Assembly, and that " subject to the provisions of any enactment made by the Constituent Assembly "—a reference to the new Constitution, which would abolish the legal existence of the old National Assembly—nothing in the Bill was to affect the working of the National Assembly as such.

Clause 3 enabled a constitutional plebiscite to be held:

> " In order, before passing a Bill for a new Constitution, to inform itself as to the wishes of the people on the form of the Constitution, or the person who is to become the new Head of the State or any other matter, the Constituent Assembly may order the holding of a plebiscite to determine such questions as the Constituent Assembly may direct."

Although power to hold a referendum already existed under the Referendum Act, 1959 (No. 10), it was felt that this should not be used for testing opinion on the republican issue. Under that Act the referendum would have had to be ordered by the Governor-General, whereas it seemed more appropriate, since the task of constitution-making was entrusted to the Constituent Assembly, to place control over the questions to be asked and other relevant matters in the hands of that body. Although the two main questions had already been chosen in principle by the Government, clause 3 allowed other questions to be put if it was later thought necessary to do so. This power did not in fact have to be used.

Clause 3 went on to give the Constituent Assembly power to make regulations governing the detailed procedure of the plebiscite. In view of recent by-election disturbances, this power was made sufficiently wide to enable public order to be maintained by the control of the movement and assembly of persons and the supply of intoxicating liquor. Power to provide for requisitioning of vehicles and buildings was also given.

Clause 4 of the Bill, which was the only one to be amended, dealt with its duration. As introduced, this provided that the Act was to be automatically repealed on the coming into operation of a Constitution enacted by the Constituent Assembly. It was amended so as to delete this repeal while taking away the right of the National Assembly to resolve itself into a Constituent Assembly once the new Constitution had come into force. One reason for the change was a technical one connected with the passing of a new Interpretation Act. The other was to enable the measure to remain on the statute book " so as to explain how Acts were enacted by the Constituent Assembly."[1] In view of the fact that the repeal of an Act does not affect its previous operation or anything done under it[2] no harm would be caused by repeal, although the Act may perhaps be allowed to remain as a historical document.

While the United Party criticised the Constituent Assembly and Plebiscite Bill on points of detail they did not press their opposition to a division at any stage. The Bill was passed on 25th February, 1960, received the Royal Assent the same day and came into operation on its publication as a supplement to the *Ghana Gazette* two days later.[3]

So that the Constituent Assembly should not find itself in procedural difficulties at its first meeting, the National Assembly passed a special motion on 29th February. This provided that the Standing Orders of the National Assembly were to apply for the purposes of the Constituent Assembly subject to certain modifications. On any day appointed for the transaction of business by the Constituent Assembly, the Speaker was required, at the conclusion of National Assembly business, to put the question " That this House do now resolve itself into a Constituent Assembly ", which was to be decided without amendment or debate. At the end of Constituent Assembly business the National Assembly was automatically to resume. The Speaker was enabled to take the chair at the Committee stage of Bills, and minor adjustments were made to the procedure for the passing of Bills.[4]

[1] See Pari. Deb. Official Report, Vol. 19, cols. 11 and 61

[2] Interpretation Act, 1960 (C.A. 4), s. 8.

[3] The text of the Constituent Assembly and Plebiscite Act is given in Appendix A, p. 470, *post.*

[4] *Minutes of the National Assembly,* 29th February, 1960. The motion was later amended to allow Bills to be introduced before the prescribed period had elapsed after publication: *Minutes of the National Assembly* 7th June, 1960.

3. THE DRAFT CONSTITUTION

The draft republican Constitution had been in preparation since the previous December, and on 6th March, 1960, the third anniversary of independence, the Prime Minister, in a broadcast to the nation, outlined his Government's proposals. He stated that the keynote of the draft Constitution was one man-one vote and the unity of Africa, namely the political union of of African countries, and that the draft Constitution was based firmly on the rule of law and left no scope for arbitrary action or for discrimination against any individual or community. The next day a Government White Paper was issued giving the text of the draft Constitution and setting out the Government's proposals in an accompanying commentary.[1] The parts of this commentary which are relevant to the Constitution as passed are described in the next chapter in the course of discussing the details of the Constitution. Two extracts only need be given here. The status of the draft Constitution was described in the opening words of the White Paper as follows:

> " The draft Constitution recognises that ultimately all powers of the State come from the people, and it will be for the people and not primarily for the Constituent Assembly to determine the form of the Constitution. It is, however, the duty of the Government and of the elected representatives of the people in the Constituent Assembly to advise what is, in their view, the most suitable form for the Constitution of the Republic of Ghana. In order to enable the views of the Constituent Assembly to be expressed and made known the Government will immediately lay this White Paper before the Assembly and will ask the Assembly to endorse the draft Constitution before it is submitted to the people. If the Assembly does so the people will then be asked, in a plebiscite to be held between 19th and 26th April, 1960, whether they approve the main provisions of the draft Constitution. If this approval is given the Constituent Assembly will clearly be in duty bound to enact a Constitution along the lines of that approved by the people."[2]

This passage was elaborated at the end of the commentary, where the principles contained in the draft Constitution were summarized as follows:

> " 1. That Ghana should be a sovereign unitary republic with power to surrender any part of her sovereignty to a Union of African States.

[1] *Government Proposals for a Republican Constitution* (W.P. No. 1/60).
[2] **W. P. No. 1 /60, p. 3.**

2. That the Head of State and holder of the executive power should be an elected President responsible to the people.

3. That Parliament should be the sovereign legislature and should consist of the President and the National Assembly, and that the President should have a power to veto legislation and to dissolve Parliament.

4. That a President should be elected whenever there is a general election by a method which insures that he will normally be the leader of the party which is successful in the general election.

5. That there should be a Cabinet appointed by the President from among Members of Parliament to assist the President in the exercise of his executive functions.

6. That the system of courts and the security of tenure of judges should continue on present lines.

7. That the control of the armed forces and the civil service should be vested in the President."[1]

It was explained that these seven points constituted the essence of the Government's proposals. The Government would not consider itself bound to introduce a Constitution Bill which followed word for word the draft in the White Paper, since, in the light of reactions to the draft, changes of detail, arrangement and emphasis might be found desirable. However, if the people approved the proposals, the seven points would be treated as fundamental.

The constitutional proposals were received with keen interest by the world press. British comment was on the whole favourable. The *Times* expressed the view that:

" It is an ingenious constitution, avowedly aimed at efficient government during the early stages of development and expertly framed to suit Ghanaian conditions."[2]

The *Daily Mirror,* under the heading " Good Luck Ghana! ", said:

" The new Constitution puts paid to any idea that Ghana is heading for dictatorship."[3]

The Manchester *Guardian* found that:

" Altogether, the draft Constitution seems quite a promising one, and there is no reason why Ghana should not remain a welcome member of the Commonwealth under it."[4]

[1] W. P. No. 1/60, p. 16.
[2] Issue of 7th March, 1960.
[3] Issue of 7th March, 1960.
[4] Issue of 7th March. 1960.

