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SUBMISSIONS BY G. BING, Q.C., ATTORNEY-GENERAL ON BEHALF OF THE RESPONDENTS ON THE DETERMINATION OF QUESTIONS ARISING UNDER THE CONSTITUTION, 1960

12 June 1961

May it please your lordships:

The court is asked for the first time to interpret a written Constitution. Obviously the first exercise of your lordships' powers under Article 42 of the Constitution, 1960, is a matter of considerable importance and therefore I hope that your lordships will accept what is perhaps an innovation, the making to you of a speech of which a part has been reduced previously into writing.

My lords. under the Constitution the Supreme Court is bound in principle to follow its own previous decisions of law and the High Court is bound to follow the previous decisions of the Supreme Court on such questions, but neither the Supreme Court nor indeed the High Court is otherwise bound to follow the previous decisions of any court on questions of law. The decisions which your lordships come to on the Constitution in so far as they arise out of this case will be a final and complete determination of its meaning.

When your lordships are exercising as important a task as this it is not unreasonable I think that counsel should reduce the most important part of their argument to writing, and I would respectfully suggest that your lordships might consider whether in cases of this sort it might not be desirable to indicate to counsel that this course ought to be followed.

The advantages of it are manifest. In the first place, it shortens proceedings by forcing counsel to define on paper exactly the argument which he wants to advance. Secondly, it saves your lordships the tedium of recording in long-hand counsel's arguments, a course which is always undesirable because counsel can afterwards urge that the gist of the argument was not in fact contained in the note which your lordships made of its general tenor. Finally, it is probably desirable for the purpose of reporting constitutional cases that there should be an authentic record in full of the main points of the arguments of counsel.

My lords, what I am proposing is merely a suggestion. Naturally, in the course of my reading of this written address there will be points at which your lordships will wish to interrupt to clear up some points which I have not made clear, or to ask for authorities to justify some propositions which I may have made.

I have prepared this written address after hearing only four days of my learned

friend's argument. It is always possible, though I am afraid not probable, that he may say something new in the remaining stages of his argument. In which case I shall seek your lordships' permission to break into the written text at an appropriate point in order to deal with any new matter which may be raised by him.

The position of the Supreme Court under the Constitution

Under Article 42(2) of the Constitution, 1960, it is provided that "The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution." It is desirable that I should begin by explaining to your lordships what is in my submission the meaning of these words and the duty of the court in regard to them.

I can perhaps best start with an analogy. If A murders B , A is a murderer irrespective of whether his crime is ever detected. No legal consequences however flow from this unless A is convicted of murder in accordance with law in force. In exactly the same way, if Parliament makes a law in excess of its powers under the Constitution, this law is void for this very reason. No legal consequences however flow until the Supreme Court pronounces the law to be void.

The Supreme Court is therefore not in my submission superior to Parliament. Under the Constitution, 1960, the Supreme Court and Parliament have each different and separate functions to perform. One cannot therefore be said to be superior to the other, both are controlled in their powers and functions by the Constitution.

Main theme of Dr. Danquah's argument

The argument of my learned friend, Dr. Danquah, really falls into two quite distinct parts. In the first place, there is the argument that the Preventive Detention Act, 1958 (Act No. 17 of 1958), should be interpreted in such a way as to allow for judicial review of the discretion exercised in the past by the Governor-General and today by the President. Secondly, there is the entirely separate argument that the Preventive Detention Act is *ultra vires* the Constitution.

My lords, I should at the outset call your lordships' attention to one authority quoted by Lord Atkin in his dissenting judgment in *Liversidge* v. *Anderson* (1942) A.C.206, H.L. This authority supports, and strongly supports, the arguments put forward by my learned friend on both heads. It was the only authority which Lord Atkin was able to find to support the type of proposition which has been advanced by my learned friend and I have myself been unable to find any other authority than that quoted by Lord Atkin. I therefore put it forward so that it may be given full consideration by your lordships. The passage will be found in f19421 A.C. at p.246, H.L.

Lord Atkin said:

> "I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean different things." "The question is," said Humpty Dumpty, "which is to be master—that's all". (Through The Looking Glass, c.vi.)."

The essence of my learned friend's argument is that the Supreme Court of Ghana should consider itself a kind of corporate Humpty Dumpty and give to words of Acts of Parliament and to the Constitution such meanings as the court thinks might be appropriate in particular circumstances, irrespective of what the words of the Constitution or the laws actually say.

It is this argument which, in my submission, led my learned friend to such a long dissertation about "emergencies." His argument about the Preventive Detention Act ultimately boiled down to this, that the expression "is satisfied" meant something quite different when it was used in the context of an "emergency" than it did at other times.

