From *The Constitutional Law of Ghana* by F.A.R. Bennion (Butterworths, 1962)

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The Constitution of the Republic of Ghana was passed by the Constituent Assembly on 29 June 1960 and came into force on 1 July 1960. Before proceeding to a detailed examination of the Constitution we might well pause to consider the formal principles on which it is drawn. In its formal aspect the Constitution is a product of modes of thought and verbal construction largely deriving from British practice. It is not therefore to be approached, like a constitution from the continent of Europe, as a collection of vague and largely unenforceable directives. Nor is it, like the constitution of the United States, a product of the days before an enactment in the English language was considered inadequate if it did not form a precise working mechanism, as free as is humanly possible from ambiguities and inconsistencies. The formal principles governing Ghana's republican Constitution may be expressed as follows:

1. It is a mechanism, and all its operative provisions are intended to have the precise effect indicated by the words used - no more and no less.
2. It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning; that they mean what they say and not what people would like them to mean; and that if they prove unsuitable they will be altered formally by Parliament and not twisted into new meanings by 'interpretation'.
3. It leaves no powers unallocated: those not reserved to the people are exercisable by the authorities established by it.
4. In its original form, or as for the time being expressly amended, it overrides any inconsistent law whenever made.
5. It assumes that legitimate inferences will be drawn by the reader, but that he will not transgress the rules of logic - as by

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drawing an inference from one provision which is inconsistent with the express words of another provision.

6. It needs to be read as a whole, and with care.

To these formal principles may be added a few words of general description. The Constitution is the basic law of the land. All the institutions of Government, of the courts and of the legislature owe their existence to it, whether directly or indirectly; all powers of the State are wielded by virtue of it. It formulates the aspirations of Ghanaians towards the unification of the continent of Africa. It states the principles on which they wish to be governed. It contains certain entrenched provisions, by which powers are reserved to the people and can only be exercised after a referendum (other provisions can be altered by ordinary Act of Parliament). Finally, it does not deal with details of the transition to republican status, apart from continuing existing laws which are not inconsistent with it. These details are contained in a separate enactment, the Constitution (Consequential Provisions) Act.

1. POWERS OF THE PEOPLE

Recognition of political sovereignty

A prominent feature of the Constitution is the emphasis given to the underlying authority of the people. This appears immediately in the Preamble, which states

'We the people of Ghana, by our Representatives gathered in this our Constituent Assembly, in

exercise of our undoubted right to appoint for ourselves the means whereby we shall be governed . . . do hereby enact and give to ourselves this Constitution.'

It is taken up by the opening words of art. 1: 'The powers of the State derive from the people . . .' and is driven home by the first of the fundamental principles set out in art. 13:

'That the powers of Government spring from the will of the people and should be exercised in accordance therewith.'

There is of course nothing new in this. The words ' We the people . . .' have become familiar in constitutions since they were first used, under the influence of the social contract theories of John Locke[1] and Rousseau, as the opening words of the

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Constitution of the United States of America in 1787.[2] The Declaration of Independence itself was made 'in the Name and by Authority of the good People of these Colonies', and of constitutions now in force, the majority explicitly recognise the sovereignty of the people.[3] Most countries are content to name the people or the nation generally, but in the case of the U.S.S.R. and the People's Democracies such expressions as 'workers in cities and villages' and 'the working people of town and country' are used. In the United Kingdom and other countries of the Commonwealth still owing allegiance to the Queen sovereignty is regarded as formally residing in the Crown, but the underlying power is seen to rest with the people. Thus Dicey speaks of

.. . . . the will of that power which in modern England is the true political sovereign of the State-the majority of the electors or (to use popular though not quite accurate language) the nation.[4]

This illustrates the well-known distinction between political sovereignty, the ultimate source of power in the State, which is the naked capacity for forceful action possessed by the inhabitants in the mass, and legal sovereignty, which is the power conferred by the constitutional law on certain organs of the State established under that law. The distinction is not so clear in fact as it may appear in theory. Sir Ivor Jennings has criticised Dicey's view that legal sovereignty 'is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit'[5]. If this is so, he remarks, 'legal sovereignty is not sovereignty at all . . . It is a legal concept'.[6] Legal sovereignty must mean more than the power to make laws. It should correspond to

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the whole content of the political sovereignty inhering in the inhabitants and be vested in organs best fitted

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[1] 'For, when any number of men have, by the consent of every individual, made a community, they have made that community one body which is only by the will and determination of the majority': *Two Treatises on Civil Government,* Book 11, § 96.

[2] The concept appears to be indigenous to America herself. Morison and Commager record that, before any European settlement had occurred, 'almost every Indian tribe called itself something equivalent to "We the peop1e" and used some insulting title for its near neighbours': *The Growth of the American Republic* (4th edn.), VoI I, p. 11.
Bernard Schwartz points out that 'as a matter of practical reality, it was the States themselves, rather than the whole people of the United States, that formed the American Union': *American Constitutional Law,* Cambridge University Press, 1955, p. 31.