The *Irish Independent* said of the proposal to couple the election of the President with that of Members of Parliament:

> " This is an arrangement without precedent and, on paper, is full of promise. It combines strong government with democracy, something which older countries have often failed to achieve."[1]

In the United States the draft Constitution was generally welcomed as marking the final emancipation of Ghana from colonial rule. The *Washington Post* commented:

> " What makes the move of special significance is that Ghana, as the first West African country to attain full independence from colonial status in 1957, is in many respects the bellwether for the continent during an exciting period."[2]

On the other hand the reception in South Africa was generally cool. The Natal *Witness* referred to " Black Bonapartism ", while the Pretoria *News* found the proposals a serious departure from British democratic principles. In France, *L'Information* described the draft Constitution as at the same time authoritarian and expansionist. All over the world, whatever the attitude adopted, great interest was shown and the press devoted much space to describing and examining in detail the blue-print for Ghana's republican future.

In Ghana itself the press reaction was predictable. The *Ghana Times* and the *Evening News,* both strong Government supporters, gave the proposals an enthusiastic welcome. The British-owned *Daily Graphic* printed the entire draft Constitution and advised those who liked the draft to accept it and those who disliked it to reject it. The *Ashanti Pioneer,* at that time an Opposition newspaper, was outspokenly critical.

The first sitting of the Constituent Assembly took place on 14th March, 1960. The Prime Minister, Dr. Nkrumah, moved

> " That the Constituent Assembly recommends to the people of Ghana the Government proposals for a republican Constitution set out in the White Paper issued on the 7th March, 1960."

His opening words were:

> " It is with joy and pride that I appear this morning, before the representatives of the people of the nation of Ghana here gathered in a Constituent Assembly, to move this motion. I do so with thankfulness to the dead and the living, who by their sweat, blood and sacrifice have made possible the victory of

[1] Issue of 26th March, 1960.
[2] Issue of 22ud March, 1960.

> the Ghana we pronounce today. It is a great day for Ghana and the Ghanaian people, for today marks the opening of our Constituent Assembly by which the people of Ghana, for the first time in our long history, are exercising their undoubted and inalienable right to enact for themselves the Constitution by which they shall be governed,"[1]

The Opposition moved an amendment to the Prime Minister's motion which, while not rejecting the Government's proposals, suggested that a Constitutional Reform Commission should be set up to enquire into them and make recommendations to the Constituent Assembly. No details were given, either in the amendment or by Opposition speakers in the ensuing debate, as to the composition or method of appointment of the proposed Commission. Indeed, in spite of the terms of their amendment, the five Opposition speakers in the two-day debate spent most of their time attacking the draft Constitution along the lines indicated by a United Party statement published a few days before.[2] This described the draft as " worse than the crudest colonial constitution of the nineteenth century." Apart from the Prime Minister and Mr. Ofori Atta (Minister of Local Government), who wound up the debate, four members of the Convention People's Party spoke. While strongly supporting the Government's proposals they did give voice to a few criticisms. Mr. J. A. Braimah thought that in the provision enabling sovereignty to be surrendered by ordinary Act of Parliament " the people will be signing a blank cheque for Parliament to use at a future date perhaps at a heavy cost." He suggested that a referendum should be necessary before sovereignty could be surrendered.[3] Mr. A. J. Dowuona-Hammond, supported by Mr. Mumuni Bawumia, expressed the view that the Chief Justice should not share the safeguards against dismissal proposed for the judges of the superior courts.[4] At the end of the debate the Opposition amendment was rejected by seventy-five votes to ten, and the Government motion was then carried without a division.

4. THE CONSTITUTIONAL PLEBISCITE

On 15th March, 1960, at the end of the debate on the constitutional proposals, the Constituent Assembly made an order for

[1] *Proceedings of the Constituent Assembly,* 1.
[2] *Ashanti Pioneer,* 12th March, 1960.
[3] *Proceedings of the Constituent Assembly,* 20-21.
[4] This view was later adopted in a modified form; see p. 92, *post.*

the holding of the plebiscite.[1] Voting was to take place in specified parts of Ghana on three different days so that the limited numbers of polling staff and police available could be moved from one place to another. Provision was included for the dates to be changed by *Gazette* notice if necessary, and in fact this had to be done.[2] The order provided for nominations for the office of Head of State under the new Constitution. The candidate had to be a citizen of Ghana who had attained the age of thirty-five, and the nomination form had to be signed by not less than ten Members of Parliament. As the names of the candidates could not definitely be known until the period for nominations had elapsed (it was thought that the Opposition might boycott the plebiscite), the order left the actual questions to be determined at a future time. The candidates nominated were Dr. Nkrumah and Dr. J. B. Danquah, the doyen of the United Party.[3] When the closing date for nominations had passed, the Constituent Assembly made a further order directing two questions to be submitted for the determination of the voters.[4] These were:

> "1. Do you accept the draft republican Constitution for Ghana as set out in the White Paper issued by the Government on 7th March, 1960?
>
> 2. Do you accept Kwame Nkrumah or Joseph Boakye Danquah as the first President under the new Constitution? "

The White Paper had stated that the Government would propose to the Constituent Assembly that voting should be on a parliamentary constituency basis, so that the people of Ghana would know not only the total number of votes cast but also the state of opinion in each constituency.[6] This was accordingly provided for in the detailed regulations made by the Assembly to govern voting procedure.[6] The regulations closely followed those in force for general elections. Both the Opposition and Government parties were entitled to have polling agents present in every polling station as a check against irregularities, and also to have a counting agent in each constituency to witness the counting of votes. There were four ballot boxes in each polling station, and the voter was given two papers. One was to be put either in the

[1] Constitutional Plebiscite Order, 1960 (E.I. 73).
[2] *Ghana Gazette,* 30th March, 1960.
[3] *Ghana Gazette,* 21st March, 1960.
[1] Constitutional Plebiscite (Questions) Order, 1960 (E.I. 75).
[6] W.P. No. 1/60, p. 7.
[6] Constitutional Plebiscite Regulations. 1960 (E.I. 74).

box bearing the word " yes " in white on a red ground or the box bearing the word " no " in black on a white ground, indicating approval or disapproval of the draft Constitution. The other was to be put either in the box bearing the photograph of Dr. Kwame Nkrumah and the red cockerel symbol of the C.P.P. or in the box bearing the photograph of Dr. J. B. Danquah and the cocoa-tree symbol of the United Party.[1] Apart from answering the two questions posed, the votes were to serve an additional purpose. The Government had pointed out that the plebiscite would correspond very nearly to a general election. The Presidential candidates were the respective leaders of the only two political parties in the country, and voting was on a constituency basis. It would thus be possible to tell in which constituencies the Government and the Opposition had a majority. The Government had accordingly announced that if the Presidential election showed that there would be little change in the balance of parties in the Assembly if a further general election were held, they would treat this as a mandate to extend the life of the existing Assembly, which was due to be dissolved by July, 1961 at the latest.[2]

The public were informed of the holding of the plebiscite, the issues involved and the method of voting in a number of ways. Apart from the issue of the White Paper and the widespread newspaper coverage, a large number of posters were put up all over the country. Among these were posters setting out the seven points listed in the White Paper. The posters were printed in English and in nine of the vernacular languages, including Twi, Fante, Ga and Ewe.