This is the exact opposite of what Lord Atkin was arguing in his dissenting judgment in the *Liversidge* case. The essence of Lord Atkin's argument was that the courts must give the same weight and meaning to words whatever the context of the times and must not be led by the existence of an emergency into placing a strained and unnatural construction on terms used in a statute.

It is not without significance that my learned friend, in attempting to place a strained and unnatural construction on words, has called in aid a number of United States cases and has quoted at length from writers on the United States Constitution.

At a later stage I shall have more to say on this subject because it is, in my submission, important that the Court should distinguish between the conceptions of judicial review as they exist under the Constitution of Ghana, and indeed as they exist under the constitutions of almost all other countries. Judicial review, in the sense in which it exists in the United States, is generally acknowledged as a particular United States institution springing from the particular form of the United States Constitution.

My learned friend's argument reduced to its simpliest form, can be expressed in three propositions.

First, that constitutions can be divided into classes, written and unwritten. Secondly, that all written constitutions are the same.

In which case it follows, thirdly, that the United States Constitution can be

used to interpret the Constitution of Ghana.

At this stage I do not propose to deal with the meaning of judicial review under the Constitution of Ghana but I shall return to it at a later stage in my argument. At this point, however, it is most desirable to utter a warning against accepting American authorities on judicial review which have their origin in the provisions of the United States Constitution, which do not exist in the Constitution of Ghana. Later on I shall make a number of quotations from one of the standard works on the power of the Supreme Court of the United States to pass judgment on the constitutionality of legislation. At this stage I might perhaps quote from the Preface of the book in question, Professor Benjamin F. Wright's *The Growth of American Constitutional Law*. In the opening passage to the Preface of this work he says:

> "In this Book I have attempted to give a brief account of the work of the Supreme Court of the United States in passing upon the constitutionality of legislation. The institutions of judicial review of legislation has long seemed to me to be one of the American institutions of which it is essential to have some understanding in order to comprehend the course of American history or the character of American political life. It is a more peculiar feature of American history than, for example, the frontier movement, or immigration, or the growth of cities. It resembles less the constitutional laws and practices of other states than do the systems of checks and balances, or federalism, or adult suffrage, all of which have sometimes been spoken of as uniquely American."

I shall suggest that United States cases are not of great assistance in interpreting the Constitution of Ghana, not because of course they are wrongly decided, or are not based upon a fundamental study of the law and the Constitution of the United States, but because this Constitution and law is different in its origins, aims and objects from the Constitution of Ghana.

The extent and principles of judicial review came not from any universal theory of the rights of the courts but from the precise powers of review and interpretation given to the courts in any particular constitution.

The main issues in this appeal

With these preliminary remarks, let me come now to the main issues in this particular appeal.

My learned friend began with his fifteen grounds of appeal against the decision of Sarkodee-Adoo J. With your lordships' permission, I shall deal with each one of these points separately at a latter stage of my address. While argument on

them is of course important, it is not, in my respectful submission, as important as argument on the Constitution itself and therefore, subject to your lordships' views, I do not propose to reduce to writing the points I shall make to your lordships in regard to the specific grounds of appeal.

The main issues of this appeal are, in my submission, two. First, there is the question of the meaning and effect and purpose of Article 13(1) of the Constitution. Clearly this Article is of great importance. It expresses the fundamental philosophy of the Constitution in that the President must make the declaration at the time that he assumes office and that Parliament cannot delete any paragraphs in the declaration without first obtaining the approval of the people. The question before the court, in my submission, is however rather different. It is this: What effect does this Article have on the construction of legislation by the courts?

The second important question raised by this appeal is one with which I have already dealt with generally. It is this, how should the Supreme Court exercise its power of examining the constitutionality of any law?

Article 13 (1)

At first sight it is a little difficult to see how Article 13(1) is really relevant to my learned friend's submissions.

Article 42(2) of the Constitution gives the Supreme Court jurisdiction "where a question arises whether an enactment was made in excess of the powers conferred on Parliament *by or under the Constitution*." (My emphasis) Since the Preventive Detention Act was enacted in 1958 it cannot be said to be enacted directly by Parliament "by or under the Constitution." It can however be said to have been indirectly enacted by the Constitution itself under Article 40(d) which provides that the laws of Ghana consist among other matters of "enactments in force immediately before the coming into operation of the Constitution."

As I understand my learned friend's argument, it is not contended that the Preventive Detention Act was beyond the powers of Parliament under the previous Constitution. What is contended is that although this enactment might have been in force under the previous Constitution, it has been impliedly repealed by the present Constitution by virtue of Article 13(1).