[3] In sixty-six nations, constituting about 71 per cent. of the total number of nations and comprehending about 80 per cent. of the world's total population this concept *(sc.* that sovereignty rests with the people) appears in existing constitutional provisions': *Constitutions of Nations* (2nd edn.), ed. Amos J. Peaslee, 1956, Vol. I, p. 5.

[4] *Law of the Constitution* (9th edn.), 1939, p. 429.

[5] *Op. cit.,* p. 72.

[6] *The Law and the Constitution* (4th edn.), 1955, p. 144.

to channel popular power to work the ends desired by the people.[7] If the constitutional framework is not equipped to give effect to the popular will it is not the people who will give way in the end, but the constitutional framework.[8] The written constitution of a democratic state should be a complete formal statement by the people of the manner in which they wish the political sovereignty to find expression. By working through the procedures laid down by the constitution, political sovereignty is transmuted into legal sovereignty. Legislation is one of these procedures and its product law is a manifestation of legal sovereignty the validity of which depends on its conformity or otherwise to the instrument under which it is made, namely the constitution. Where there is a well drawn written constitution there is no difficulty in deciding whether a given proposition is or is not a law. One looks at the body by whom and the manner in which the proposition was enunciated and if these conform to the provisions in the constitution regulating legislation, the proposition, if it has not subsequently been abrogated in conformity with those provisions, is a law. The constitution may be less forthcoming about the consequences of its being a law. It will probably leave unsaid the obvious statement that it is the duty of the courts to make orders, in cases brought before them, giving effect to the laws. It will assume that particular laws will themselves specify the persons who are to be bound by them - whether all the inhabitants or particular individuals or classes of individuals, and that laws will provide for the detailed methods of inflicting punishments ordered by the courts and otherwise carrying out court orders. A law made under a written constitution is not affected by the extent to which it is

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obeyed or even by the extent to which disobedience to it is punished. Unless formally abrogated it remains a law while the constitution remains a constitution.[9]

Legislative, executive and judicial power

Since the institutions of a country cannot develop and mature if the constitutional framework is dismantled every few years, and since Ghana has, in the course of development from colonial status, of necessity undergone frequent and radical constitutional changes in the course of this century, it was all-important, having given due recognition to the real source of power, to attempt to ensure that the organs of the new republic should be well designed to achieve the smooth working of democratic government. But before popular power can be properly distributed some attempt must be made to find out what it consists of. We are discussing the people as a social group, that is a State, and our concern is with the basic methods by which civilised peoples govern themselves and regulate their relationships with other States. A basic analysis would show civilised people governing themselves first by establishing some means of laying down general rules for the ordering of individual conduct and state affairs, which they agree to enforce by their collective power, secondly by establishing some means both of finding out whether individuals have broken such of the rules of conduct as are mandatory (and punishing them if they have) and of settling disputes between individuals as to the meaning or effect of other rules of conduct, and thirdly by establishing some means of carrying into effect the rules laid down for ordering the affairs of the State. The means thus established regulate respectively the exercise of the legislative power, the judicial power and the executive power of the State. This classification of the governing powers of persons collected into a society is as old as Aristotle and is still useful as throwing light on the essential nature of civilised government.[10] The meaning of

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[7] Again, this should not be taken too literally. There are many cases where the legal sovereign is not expected to carry out the will of the political sovereign, however clearly expressed. Thus the London Times, reporting in a leading article that an opinion poll had indicated an overwhelming majority of British people to be in favour both of capital punishment and corporal punishment, did not even discuss the question whether Parliament should give effect to the will of the people, but merely spoke of 'the task of education still facing the reformers': *The Times*, 22 March 1960.

[8] *Cf.* Aron, *France - the New Republic*, New York, 1960, p. 43: 'Every time we had a crisis we made a constitution. It is a sort of permanent reaction to an event. The main quality of any constitution is to be accepted and for more than a century and a half France never had a constitution which was generally accepted by its people.'

[9] *Cf.* Jennings' note on the theory of law, *op. cit.*, pp. 302-319.

[10] Most constitutions recognise this classification, particularly those which proclaim the underlying sovereignty of the people. For example the Constitution of the Union of Burma, which was enacted in 1947, contains the following section:

legislative power and judicial power is reasonably

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clear but that of executive power is less definite. If the threefold classification is to be comprehensive (and it is usually taken to be) the executive power must be treated in a wider sense than is indicated above and made to embrace all governmental functions which are not of a legislative or judicial character, for example relationships with foreigners who are not within reach of the: legislative power, and the protection of the State from attack so far as this is not provided for by the laws. This was recognised by Montesquieu, who defined the executive power as the power by which the Prince or Magistrate 'makes war and peace, sends and receives ambassadors, establishes order, prevents invasions'.[11] The concept of executive power as consisting in the carrying out of laws relating to the ordering of State affairs is faulty. The laws themselves usually indicate who is to perform functions made necessary by them and no overall executive power in this sense is capable of being bestowed on any one organ of the State. The truth of this is disguised by the fact that the executive organ, or a component of it, is usually chosen by the law (having perhaps had some say in the making of it) as most suitable to be entrusted with the execution of the law. The power of administering a particular law is in general derived from the law itself, in other words from the exercise of the legislative power. This is the field of what has now come to be known as administrative law.