The plebiscite was held on 19th, 23rd and 27th April, 1960, and proved a triumph for the Government. Dr. Nkrumah was elected as first President in all but two of the 104 constituencies, obtaining 1,015,740 votes as against 124,623 cast for Dr. Danquah. Only in one constituency was there a majority against the draft Constitution, which was approved by 1,009,692 votes to 131,393.[3] The great interest aroused was indicated by the fact that more than half the registered electors voted.[4]

[1] Constitutional Plebiscite (Symbol) Regulations, 1960 (E I 76)
[2] W.P. No. 1/60, p. 11.
[3] *Ghana Gazette*, 14th May, 1960.
[4] The exact proportion was calculated at 54.6%. Surprisingly, in view of its high illiteracy rate, the biggest proportion was in Ashanti, where 76 "/ of the registered electors voted.

5. THE ENACTMENT OF THE CONSTITUTION

The Constitution Bill was introduced into the Constituent Assembly on 13th June, 1960. The interval of three months since the first publication of the draft Constitution had been used to make a considerable number of detailed changes designed to improve its effectiveness and to meet certain criticisms. These changes were explained in the Memorandum signed by the Prime Minister which accompanied the Bill as introduced, and were indicated by bold type in the Bill itself. The most important changes related to Parliament. The provisions of art. 20, which lays down the legislative powers of Parliament, were greatly expanded.[1] In the words of the Memorandum, it was made clear that

> " except in relation to matters reserved by the Constitution to the people, the legislative power of Parliament is supreme."

Other changes in art. 20 safeguarded the Constitution against amendment by implication, and restricted the power of Parliament to transfer its supremacy to any other body. The dignity of the National Assembly was enhanced by the insertion of a provision guaranteeing freedom of speech, debate and proceedings.[2] The franchise principle in art. 1 was strengthened by adding the requirement that votes were to be cast in freedom and secrecy. Presidential messages to the Assembly were to be read by a Minister, " to ensure that no stranger can be authorised by this provision to enter the Assembly ".[3]

A change was made in the last paragraph of the declaration of fundamental principles required to be made by the President on his assumption of office. Originally this paragraph read:

> That no person should be deprived of his property save in accordance with law, and that no law should be made by which a person is deprived of his property without adequate compensation other than a law imposing taxation or prescribing penalties for offences or giving restitution for civil wrongs or protecting health or property.

The substituted version is as follows:

[1] References here to article numbers are to the numbers in the Con stitution as finally enacted. The text is given in Appendix A, *post.* For detailed explanations of the text see Chap. 3, *post.*

[2] Article 21 (3).

[3] Article 25 (5).

> That no person should be deprived of his property save where the public interest so requires and the law so provides.[1]

Following a suggestion made by Government backbenchers,[2] the position of the Chief Justice was altered to enable him to be dismissed at will from his office of Chief Justice, though not from his judgeship.[3] As the Memorandum explained, the new version

> " assimilates the position of the Chief Justice to that of Lord Chancellor in England. The Chief Justice must be a Judge of the Supreme Court, and cannot be removed from his judgeship.[4] He may, however, be removed as Chief Justice if the President thinks fit. His capacity as Chief Justice makes him the administrative head of the Judicial Service, and in relation to such non-judicial functions it is considered that the President ought to be in a position to ensure that the Chief Justice will give his loyal co-operation."

Criticism had been aroused by a provision in the first draft which gave the President unfettered discretion to grant loans from public funds. This was met by giving the National Assembly power to require any agreement for a loan to be submitted for their ratification.[5] The opportunity was also taken to entrench the article charging the public debt on the general revenues and assets of Ghana.[6] The criticism that the Attorney-General appeared to be given power by the first draft to discontinue civil proceedings brought against the Republic was met by an amendment making it clear that this was not so.' Other changes that should be mentioned here were as follows. The article listing the laws of Ghana was completely altered.[8] The system of courts was

[1] Article 13 (1).
[2] See p. 88, *ante.*
[3] Article 44 (3).
[4] I.e., without a vote of two-thirds of the members of the National Assembly.
[6] Article 35 (2).
[6] Article 37 (2).
' Article 47 (2).
[8] Article 40. The original version stated that the laws comprised:

> " *(a)* indigenous laws and customs not being repugnant to natural justice, equity and good conscience, in so far as their application is not inconsistent with any enactment for the time being in force, and
> *(b)* the doctrines of common law and equity, in so far as their application is not inconsistent with such indigenous laws and customs or with any enactment for the time being in force, and
> (c) enactments for the time being in force made under powers conferred by the Constitution or previously existing."

modified—instead of a Supreme Court functioning both as a Court of Appeal and a High Court, two separate superior courts were established, namely the Supreme Court and the High Court.[1] The Supreme Court was made the final court of appeal and also given an exclusive original jurisdiction over questions as to the validity of legislation.[2] The section dealing with the Civil Service was widened to cover the Public Services generally.[3] In consequence the article establishing the Civil Service Commission was omitted, and mention was made of the police. To emphasize its civilian character, in the words of the Memorandum, the description of the police was changed from Police Force to Police Service.

Before the second reading of the Constitution Bill, which took place on the day it was introduced, the Constituent Assembly passed a procedural motion governing the Constitution Bill and all other Bills to be passed by the Constituent Assembly. This was necessary because the Ordinances Authentication Ordinance (Cap. 2) had been disapplied by s. 2(3) of the Constituent Assembly and Plebiscite Act, 1960 (No. 1). Provision had therefore to be made for such matters as the authentication, numbering and publication of Acts of the Constituent Assembly.[4] The motion was on similar lines to those subsequently laid down for Republican Acts by the Acts of Parliament Act, 1960 (C.A. 7).

The second reading debate passed off quietly. The results of the plebiscite left the Opposition little scope for objection to the Bill and they were in any case appeased to some extent by the fact that alterations had been made in the Bill to meet their criticisms. Mr. Dombo, the Leader of the Opposition, remarked:

> " I think most of the criticisms we levelled against this Constitution have been met and for that reason I say well done to the people who have redrafted it."[5]

He continued to find objectionable however the statement in art. 8(4) that the President is not obliged to follow advice tendered by any other person. This had been widely criticized as contravening the customary principle that a chief, though by forms and ceremonies appearing autocratic, was in reality bound

[1] Article 41.
[2] Article 42 (2).
[3] Part VIII.
[4] The text of the motion is given in *Proceedings oflhe Constituent A ssembly,* 161.
[5] *Proceedings of the Constituent Assembly,* 178.

to act in a democratic manner, that is by consulting with his councillors before taking any action in his capacity as chief and by following the advice tendered by them.[1] To some extent the criticism appears to have been based on a misundertsanding, as illustrated by Mr. Dombo's remark that the effect of art. 8(4) is that " the President shall not take advice from anybody ".[2] All that the article does is to make plain the difference between the President's position and that formerly occupied by the Governor-General. After he has considered such advice as he is offered or seeks, the ultimate decision is the President's, taken in his own discretion. He is not, in other words, a constitutional monarch but an executive President. Even so the rule is not absolute, since it may be modified in particular cases by ordinary Act of Parliament and in practice rarely operates in full force. The tradition that the Head of State acts only on the majority opinion in Cabinet dies hard.