If I may try to summarise what I understand to be the gist of my learned friend's argument, it is this: First, it must be assumed that the Constitution will be consistent throughout. Secondly, it is argued that the Preventive Detention Act is inconsistent with Article 13(1) and that therefore it must be implied that the Preventive Detention Act was not one of the enactments continued in force by the Constitution because it was impliedly repealed through its inconsistency with the declaration.

In my submission, this argument requires examination and answer on its merits,

though I must point out that there are grave difficulties in accepting it.

In the first place, the Preventive Detention Act is specifically referred to in the Constitution (Consequential Provisions) Act. (See C.A. 8, Sched.II.) The Constituent Assembly can hardly be held at one and the same time, impliedly to repeal the Preventive Detention Act by Article 13(1) of the Constitution and expressly to continue it by section 23 of the Constitution (Consequential Provisions) Act.

Secondly, all the canons of interpretation are strongly against implied repeal. In this connection, may I refer your lordships to *Maxwell on the Interpretation of Statutes* where the rules are set out very fully. My lords, mine is the tenth or vintage edition – by that I mean the Granville Sharpe edition, and not the earlier edition, which my learned friend prefers to quote. I shall not trouble your lordships by reading the passage, but the various cases dealing with implied repeal are dealt with from pages 164 to 170),and in the course of the discussion of these cases it is said (at page 170) "It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute – Book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable."

Nevertheless, despite these great difficulties in accepting the argument put forward by my learned friend, it should, in my humble submission, be considered on its merits. The actual merits or demerits of the argument of my learned friend can be best examined if one makes for the purpose of the argument the following two assumptions. First, that prior to the coming into force of the present Constitution, no Preventive Detention Act had been passed. Secondly, let it be assumed for the purpose of argument, that the Preventive Detention Act, 1958, was enacted for the first time under the present Constitution.

The nature of the Constitution

In order to obtain an answer to the question put in this form it is necessary to examine the Constitution itself, and to some extent the background against which it was passed.

My learned friend has quoted from the White Paper which accompanied the Constitution. Under section 19(1) of the Interpretation Act, 1960 (C.A. 4), he is certainly entitled to do so. The section reads as follows:

> "For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of inquiry into the state of the

> law, to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly."

I propose to follow his example and also to quote from the White Paper because it provides a valuable Clue as to the novel form of the Constitution and, incidentally, dispels the idea that it in any way is copied from the Constitution of the United States.

[*The Attorney-General here quoted from the White Paper.*]

It may be asked why was it necessary for the Constituent Assembly to adopt an entirely new, form of constitution and not merely to copy some existing constitution as other newly independent countries have on occasions done. The broad answer to this question is, I think that it is a wise course for any nation to frame its own constitution in accordance with its own national aspirations, and in agreement with the conditions existing in that country. The real needs of any nation are unlikely to be met merely by copying the constitution of some other country, which was enacted in different circumstances and to meet the needs of that particular country.

Fundamental rights and the Constitution

All constitutions are enacted in the interests of those who make them. A constitution therefore, made in the interests of the people should do its utmost to safeguard the people's rights. How this can most effectively be done has been a matter of constitutional discussion in all countries and different methods have been employed in different countries. In general, two trends can be discerned.

First, there is the trend, which was first established by the United States Constitution and which consists of writing into the constitution itself specific guarantees which can be enforced by the courts and, indeed, which it is left to the courts to enforce. This method has certain and obvious disadvantages.

Allow me to refer your lordships in this connection to a valuable article in the 10 *International and Comparative Law Quarterly*, pp.83 and 215. Under the title of "Fundamental Rights in the New Commonwealth" Mr. de Smith, Professor of Public Law in the University of London, deals with this problem in general and in particular quotes from the Report of the Joint Parliamentary Committee on Indian constitutional Reform. He points out at p. 217 that this report in turning down a proposal to embody in the then-proposed Indian Constitution a set of fundamental rights,

> "had remarked that a cynic might find plausible arguments in contemporary history for asserting that 'the most effective method of assuring the destruction of a fundamental right is to include a declaration

> of its existence in a constitutional document.' It had gone on to say "either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws will be declared invalid by the courts."

Despite this warning, the 1957 Constitution, which it is important to note was enacted by the United Kingdom Government by Order in Council and not by the legislature of the then Gold Coast, contains certain limited fundamental rights written into the Constitution in rather the same way as fundamental rights were written into the United States' Constitution, and the courts had in so far as these limited rights were concerned, an opportunity to review judicially the Acts of the legislature.