Distribution of powers

Having used the concepts of legislative power, judicial power and executive power as a means of indicating the content of political sovereignty, we next consider how these powers are distributed by the constitution. Montesquieu, basing himself on what he supposed to be the provisions of the British Constitution, believed that it was essential for liberty that each of the three powers should be conferred on a different organ of the State This view was elevated by the Federal Convention of America, again on the supposition that they were following the British Constitution, into the principle that not only should the power be possessed by different organs but that no organ should be predominant. Hence the fundamental doctrine of the American Constitution, described by the U.S. Supreme Court in the following terms:

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> 'The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.'[12]

In fact the separation of powers in the British Constitution is incomplete and there can be no doubt that the legislature is supreme in relation both to the executive and the judiciary. In any case, as Sir Ivor Jennings has said: ' . . . it is democracy and not merely the separation of powers that keeps Britain free.[13] Nevertheless it is clear that all powers cannot be given to one organ of the state. As one of the Founding Fathers of the United States, James Madison, said:

> '. . . . the accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.[14]

Apart from this, even where supreme power is bestowed on a democratic legislature, such a body, being

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'4. All powers, legislative, executive and judicial, are derived from the people and are exercisable on their behalf by, or on the authority of, the organs of the Union or of its constituent units established by this Constitution.'

[11] Cited in Jennings, *op. cit.*, p. 21.

[12] Humphrey's Executor v. United States (1935) 295 U.S. 602.

[13] Op. cit., p. 24.

[14] The Federalist, No. XLVII.

essentially a deliberative assembly, is not fitted to negotiate treaties, command armies or try criminal and civil causes. The real question is not whether powers shall be divided but whether any organ of the State shall be granted supremacy, and if so which. In this matter Ghana has followed the British rather than the American model and granted supreme power to a Parliament consisting of the President and the National Assembly.[15] This power is not absolute, since the power

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to repeal or alter certain entrenched provisions of the Constitution is expressly reserved to the people, but within the basic framework of the Constitution Parliament is sovereign by virtue of its possession of unlimited legislative power.[16] Provision is made for the exercise of the reserved powers of the people by the joint action of the President, the electorate and Parliament so that no gap exists in the legal means provided by the Constitution for the exercise of the political sovereignty.[17] The Constitution even provides legal means for repealing the Constitution and enacting an entirely different one in its place. (This could be done by the President ordering a referendum on the Bill for the new Constitution and, if the majority of voters in the referendum approved the Bill, by its subsequent enactment by Parliament.) The Constitution does not however follow the Burmese example and assume that all powers are either legislative, judicial or executive since there is room for argument on this and ambiguity must be avoided. Thus we find that the general power to authorise the meeting of expenditure out of national funds is conferred on the National Assembly in a way which avoids a pronouncement on the nature of this power.[18] It has the appearance of an executive power although in most countries it is exercised by an act of the parliament. In Ghana it is exercised by one organ of Parliament, namely the National Assembly.

Since it is relatively easy to decide whether a given function is or is not legislative or judicial, the tendency is to class indeterminate functions as falling within the executive power.[19] In Ghana therefore the President would exercise indeterminate functions as to which no provision was made by law. The executive power is conferred on the President and the judicial power on the courts - in both cases 'subject to the provisions of the Constitution', a phrase which enables the powers to be regulated and even curtailed by Act of Parliament as under the British Constitution, and incidentally ensures that any doubts which arise as to the detailed content of the powers can be set at rest by legislation.

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[15] Wade and Phillips in their Constitutional Law (4th Edn.), pp. 26 et seq., pose three questions by which separation of powers can be tested. Tentative answers in relation to the Constitutions of the United States, the United Kingdom and Ghana are given below; positive answers are in most cases impossible:

	U.K.	U.S.	Ghana
1. Do the same persons or bodies form part of both the legislature and the executive?	Yes	No	Yes
2. Does the legislature control the executive?	Yes	No	Yes
3. Do the legislature and the executive exercise each other's functions? -	Yes	Yes	Yes

See also Schwartz, American Constitutional Law, Cambridge University Press, 1955, pp. 18-22.

[16] Article 20.

[17] 'Unless you give a government specific powers, commensurate with its objects, it is liable on occasions of public necessity to exercise powers which have not been granted': John Fiske, *The Critical Period of American History,* p. 207.

[18] Articles 31-33.

[19] See *Springer* v. *Phillipines Govt.* (1928), 277 U.S. 189, where the court held on this principle that the executive should exercise voting rights in Government-owned stock.