Two points made in the debate by Government members should be noticed here, since they led to changes in the Bill.[3] Mr. Dowuona-Hammond and Mr. Kwaku Boateng suggested that some mention of local councils should be made in the Constitution.[4] They also made another suggestion, of far greater importance, in which they were joined by Mr. Mumuni Bawumia. This was that, apart from his legislative function as an organ of Parliament, the President should be given special legislative powers of his own. Mr. Boateng put it in this way:

> " It appears that under this Constitution it is possible to have the leader of the majority party in power, who will be the President, disagreeing with Members of Parliament, and therefore when such a disagreement occurs it is likely that there may be a general election. It is also possible that this disagreement between the President and Members of Parliament may extend to members of the Cabinet, in which case it is possible that the disagreement may affect all Members of Parliament together with Ministers. When this situation arises general elections may not necessarily be the appropriate remedy. In such circumstances the country will be difficult to govern. In a rapidly developing country such a situation will produce anarchy and chaos. Further, there could be circumstances which though short of an

[1] *Cf.* Rattray, *Ashanti Law and Constitution*, 406. Rattray mentions that a chief on enstoolment hears the words, " We do not wish that he should act on his own initiative ": p. 82.
[2] *Proceedings of the Constituent Assembly,* 179.
[3] See arts. 51 (1) and 55.
[4] *Proceedings of the Constituent Assembly,* 182, 194.

> emergency could plunge the country into political turmoil. The solution to my mind lies in some form of enabling powers for the President."[1]

Mr. Dowuona-Hammond, who at that time was Parliamentary Secretary to the Ministry of Education and Information, asked for powers enabling the President " to act, as occasion demands, by mere administrative directions which are deemed to carry the force of law ". He went on:

> " This will nip in the bud cases of espionage, insurrections or even *coups d'etat* before they rear their ugly heads to warrant declaration of a state of emergency. In a country like Ghana where some people feel they should oppose every Government measure, however wise, simply because they style themselves ' Opposition ', and where there have been instances of questionable loyalty of some Civil Servants, the long winding *(sic)* procedure of having Bills drafted, published a number of times before passing through the various stages in Parliament should be avoided. The President could by administrative action deal promptly with situations without having recourse to such procedure."[2]

In winding up the debate, the Minister of Local Government, Mr. A. E. A. Ofori Atta, answered Mr. Boateng's point in the following way:

> " The Constitution states clearly that the Government of the country is in the hands of the President and his Ministers— the Cabinet. If the Cabinet as a whole tenders its resignation to the President and he finds that because of the opposition of Members of Parliament he is unable to get other Members of Parliament to form a Cabinet, he is in duty bound to carry on the government of the country with a body of Ministers. Therefore, it is expected that if the President finds that it is impossible for him to get Ministers to help him, he should refuse to accept the resignation of his Ministers."[3]

At the end of the debate the Bill was given a second reading without a division. The committee stage was held on 24th June and a small number of amendments were made. None were opposed except the controversial addition of art. 55. Before discussing this we will mention the more important of the other amendments. Article 6 was amended to create two new Regions,

[1] *Proceedings of the Constituent Assembly,* 194. [2] *Ibid.,* 182.
[8] *Ibid.,* 197-198. This is presumably only intended to apply during the period before a general election can be held. The White Paper had stated that the draft Constitution was so devised that " if the National Assembly and the President disagree the issue can be decided by a general election " (W.P. No. 1/60, p. 6).

the Upper Region and the Central Region. A new section **was** inserted in art. 29 to make it clear that the making of payments charged on public funds was to be automatic and not discretionary. At the same time the Minister of Finance, Mr. K. A. Gbedemah, made a statement underlining the security given to foreign investors by the provisions charging debt payments on public funds and adding a " categoric assurance " that, whatever changes might be made in the national status of Ghana as a result of steps taken to further African unification, " all financial obligations entered into by her will be fully honoured by Ghanaians and their Government ".[1] Article 51 was amended to create a new Local Government Service, although no details were given and no reference was made to the local government structure. Finally, Mr. Ofori Atta moved the insertion at the end of the Bill of a new Part headed " Special Powers for First President " and containing only art. 55. This gave the first President, during his initial period of office (which would last until some other person became President), a limited power to give directions having the force of law " whenever he considers it to be in the national interest to do so ". This was to meet an amendment put down by Mr. Mumuni Bawumia which would have added to art. 20(5) the following proviso:

> " Provided that the President may, whenever he considers it to be in the national interests to do so, give directions by regulations which shall have the force of law."[2]

Mr. Bawumia's amendment, which had much support, and which the Government were inclined to accept, would have rendered the provisions of art. 20 mutually contradictory and would have been very doubtful in its effect. Article 55 was therefore drafted to make clear the extent of the new legislative powers. It was explained by Mr. Ofori Atta on lines similar to those followed by Mr. Boateng in asking for the amendment.[3] Mr. Ofori Atta said:

> " The provision for vesting legislative power in the President is particularly very necessary during the formative period of the republican Constitution. It is possible that there may be an impasse in the legislative machinery of the State under the unamended Constitution when there is a sudden unexpected fundamental disagreement between the President and the National Assembly and if this were to occur (which God forbid) as Head of State the President should have the power to issue

[1] *Proceedings of the Constituent Assembly,* 359.
[2] Order Paper, 16th June, 1960.
[3] See p. 94, *ante.*

> directions which have the force of law until the situation is righted to safeguard the nation against any chaos and anarchy and thereby endangering its security. ... I have to add that the President in the exercise of these powers will always consult his Cabinet and the Central Committee of the Party."[1]

The amendment was strongly resisted by the Opposition, Mr Abayifaa Karbo being their chief spokesman. Mr. Karbo expressed disappointment at the addition of art. 55 at a stage when the Constitution as amended could be regarded " as something of a national effort which could bring the people of Ghana together and inspire them to work together ".[2] He castigated it as unnecessary, listing the numerous provisions such as the Emergency Powers Act and the Preventive Detention Act which were available to deal with the sort of situation used to justify art. 55. Nevertheless, after the only division held on the Constitution Bill, art. 55 was added to the Bill by 63 votes to 7. The third reading of the Bill was deferred as long as possible to enable such last-minute amendments as might be needed to be made. None proved necessary, and on 29th June, 1960 the Bill was read a third time and passed.[3]

6. OTHER ACTS OF THE CONSTITUENT ASSEMBLY In addition to the Constitution Bill itself, the Constituent Assembly considered eleven other Bills bearing on constitutional law. All had been prepared in the early months of 1960 and all were passed into law as Acts of the Constituent Assembly. Why, if they were constitutional in nature, were these Acts not made part of the Constitution? There were a number of reasons. In the first place, the Constitution was seen as the basic framework of government and as the fundamental law. It should therefore contain only provisions of first importance, and not be cluttered up with detail. In this way the basic structure would stand out, and be clearly perceived. Secondly, the Constitution should be worthy of respect. Respect might be lost if the Constitution concerned itself with trivialities and if it contained masses of