As so often, however, the fundamental rights were so loosely expressed that it was impossible to interpret them with any certainty. The meaning, for example, of section 35 was so obscure that it was liable to lead to conflicts between the courts and Parliament and to cause the court to pronounce on the validity or otherwise of rulings made in the National Assembly by the Speaker. Anything more undesirable can hardly be imagined.

The legislative history of Ghana shows that the 1957 Constitution in its original form was found unacceptable by the people.

[*Attorney-General here referred to the Constitution (Repeal of Restrictions) Act, 1958 (Act No.38 of 1958).*]

The decisive popular support for this Act is shown by the heading to it, which indicates that the constitutional formalities were observed. The note records that the Act received the approval of all Regional Assemblies and also the approval of at least two thirds of the total membership of the National Assembly.

The effect of this Act was to make any part of the Constitution amendable by an ordinary Act of Parliament. Therefore, as from 18 December 1958, no action of the Ghana Parliament could be held to be unconstitutional by the courts, since Parliament was then in possession of sovereignty as complete and absolute as that enjoyed by the Parliament of the United Kingdom.

I imagine that the passage of the Constitution (Repeal of Restrictions) Act,1958 (Act No.38), must have been overlooked by my learned friend because, of course, it makes complete nonsense of his allegations that the people of Ghana were in some way defrauded by being given a new Constitution, which contained fewer safeguards than the Constitution which had been superceded.

Perhaps at this stage I ought to draw the court's attention to the fact that the Preventive Detention Act, 1958, came into force on 18 July 1958 and therefore

its legality or otherwise was not affected by the Constitution (Repeal of Restrictions) Act.

The important point, however, to note is that even prior to the submission of the Constitution to the people by way of plebiscite, the people had previously been consulted through their regional Assemblies and through the National Assembly on the question of whether Parliament should have an unfettered legislative power or whether that power should be limited by specific restrictions inserted into the Constitution. The vote was decisive in favour of the unrestricted sovereignty of Parliament.

In view of this, it is not unnatural to find that the sovereignty of Parliament occupies a central position in the new Constitution. It was after all the only constitutional issue upon which the people of Ghana had been consulted in regard to the 1957 Constitution. They were given by the United Kingdom a Constitution not of their own making, which limited the sovereignty of Parliament. That limitation by their own Act they removed.

Acticle 20 of the Constitution

In my *respectful submission*, Article 20 of the Constitution is its key stone, and explains and makes clear the other provisions. It is highly significant that in the whole of his argument (up to at any rate the end of the fourth day) my learned friend never referred to this Article at all. It is essential that I should repair this omission.

[*The Attorney-General here read article 20 of the Constitution*]

The effect of Article 20 can be summed up thus:

(a) Parliament cannot alter any of the entrenched Articles in the Constitution unless there has been a referendum in which the will of the people is expressed;

(b) Parliament can, however, of its own volition, increase but not diminish the entrenched Articles; and

(c) the Articles which are not entrenched can only be altered by an Act which specifically amends the Constitution. In other words, no constitutional provision can be impliedly repealed.

It should be noticed that in this detailed and careful definition of the powers of Parliament there is no mention of Parliament's powers being limited in any way by Article 13(1).

Article 13

My learned friend suggested in his argument that the Constitution should not be interpreted in a mechanical fashion. In fact, as an examination of Article 20, and indeed of other Articles will show, it is a mechanistic Constitution. By this I

mean that not only does the Constitution express general principles but it provides the detailed mechanism by which these principles are to be implemented. One very good example is provided by Part V which deals with public revenue and expenditure.

Article 26(1) expresses the general principle that there shall be no taxation without representation and the remaining Articles deal in the mechanical details of how this is to be secured.

[*The Attorney-General then read and referred to Article 26 and other Articles in Part V of the Constitution.*]

If Article 13 is compared with other parts of the Constitution it will be immediately noticed that it is entirely differently expressed. In the first place, it is in no sense part of the general law, it is in the form of a personal declaration to be made by each individual President.

In other parts of the Constitution where a duty is imposed, the word "shall" is used. Throughout the declaration the word used is "should." This shows that the declaration represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts. Considering the precision with which obligations that have to be performed under the Constitution as legal acts are defined, the very imprecision of the declaration makes its nature clear.

One example of this is the final paragraph of the declaration in which the President pledges himself to use his powers to respect private property and the corresponding provision of the old Constitution which legally Safeguarded private property in the sense that it made any law which deprived persons of private property invalid and enabled the courts to declare it unconstitutional.

The easiest way to see what is the purpose of the declaration is to examine each paragraph of it in turn and enquire how it could be enforced by the courts.

[*The Attorney-General here read the Declaration paragraph by paragraph, commenting on each.*]

The court will recall that at one stage in his argument, I interrupted my learned friend in order to get him to clarify his argument, as to whether he was contending that every paragraph of the declaration was enforceable by the courts as a legal obligation, which limited the authority of Parliament to legislate. His answer, as I understood it, was that the courts were only called upon to enforce as legal obligation those paragraphs in which individual persons or citizens were specifically mentioned. To test the validity of this argument, let me quote again one paragraph from the declaration:

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

If my learned friend's argument is accepted, this would involve the Supreme

Court first determining the gross national product of Ghana and then apportioning it according to same principle of natural justice to each individual citizen. It would involve the theory that the Supreme Court could issue an order of prohibition to Parliament forbidding them to adopt budget resolutions on the grounds that they did not secure in the view of the Supreme Court a fair share of the produce of the country to same particular individual who claimed to be affected. It is merely necessary to state this proposition to demonstrate the absurdity of the argument of my learned friend.

The importance of Article 13

The fact that Article 13 cannot be legally enforced by the courts does not however detract from its importance; indeed, it is my respectful submission that Article 13 ensures fundamental rights in a much more satisfactory way than could be achieved by attempting to make them legally enforceable through court action, a method which I hope to show later has been in many cases singularly unsuccessful and has in fact resulted in the establishment of principles which are the direct opposite of those intended by the framers of the constitution in question.

In my submission, the declaration is a solemn statement of principles intended to prevent any person who cannot subscribe to them becoming President of Ghana.

In my submission, the object of the declaration is to impose on every President a moral obligation. Article 13(1) provides in fact a political yardstick by which the conduct of the President can be measured by the electorate. If the President departs from any of the principles set out in the declaration, the people have a remedy, not through the use of the courts but through the use of the ballot box. The opportunity to vote out of office a President who fails to observe the fundamental principles set out in the Constitution may in fact be a far more effective remedy than a re-course to the courts of law.

As was pointed out in the White Paper, the Constitution of Ghana has not been copied from that of any other country and therefore in seeking to interpret it, care must be taken in seeking parallels from the constitutional provisions of other countries. However, if this warning is borne in mind, it is valuable I think to compare the declaration with the United Kingdom Bill of Rights. No one would deny that the Bill of Rights and its predecessor the Petition of Right are important constitutional documents. For example, if one consults Peaslee's *Constitutions of Nations*, which is perhaps the standard compendium in the English language of the constitutions of the countries of the World, the learned author says this: [*The Attorney-General quoted from Vol. 3 (2nd ed.), pages 505-506.*]

The various Acts of Parliament quoted by Peaslee are generally accepted as providing a standard to which Parliament should adhere and any departure from

them might properly be described as "unconstitutional." Because Parliament is sovereign, any departure from them cannot be described as "illegal." The remedy therefore for "unconstitutional" conduct must be sought in Parliament and at elections and not through the courts. Constitutionality is enforced through Parliamentary pressure and not by prerogative writ.

May I give to your lordships one practical example, which incidentally deals with a number of other points raised, by my learned friend. There is a subordinate Parliament within the United Kingdom, the Parliament of Northern Ireland; section 75 of the Government of Ireland Act. 1920 (10 & 11 Geo.5, C.67), which set up this Parliament reads as follows:

> "*Saving for supreme authority of the Parliament of the United Kingdom* — Notwithstanding the establishment of the Parliament of ....Northern Ireland ..... or anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof."

I mention this fact because of course Northern Ireland is part of the United Kingdom and the United Kingdom Parliament is, under the Government of Ireland Act, 1920, ultimately responsible for the conduct of the Northern Ireland Parliament, whose legislation they can, if they so desire, repeal under the provisions of section 75, which I have quoted.

My learned friend expressly stated that in the United Kingdom preventive detention is unknown except in war time, it is therefore interesting to note that it exists as a permanent part of the law of Northern Ireland and is established by the Civil Authorities (Special Powers) Act (Northern Ireland), 1922 (c. 5), which will be found in Halsbury's *Statutes*, Vol. 17 (2nd ed.), at page 167. As in war-time Britain, this Act gives the Home Secretary of Northern Ireland power to make regulations to detain without trial and such regulations have been made and used for a variety of purposes.