[1] *Proceedings of the Constituent Assembly,* 361-362.
[2] *Ibid.,* 362.
[3] It is suggested by Rubin and Murray *{op. cit.,* pp. 27-29) that art. 55, and the other provisions which did not appear in the draft as first published may be invalid as not having been approved in the plebiscite. This argu ment disregards the terms of the Constituent Assembly and Plebiscite Act. As explained at pp. 80-84, *ante,* the power to pass the Constitution was derived from this Act and not from the plebiscite, the purpose of which was to enable the Constituent Assembly to obtain information as to popular opinion.

ephemeral detail requiring frequent amendment. Thirdly, time was insufficient to prepare provisions on all the matters that would, on this approach, have required detailed treatment. Subjects such as elections, the regulation of the armed forces, local government and chieftaincy could hardly have been omitted, but were not dealt with in the Bills submitted to the Constituent Assembly. The subjects chosen for these Bills were ones where the law urgently needed amendment to fit it for the new era of the Republic. In the case of one Bill, which became the Courts Act, 1960 (C.A. 9), the law was consolidated principally because of the decision to alter the courts' structure and also because of the need to enact new provisions in a relatively small section of the field, namely Part F of the former Courts Ordinance (Cap. 4) (which dealt with the application of customary law and English law).[1] The Civil Service Act, 1960 (C.A. 5) was passed to implement the New Charter for the Civil Service, published by the Government as a White Paper at the same time as the proposals for a republican constitution.[2] The Judicial Service Act, 1960 (C.A. 10) was required to carry out the Government's decision to establish a new Judicial Service organised on lines similar to those of the Civil Service. The Regions of Ghana Act, 1960 (C.A. 11) replaced the provisions defining the areas of the Regions in the former Constitution. The former provisions were in any case unsatisfactory for a number of reasons. They were so drawn as to make necessary a lengthy search through previous legislation in order to ascertain the Regional boundaries, and even then some doubt remained. They had also been considerably amended, and did not of course deal with the new Upper and Central Regions.

Other Acts were needed immediately to amplify the parts of the Constitution relating to the new office of President. These were the Presidential Affairs Act, 1960 (C.A. 2), the Cabinet and Ministers Act, 1960 (C.A. 3) and the Acts of Parliament Act, 1960 (C.A. 7). The new forms of oaths made necessary by the change from Queen to President were set out in the Oaths Act, 1960 (C.A. 12). The law governing the property and contracts of the new Republic, including powers of compulsory acquisition, was set out in the State Property and Contracts Act, 1960 (C.A. 6). A Bill was prepared to regulate the procedure for civil suits by and against the Republic and to replace the Petitions of

[1] This is treated at some length in Part IV, *post.* 2 W.P. No. 2/60.

Right Ordinance (Cap. 18), but this was not proceeded with.[1] It remains to mention two Acts which bear a very close relation to the Constitution in that they affect its construction. These are the Constitution (Consequential Provisions) Act, 1960 (C.A. 8) and the Interpretation Act, 1960 (C.A. 4). As indicated above, it was desired to produce a Constitution which was clear, simple and free of extraneous detail. Nevertheless, transitional provisions were required which inevitably would be lengthy and of only fleeting importance. In the past such provisions had been included in the Constitution itself, but this was strongly felt to be undesirable. Nor was the expedient used in the Irish Constitution of authorising the Constitution to be reprinted without the transitional provisions looked on with favour. The only course was to enact the transitional provisions separately. This was done in the Consequential Provisions Act, which is not referred to in the Constitution and yet in some respects modifies its operation in the early days of the Republic. Thus, for example, art. 21(2) (which provides that Members of Parliament are to be elected on the principle of universal adult suffrage set out in art. 1) is modified, in the case of the first Republican Assembly only, by s. 1 of the Consequential Provisions Act. This states that the existing members are to be deemed to have been duly elected in pursuance of the provisions of the Constitution, although in fact they include ten women members who were elected by the National Assembly itself under the Representation of the People (Women Members) Act, 1960 (No. 8). Again, whereas art. 23(2) requires the Assembly to be dissolved not later than five years after its first sitting following the previous general election, s. 1(2) of the Consequential Provisions Act extends this period by several years in the case of the first Republican Assembly.[2] Apart from provisions of this kind, the Consequential Provisions Act included a large number of textual alterations to the existing law, and conferred power on the President to make further alterations during the first year of the Republic.[3] It also dealt with two further matters, namely the discontinuance of appeals to the Privy Council and the status of Ghana Government securities, which may conveniently be explained here.

[1] It was passed in the following year as the State Proceedings Act, 1961 (Act 51).

[2] This was done under a mandate taken to have been conferred in the constitutional plebiscite; see p. 90, *ante*.

[3] Constitution (Consequential Provisions) Act, 1960 (C.A. 8). s 21. The power was exercised by L.I. 102 and 105

The right of appeal to the Judicial Committee of the Privy Council had long existed in Ghana.[1] In its current form the right existed by virtue of the Ghana (Appeal to Privy Council) Order in Council, 1957,[2] which was made at the request of the Government of Ghana on 31st July, 1957. This gave an appeal as of right from decisions of the Ghana Court of Appeal where the value of the matter in dispute was £500 or more, and also an appeal by leave of the Court of Appeal in other cases where a point of " great general or public importance or otherwise " was involved. The Court of Appeal was required to conform with and execute any order made on the appeal. It was felt that to continue these appeals would not accord with Ghana's new status and so, following the example of Canada, the Union of South Africa, India and Pakistan, the Consequential Provisions Act repealed the 1957 Order in Council and the other enactments relating to such appeals. Arrangements were however made to enable pending appeals to go forward and be decided by the Judicial Committee.[3] The result was to make the new Supreme Court the final court of appeal for cases in Ghana, the right to go to the West African Court of Appeal having been abolished in 1957.[4] Ghana Government stocks at this time enjoyed the status of authorised trustee investments in the United Kingdom. The Colonial Stock Act, 1900 authorised trustees to invest in colonial stock registered in the United Kingdom if certain conditions laid down by the Treasury were satisfied. The colony was required to provide by legislation for the payment out of its revenues of any sum ordered by a United Kingdom court to be paid to stockholders, and also to satisfy the Treasury that money would be available in the United Kingdom to comply with any such order.[6] A third condition referred to disallowance of legislation which would be injurious to stockholders, but this was superseded for the self-governing dominions by the Colonial Stock Act, 1934, which stated that the third condition would be satisfied if the government of the dominion gave a certain undertaking, and

[1] See pp. 19, 33, *ante.*
[2] S.I. 1957 No. 1361; L.N. 215.
[3] Constitution (Consequential Provisions) Act, I960 (C.A. 8), s. 16. Pending appeals were dealt with from the United Kingdom end by the Ghana (Consequential Provision) Act, 1960, s. 2 and the Ghana (Pending Appeals to Privy Council) Order in Council, 1960.
[4] West African Court of Appeal (Amendment) Order in Council 1957 (S.I. 1957 No. 279; L.N. 66).
[6] Treasury Order, S.R. & O. 1900 No. 926.

continued it by an Act of Parliament of the dominion. The undertaking was that legislation of the dominion which appeared to the British Government to be injurious to stockholders or to depart from the original contract governing the stock should not be submitted for Royal Assent unless the British Government agreed. Furthermore, if attention was only drawn to such legislation after it had been passed, the dominion government must undertake to amend it when asked to do so by the British Government. This provision was applied to Ghana on the attainment of independence,[1] and the conditions were satisfied by the passing of an Ordinance which came into force at the same time as the Independence Act.[2] So that Ghana Government securities should still be authorised for trustee investment in the United Kingdom after the change to republican status, the British Government provided that the Colonial Stock Acts should continue to apply, but with modifications to fit Ghana's new status.[3] Ghana law was made to satisfy the Treasury conditions (as so modified) by various amendments to the 1957 Ordinance made by the Constitution (Consequential Provisions) Act, 1960 (C.A. 8), s. 19.

In 1961 the British Parliament effected a considerable widening of the investment powers of trustees with the passage of the Trustee Investments Act, 1961. This repealed the above-mentioned provisions of the Colonial Stock Acts and thus rendered the Ghana legislation on the subject obsolete. Trustees now have power under British law to invest in securities issued by the Ghana Government or a Ghanaian public or local authority provided they are issued and registered in the United Kingdom and do not require the holder to accept payment otherwise than in sterling.

The Interpretation Act, 1960 (C.A. 4) affects the construction of the Constitution because it applies to it, as to every other enactment, " except insofar as the contrary intention appears in the enactment ".* Perhaps the most important provisions in

[1] Ghana Independence Act, 1957, Sch. 2, para 4.

[2] Trustee Investment in Ghana Government Securities Ordinance, 1957 (No. 13).

[3] Ghana (Consequential Provision) (Colonial Stock Acts) Order in Council, 1960 (S.I. 1960 No. 969).

[4] Section 1. A useful explanation of the effect of the Interpretation Act appears at the beginning of Vol. I of the Acts of Ghana, published in the official Cumulative Binder Service. Various provisions of the Act are also dealt with elsewhere in this book.

this regard are ss. 17 and 18, which explain the meanings of the references to the common law and customary law in art. 40 of the Constitution.

In conclusion, a word should be said about the status of the Acts, other than the Constitution, which were passed by the Constituent Assembly. Except in one respect, which is discussed below, the Acts have the same status as any other Act of Parliament passed before or since, and may accordingly be repealed or amended (whether expressly or impliedly) by a later enactment. This is made clear by art. 20(6), which, subject to exceptions which relate only to the Constitution itself, states that " the power of Parliament to make laws shall be under no limitation whatsoever ". It necessarily follows that this legislative sovereignty extends to the repeal or amendment of Acts of the Constituent Assembly in the same way as it extends to the repeal or amendment of other laws. Such amendments have indeed taken place, as for example by the substitution of a new section for the original s. 1 of the Presidential Affairs Act, 1960 (C.A. 2).[3]

The exception referred to is this. We have seen above that certain provisions of the Consequential Provisions Act and the Interpretation Act modify the construction of the Constitution as opposed to providing for its working out in detail. It follows that these provisions are in effect written into the Constitution. They were made by the same body as the Constitution and came into force at the same time. They must therefore be treated as part of the Constitution and as subject to the restrictions on amendment or repeal imposed by art. 20. This is particularly important where they modify an entrenched provision. Thus an attempt to amend by ordinary Act s. 1(2) of the Consequential Provisions Act (which fixes the maximum life of the present Parliament) would be ineffective since s. 1(2) modifies an entrenched provision of the Constitution, namely art. 23(2). The correct procedure would be to hold a referendum under art. 20(2) and then, if the electors approved, modify art. 23(2) directly. Where entrenched provisions are not involved the only restriction is that imposed by the proviso to art. 20(2), which requires alterations to the Constitution to be made by an Act " expressed to be an Act to amend the Constitution and containing only provisions effecting the alteration thereof ". Let us take as an example an amendment to s. 10(2) of the Interpretation Act, which

[1] See the Presidential Affairs (Amendment) Act, 1960 (Act 8).

states that an enactment conferring power to do any act or thing shall be taken also to confer such additional powers as are reasonably necessary to enable the act or thing to be done. This means that a provision in the Constitution which in terms confers only primary powers—e.g., art. 39, conferring powers on the Auditor-General—actually confers these secondary powers also. An amendment which narrowed the effect of s. 10(2) would therefore narrow the effect of certain provisions of the Constitution. Because of the proviso to art. 20(2) it would not do so however unless also embodied in an additional Act satisfying the requirements of art. 20(2). It should be added that such amendments to the Interpretation Act are very unlikely to be needed. Were this not so the complications just described would be indefensible. In the case of the definitions of common law and customary law, where the possibility of future amendment of the Interpretation Act was foreseen, the complications are avoided by the opening words of art. 40, which enable the definitions to be altered without this operating as an amendment of the Constitution.

7. INAUGURATION OF THE REPUBLIC

Ghana became a republic within the Commonwealth on 1st July, 1960. In the stage of development it has now reached the Commonwealth may be defined as a group of autonomous states having equality of status and an obligation to co-operate with one another, and each recognising the Queen as the symbol of the free association of the members of the group and as such the head of the Commonwealth.[1] The White Paper containing the Government's consitutional proposals had pointed out that, in accordance with normal practice, no provision was included in the draft Constitution in regard to membership of the Commonwealth. The White Paper continued:

> " It is, however, the intention of the Prime Minister to attend the Conference of Commonwealth Prime Ministers to be held in London on 3rd May, 1960. On that occasion the Prime Minister will tell the other Commonwealth Prime Ministers of the result of the plebiscite and, if the people vote in favour of the draft Constitution, will inform them that Ghana will become a republic but would wish to remain within the Commonwealth."[2]

[1] For a detailed examination of each element in this definition see K. C. Wheare, *The Constitutional Structure of the Commonwealth,* Oxford, I960. [a]W.P. No. 1/60, p. 15,

This intention was duly carried out. In view of the precedents established by India and Pakistan, no difficulty was anticipated in securing the consent of the other Commonwealth countries to Ghana's continuance as a member of the Commonwealth while renouncing allegiance to the Queen.[1] The giving of this consent was confirmed by a communique issued on 13th May, 1960 at the conclusion of the meeting of Commonwealth Prime Ministers. After referring to Ghana's intention to become a republic, the communique went on:

> " In notifying this forthcoming constitutional change, the Prime Minister of Ghana assured the meeting of his country's desire to continue her membership of the Commonwealth and her acceptance of the Queen as the symbol of the free association of its independent member nations and as such the head of the Commonwealth. The heads of delegations of the other member countries of the Commonwealth assured the Prime Minister of Ghana that the present relations between their countries and Ghana would remain unaffected by this constitutional change and they declared that their governments would accept and recognise Ghana's continued membership of the Commonwealth."[2]