If your lordships are interested in these purposes, one would find a discussion of them in the chapter on the Freedom of the Individual in Volume 1 of the *British Commonwealth* series which deals with the United Kingdom. The chapter in question is by Professor Sheridan, now Professor of Law in the University of Malaya. Commenting on the regulations which have been made from time to time under the Order, he says, in passing:

> "Regulation 15 (arrest without warrant and detention without trial for

> not more than 7 days) was put into operation in order to smooth the path of the Royal visit of that year (1950)."

The Special Powers Act itself contains in section 2(4) the following interesting and perhaps unique provision:

> "If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations."

This particular provision of the Northern Ireland Act has been on occasions criticised in the Parliament of the United Kingdom on the broad ground that it was unconstitutional in the sense that it enabled the courts to sentence persons for offences which were not defined in any law or regulation but which merely appeared to the court "ought to be offences." In such criticisms, however, it has never been suggested as far as I know that the Special Powers Act should be set aside on the ground that it was "illegal."

If one compares the United Kingdom Constitution with that of the United States there would be a legal argument in the United States upon which the court could be approached. The Constitution of the United States for example provides that no *ex post facto* law should be passed and the section which I have quoted is an excellent example of the *ex post facto* establishment of an offence.

It is no part of my duty as Attorney-General, and indeed it would be improper for me to do so, to speculate whether the course of history has shown that the legal recourse to the courts as provided in the United States Constitution is more effective than the political pressure which can be applied against a provision in the United Kingdom which is unconstitutional without it being technically illegal in the strict meaning of that term.

The Northern Ireland Special Powers Act is, however interesting as an example of a permanent Act providing for, among other things, the making of regulations which could include indefinite imprisonment without trial which is in force in the United Kingdom itself.

It would of course be quite improper for me to express, as Attorney-General of Ghana, any view as to the necessity or otherwise for such a law. This is a matter in the first place for the Parliament of Northern Ireland and ultimately for the Parliament of the United Kingdom. Since, however, I have raised the matter, it is only right that I should quote Professor Sheridan's final conclusions:

> "The powers reserved to the Government under the Special Powers Act and the Public Order Act are very wide (and perhaps undesirably wide) but there is no justification in the practice under the Acts for the stigma "Police State" which in some quarters it is sought to attach to Northern Ireland ... The state of the law affords much scope for criticism and reform, but daily life is as free —or otherwise — in Northern Ireland as in most places."

I have spent a little time over this example as it shows that even in the most developed countries laws authorising preventive detention are part of the permanent framework of government and may be applied in times of profound peace — as for example on the occasion of a Royal visit.

I now return to the main point to which I was directing my argument at this stage, namely, that parallels may he found in history for declarations which are extremely valuable because they have a moral and political effect though they cannot be legally enforced through the courts. Let me give one other example, again bearing, in mind the warning which I gave against the danger of trying to find exact parallels for the Constitution of Ghana, which is in itself not based on any previous Constitution.

In the seventeenth century the Crown in the United Kingdom had not became the symbol of constitutional government and the King or Queen exercised a degree of personal authority which is perhaps to some degree comparable with that exercised by the President of the United States the President of Ghana under the present Constitution. For that reason it is interesting to look at the United Kingdom statute which sets out the Coronation Oath, 1688. This was passed immediately after what is ceremony known as "the glorious and bloodless revolution," which involved the dethronement of King James II and the elevation to the English throne of King William III and Queen Mary.

[*The Attorney-General here read 1 Will. & Mar, c. 6,*]

The object of this statute was clearly not to enable the courts to hold back an Act of Parliament which violated it as illegal but to provide a moral and political yardstick by which the conduct of the Crown could be judged. The sanction if the oath was violated was the extra-legal one that the monarch might lose his throne as a result.

One other general parallel can be perhaps found in the requirement of many countries that persons in positions of authority must take an oath of allegiance. This is provided for in the laws of Ghana and in the laws of many other countries. There is nowhere, however, a case where anyone is prosecuted for the crime of having broken his oath of allegiance. Allegiance is owed by law as a result of

citizenship and therefore the offence is committed irrespective of whether an oath of allegiance has or has not been taken, if any act in the nature of treason is done.

The universal insistence on oaths of allegiance is merely an example of the value which is placed in the constitutional provisions of many countries upon moral sanctions.

Interpretation of the Ghana Constitution

It is of course, and with respect I emphasize this, for this court to state what is the meaning and purport of the Constitution of Ghana. It is for the court to tell the commentators and textbook writers what the Constitution means and it is emphatically not for commentators to tell the Supreme Court what it should mean. It is clearly not the duty of the Supreme Court to follow the views of commentators, particularly in cases where the court itself considers that there is no ambiguity in the wording of the Constitution or other law which the court is called upon to interpret.