In the case of Pakistan a similar declaration of the Commonwealth Prime Ministers had been subsequently ratified by a resolution of the Pakistan Assembly before the introduction into the United Kingdom Parliament of the Pakistan (Consequential Provision) Bill, which made reference to Pakistan's becoming a republic while remaining within the Commonwealth. This course was not followed in Ghana. It was felt that, since Dr. Nkrumah was President-elect at the time when he gave his assurance to the other Prime Ministers, and as President and holder of the executive power he would under the new Constitution have the sole right to decide whether or not to withdraw Ghana from the Commonwealth at any future time, his assurance would be given no greater weight by a resolution of the National Assembly. Furthermore the assent of the people of Ghana had been given to that assurance by their overwhelming support for the constitutional proposals, which, as stated above, indicated that such an assurance would be made. In spite of these considerations there would have been no objection to putting the matter to the vote of the Assembly if it had been in session at the relevant time.

[1] Ghana became a member of the Commonwealth on attaining indepen dence; see p. 68, *ante*.

[2] *Commonwealth Survey*, Vol. 6, p. 452.

The Parliamentary time-table in the United Kingdom made it necessary however to introduce the Ghana (Consequential Provision) Bill on a date in May and it would have been very inconvenient to summon the Ghana Assembly before that time. The Ghana (Consequential Provision) Act, which received the Royal Assent on 2nd June, 1960, followed in its main provisions the wording of similar Acts passed by the United Kingdom Parliament in relation to India and Pakistan. It is described in the long title as

> " An Act to make provision as to the operation of the law in relation to Ghana and persons or things in any way belonging to or connected with Ghana, in view of Ghana's becoming a Republic while remaining a member of the Commonwealth."

The principal effect of the Act is to provide by s. 1(1) that, in the territories for which the United Kingdom Parliament has power to legislate, the laws shall continue to apply in relation to Ghana as they did before the inauguration of the Republic. Power is given by s. 1(3) to amend existing laws by Order in Council so as to give effect to this object or otherwise to make provision which is expedient in view of Ghana's altered status.[1] The Act also makes detailed arrangements in s. 2 for the disposal of pending appeals to the Judicial Committee of the Privy Council.[2] It may be remarked that an incidental effect of the Act is to give formal recognition to the fact of Ghana's ceasing to form part of Her Majesty's Dominions. It thus operates as an implied repeal in British law of s. 1 of the Ghana Independence Act, 1957, which provided that Ghana was to form part of Her Majesty's Dominions. Furthermore, since it came into effect before the republican Constitution had even been introduced into the Constituent Assembly, it put an end to any lingering doubts as to the theoretical capacity of that body to enact the Constitution.[3] In what was perhaps an excess of caution, however, the judges appointed under the old Constitution were requested to submit their resignations, to take effect at midnight on 30th June, 1960. This was done, the resignations were accepted and the next day the judges were reappointed by the newly-installed President in exercise of the powers conferred by the republican Constitution.

[1] The power **has** been exercised in relation to trustee investments; see p. **101,** *ante.*
[2] See p. **100,** *ante.*
[3] See pp. 74 *et seq., ante.*

No judge could thereafter pronounce the Constitution invalid without at the same time saying in effect that his own appointment was invalid also. He would not be a judge under the old Constitution because he had resigned. If he was not a judge under the new Constitution he was not a judge at all, and his " judgment " would be without effect.

The Governor-General, the Earl of Listowel (who had served in that office during the whole of its existence) carried out his last official act in Ghana by proroguing Parliament on 30th June, 1960. Before this was done an address of thanks to the Governor-General was moved by the Prime Minister and seconded by the Leader of the Opposition. Since this was an historic occasion we reproduce the two speeches here.

The Prune Minister (Dr. The Rt. Hon. Kwame Nkrumah): Mr. Speaker, I beg to move the following Address:

" We the Speaker and Members of the National Assembly of Ghana in Parliament assembled wish to tender to Your Excellency the expression of our sincere appreciation of the devotion with which you have served Ghana.

On the eve of Ghana becoming a sovereign Republic, it is fitting that we should reflect on our association with the Queen and pay our respects to Your Excellency as the last Governor-General and Commander-in-Chief.

We wish Your Excellency good health and much happiness in the future."

Mr. Speaker, we have adopted a republican Constitution not through any lack of affection for Her Majestv nor because of any dissatisfaction with the way in which the Office of Governor-General has been discharged.

The people of Ghana have enacted for themselves a new Constitution because of our convictions that we need a form of government which will more truly interpret the aspirations and hopes of the people of Ghana and give full expression to the African personality. *[Hear, hear.]*

Lord Listowel was appointed Governor-General by the Queen upon the advice of the Government of Ghana. During his tenure of office he has amply fulfilled the expectations of the Government which led them to recommend his appointment to Her Majesty.

I know that the whole House will wish to join with me in expressing our thanks for the way in which he has discharged his office and will agree with me that though he may not be in Ghana, he will always be remembered by us with the warmest affection.

Mr. Speaker, in the same way as the Governor-General must feel sorrow at leaving Ghana, I feel a similar sorrow in that this is the last occasion upon which I shall speak in this House as

Prime Minister and a Member of Parliament. This National Assembly has been an historic body. *[Hear, hear.]* I have known it from its beginning. In fact, I have lived in it. I have seen it carry through great constitutional changes. I myself have been a fighter within its ramparts. Indeed, it has been the foundry which has forged and moulded the new framework of our Nation.

Though, however, from midnight tonight I shall cease to be a Member of Parliament and cease to be an active participant in this august Assembly, I am certain that I shall not lose that personal and intimate connection which I have established with this House. I believe that no constitutional change can affect the personal bonds which have been established in the ten years that we have worked together in this House. I understand from the Clerk of the House that I shall be provided with a seat in the new Assembly. I shall visit you as often as is convenient.

I realise, however, from my own regrets at leaving the Assembly, how much greater a break it must be for the Governor-General both to leave Office and to depart from Ghana. **Our** good wishes and our goodwill go with him, and I am certain that, though he may no longer be the Governor-General of Ghana, many opportunities will occur in the future for fruitful co-operation between us. *[Hear, hear.]*

Mr. Speaker, I beg to move.

Leader of the Opposition (Mr. S. D. Dombo): Mr. Speaker, it is a great pleasure to me to second the Address which has been so ably moved by the Prime Minister. *[Hear, hear.]* If I may say so, Sir, it is a remarkable address moved on a historic day. It is remarkable because it is unique, in that it pays tribute to the Crown's last representative in Ghana. It is a historic day because tonight at the stroke of twelve a new Ghana will emerge—*[Hear, hear]*—a Ghana blooming with the Ghanaian personality.

A little over three years ago we won our independence. Now we seek to give more meaning to this freedom to express our innermost selves. When it came to us, independence was sweet and wonderful. Now we regard it merely as bones—dry bones into which we are about to breath life with a concerted effort. *[Hear, hear.]* Everyone knows how determined we are to help to liberate the rest of Africa. The British Prime Minister, the Right Honourable Harold Macmillan, has told the world about the wind of change blowing over this great continent. With our coming change in status we should be better able to give velocity and direction to this wind. *[Hear, hear.]*

It has been most pleasant having Lord Listowel in our midst. He was quick to learn to know us and to identify himself with our ways. In fact, we have all come to accept him as a citizen of Ghana. It is sad that in the yielding of one order to another we should lose him. He has brought this era to an end so gracefully. In a few hours' time our allegiance to the Queen will lapse but she may be assured that our respect for her person will continue, and hope that our association with Great Britain will grow and

bloom and bear fruit. It is nice to reflect on our continued association with the Queen's person and with the Crown through our membership of the great family of nations, which is affectionately known as the Commonwealth.

Question put and agreed to.
Resolved accordingly.[1]

The Governor-General then delivered a speech of farewell, in which he reviewed briefly the events of his period of office. At the end of this he read the last message to the people of Ghana from their Queen. Her Majesty pointed out that the bonds which bound the Commonwealth together could not be expressed in written constitutions or by a set and unchanging formula of relationship. The message continued:

> " I am proud that I am Head of a Commonwealth in which every nation may choose for itself the form of Government which best suits it; now that Ghana has chosen for itself a republican form of Constitution it will not affect the interest which I have always taken and shall continue to take in the welfare of its people. . . . On this last occasion when I shall have the opportunity of addressing you as your Queen, I wish to convey to the President-elect, the Members of the National Assembly and the people of Ghana, my best wishes for the future. I pray that the blessing of Almighty God may guide the destinies of the new Republic and secure peace and happiness for its people."[2]

On the following day the inauguration of the Republic was proclaimed and the President-elect, Dr. Kwame Nkrumah, assumed office as first President of the Republic by taking the oath required by art. 12 of the new Constitution.[3] This provides that the oath is to be administered by the Chief Justice but until the President-elect had assumed office by taking the oath he could not of course appoint a Chief Justice. The danger of an impasse arising from this situation had been foreseen, and the Constitution (Consequential Provisions) Act, 1960 (C.A. 8), s. 2 had provided that the oath should be administered by the person who held the office of Chief Justice immediately before the commencement of the Constitution.[4] Sir Arku Korsah accordingly

[1] Pari. Deb. Official Report, Vol. 19, col. 249.
[2] Pari. Deb. Official Report, Vol. 19, col. 254.
[3] *Ghana Gazette*, 1st July, 1960, 1, 2. Article 10 of the Constitution appointed Dr. Nkrumah as first President, referring to his having been chosen as such in the plebiscite.
[4] The section even guarded against the possibility that the Chief Justice might be incapacitated by illness. It stated that in his absence a Justice of Appeal should officiate.

administered the oath, and following this the new President made the solemn declaration required by art. 13.[1] During intervals between the celebrations which followed on that day the President found time to sign instruments appointing Ministers, parliamentary private secretaries, judges and others, and also an Honours Warrant establishing fifteen Republican honours and awards to replace those which had hitherto been awarded by the Queen on the advice of the Government of Ghana.[2] The President also directed a commemorative medal, to be known as the Republic Day Medal, to be given to every person serving with the armed forces or the police on 1st July, I960.[3] An amnesty was granted by the use of the powers of mercy conferred by art. 48 of the Constitution.[4] A new table of precedence was published.[5] Finally, the President signed a proclamation summoning the National Assembly to meet the following day to commence the first session of the first Parliament of the Republic of Ghana.[6] The sitting of the Assembly on 2nd July was solely for the purpose of the election of a Speaker and Deputy Speaker and the swearing-in of Members. At the end of the sitting the Leader of the House, Mr. Kojo Botsio, announced that the former title of Parliamentary Secretary had been changed to Parliamentary Private Secretary (it was later changed again to Ministerial Secretary). In future the Government Chief Whip would be known as the Parliamentary Secretary.[7] The formal opening of Parliament by the President took place on 4th July. In the interval since the last sitting the chamber had undergone a transformation. It had been decided to drop the concept of an official Opposition and to abolish the salaried post of Leader of the Opposition.[8] The seating of the chamber was therefore rearranged

[1] *Ghana Gazette,* 1st July, 1960, p. 2.
[2] *Ibid.,* pp. 3-12. The honours and awards are briefly described on p. 133, *post.* For coloured reproductions of the insignia, see the *Ghana Gazette,* 1st July, 1960, pp. 9-12.
[3] *Ibid.,* p. 13.
* *Ibid.*
[6] *Ibid.*
> *Ibid.,* p. 15.
' Pari Deb. Official Report, Vol. 20, col. 6.
[8] This had been announced earlier by Mr. Botsio, who said: " In our traditional ruling houses the concept of an organized opposition is unknown, and the term ' opposition ' has confused many minds and caused much misunderstanding. It is proposed that the terms ' Government side ' and ' Opposition side ' should be abolished. The party system will continue to be part of our parliamentary life and minorities in Parliament will continue to exercise their rights to freely express their views": Pari. Deb. Official Report. Vol. 19, cols. 228-229.

so that, instead of facing benches as in the House of Commons, the benches were placed in the shape of a horseshoe. The former mace, with its insignia of the Imperial Crown, royal cypher, Tudor rose and fleur-de-lis, was replaced by a new mace. This is of silver and gilt, with Ghana's heraldic bird, the eagle, as its head. In its shaft are six traditional stools symbolising *common sharing of responsibility, the presence of God in society, lasting personality, prosperity, the presence and effect of feminine power in society, and pride.* Between the stools are embossed five *edinkra* symbols denoting *the omnipotence of God, critical examination, strength, immortality* and *justice.*[1]

A new ceremonial procedure had been devised for the opening of Parliament. The President's approach was heralded by the beating of fontomforom (traditional drums). He was received by eight linguists representing the various Regions and each carrying a distinctive stick. A libation was poured and the President then entered the chamber to the sound of mmenson (the seven traditional horns). As required by art. 25 of the Constitution, the President there delivered the sessional address, which indicated the policies proposed to be followed by his Government during the ensuing session of Parliament. This procedure is modelled on that used on the opening of Parliament in the United Kingdom, but with an interesting use of Ghanaian cultural features. It is expected to be followed on similar occasions in the future.

We conclude this chapter with a word about the honorific prefix adopted by the President. In the first few days of the Republic the prefix " His Excellency " was used, as had been the case with the Governor-General. It was soon felt however that something distinctively Ghanaian was needed. The choice fell on the vernacular term Osagyefo, meaning a warrior who, in the hour of danger, pulls his army through to victory.[2] The President is now therefore referred to as " Osagyefo the President " or simply " Osagyefo ".

[1] Note by the Clerk of the Assembly in the programme for the opening of Parliament, 4th July, 1960.

[2] The term is a combination of the Akan words *osa,* meaning war, and *gyefo,* meaning saviour.