Nevertheless, in support of the argument which I have been putting before your lordships I may be perhaps entitled to call in aid the only comments on Article 13(1) of which I am aware. In the article in the *International and Comparative Law Quarterly* to which I have already called attention, there occurs this passage under the heading "The Republic Ghana":

[*The Attorney-General here quoted from pages 227-228 of the article by Professor S. A. de Smith.*]

Is the Preventive Detention Act contrary to the President's Declaration?

In his notice to the court asking for certain matters to be determined under the provisions of the Constitution, counsel for the appellants thus formulated his grounds:

[*The Attorney-General here quoted points 1, 2 and 3 of the Notice.*]

Your lordships will see that the complaints fall under the following heads:

First, that the Preventive Detention Act is not in accordance with the will of the people. The short answer to this proposition is that the only way in which the will of the people can be determined under the Constitution is by consulting their representatives elected to Parliament. These representatives not only passed the Preventive Detention Act in the first place but also continued it under the provisions of the Constitution (Consequential Provisions) Act when they were sitting as a Constituent Assembly.

The second point made by counsel for the appellant is that the Preventive Detention Act is contrary to the statement in the declaration that freedom and justice should be honoured and maintained. The short answer to this contention

is that the maintenance of freedom and justice, and indeed of the Constitution itself, may require the taking of the most drastic steps against persons who are determined to overthrow it by force.

It would be entirely unrealistic, in my submission, for the Supreme Court to ignore the fact that in three former British colonial territories, Burma, Pakistan and Ceylon, the Prime Ministers have been murdered for political motives and with the intent of subverting the constitution. Fortunately in India the Prime Minister has escaped assassination but this fate befell the founder of the Indian Republic, Mahatma Ghandi. It cannot therefore, be said that the danger of political assassination does not threaten in any newly established state the constitution and those who have been appointed by the people to exercise power under that constitution.

It is not too much to say that in certain circumstances freedom and justice can only be maintained by such means as a Preventive Detention Act. In my submission, it is completely illogical to say that preventive detention is justified in times of war and not justified at other times. Would preventive detention have been justified in the United Kingdom because Great Britain was engaged in the Ashanti wars? On the other hand, exactly the same dangers to stability, which arise in developed countries only in times of war, are likely to arise in the transition from dependence to independence. The history of the United States and of the Republic of India both show that in the early days of independence exceptional measures akin to preventive detention have been necessary.

Thirdly, it is said that the Preventive Detention Act offends against the paragraph in the declaration which says that no person shall suffer discrimination on grounds of sex, race, tribe, religion or political belief. The allegation is that the object of the Preventive Detention Act is to detain persons on the grounds of their political prominence in the opposition party. My learned friend spent quite some time in dealing with the case of Amponsah and Apaloo and indeed, quoted from the affidavits which had been filed in the habeas corpus applications on their behalf. Does my learned friend really contend that in this case, for example, these two individuals were detained because they were leading members of the opposition party? My learned friend is of course entitled to argue that the majority finding, of the Commission of Enquiry which examined their activities was mistaken and that even the unanimous finding of the Commission to the effect that they were engaged in illegal acts, revolutionary in character, did not correspond with the true facts. What he is not entitled to do is to say that in face of the findings of the Commission, the government acted in bad faith and imprisoned those persons on account of their political beliefs. This was however the argument which he saw fit to address to your lordships and was the only ostensible reason for quoting from the affidavits as he did.

Finally, it is alleged that the Preventive Detention Act is contrary to the paragraph in the declaration which provides that "subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law."

The phrase "access to courts of law" has clearly been completely misunderstood. It cannot be said that when a man is arrested and then brought in custody before a magistrate or a judge he is exercising a right of access to the courts. Here is no question of a right, he is brought before the courts whether he wishes to come or not and in no case where an individual has been arrested and brought before the court, or attends before it on a summons can I think of any single example where, if the individual had any choice in the matter, he would emphatically forego his alleged right of access.

The expression "right of access to the courts" must, in my submission, mean the type of access which the petitioners are enjoying at this moment. This right consists of, at their own volition, invoking the aid of the court to examine their case. In passing, I might remark that it is due to a change from the old Courts Ordinance, introduced in one of the constitutional Acts, the Courts Act, 1960 (C.A.9), that the petitioners have now access to this court by way of appeal from the decision of Sarkodee-Adoo J.

The other freedoms mentioned in the declaration are obviously concerned with such questions as political and social gatherings, public meetings, public meetings and the like: free speech and the free exercise of religion. They do not guarantee that no one will be imprisoned or detained in accordance with the provisions of the law: indeed, the opening words of the paragraph of the declaration make this abundantly clear — "subject to such restrictions as may be necessary for preserving public order."

The scope of judicial review under the Constitution

I now come to the finial point with which I wish to deal in that part of my address which is in writing. It is a point upon which I have already touched and in view of the emphasis placed by my learned friend on United States case law and interpretation, a point of the very greatest importance.

In my respectful submission, it is desirable for the court to consider and they may think it of value to rule upon the scope of judicial review permissible under the Constitution. This is a large and complicated subject and on the other hand it may well be that the court will feel it better to reserve any final pronouncement upon this matter until such time as it comes to be argued in some other case. It is, however, an issue of the very greatest importance and I am sure that the court will therefore forgive me if I take a little time in dealing with it.

The first and most obvious difference between the Constitution of Ghana and the Constitution of the United States is that fundamental rights were written into the Constitution of the United States in a form which clearly demanded that they should be enforced by the courts.

[*The Attorney-General here quoted from Article 1 of the Constitution and from the Bill of Rights – the first ten Articles of Amendment to the Constitution.*]

The form of the words used, the use of the imperative "shall" together with the whole construction of the United States' Constitution shows that these fundamental rights were intended as an express limitation on the power of Congress to legislate and that this restriction on Congress was to be enforced. The Constitution, which reserves certain powers to the States and Certain powers to the Federal Government, required the existence of a legal umpire which would decide when one or the other had over-stepped the bounds of their respective authorities.

However, there is a far deeper and more important difference between the Constitution of Ghana and the Constitution of the United States, which much more vitally, in my submission, affects the scope of judicial review. As I have attempted to show earlier in my argument, one of the most fundamental provisions of the Constitution of Ghana is that which entrusts to Parliament a sovereignty only limited by the restriction that Parliament may not alter without first consulting the people the entrenched Articles of the Constitution.

The underlying philosophy of the American Constitution, which springs from the historical circumstances in which the Union was created, rejects completely the conception of any legislative body having an unlimited sovereignty. On the contrary, the legal philosophy which has dominated constitutional thinking in the United States is that there exists a higher law which restricts and controls the acts of any Legislative Assembly, irrespective of whether it be a State Legislature or the Congress of the United States itself.

In order to explain exactly how this conception arose, it is necessary to look at the circumstances surrounding the establishment of the Constitution of the United States. These circumstances have affected profoundly the scope of judicial review permissible under the United States Constitution and make that Constitution, as in the passage I previously quoted from Professor Wright, quite unique among constitutions.

In the period before the War of Independence, it was necessary for the American colonists, in order to defend their rights against what they considered to be the illegal encroachment of the British Parliament, to propound a doctrine of a higher law which was superior even to an act of Parliament. This doctrine was put forward on numerous occasions but the best known of such arguments was before the Chief Justice of Massachusetts, put forward in what is known as

"the case of the writs of assistance."

[*The Attorney-General here quoted from Hickett's Constitution History of the United States, Vol.1, page 74.*]

This constitutional doctrine, which became a part of the theory justifying the War of Independence, was reinforced from quite another quarter after the establishment of the Independence of the United States and at the period when the Constitution was in the process of adoption. At the time of the making of the Constitution, the framers were divided between those who were genuinely frightened of the effects of too much democracy and wished therefore for a strong government, not subject to too much popular control, and those who wished for a preservation of State rights against the Federal Government and to a considerable extent popular control over the State and Central Government. The leader of the Conservative wing was Alexander Hamilton and in the paper *The Federalist* he propagated his ideas as to the nature of the Constitution. These ideas ultimately had a profound effect on the Constitution of the United States, and in particular upon the theory of judicial review.

Originally, Hamilton was not concerned with the question of judicial review and it was not until after he had lost his battle for an executive elected for life, and given an unqualified veto over all acts of the National Congress, that he turned to the idea of judicial review as an almost equally effective substitute against the excesses of popular majorities.

[*The Attorney-General here quoted from pp. 24-25 of Wright's, The Growth of American Constitutional Law.*] It was not until fifteen years after the establishment of the Constitution that the theory of judicial review was formulated by the Supreme Court of the United States. It was formulated in the historic case of Marbury v. Madison, 1 Cranch 137 (1803).

[*The Attorney-General here gave shortly the facts of the case.*]

The real significance of the opinion has been thus described by Professor Wright at pp. 37–38:

> "In the long-run view the significant part of the opinion is not in the partisan censure of the administration, nor yet in the finding that an unimportant section of a Congressional act was invalid. It is in the assertion of a theory of judicial review which follows the doctrine of Hamilton, not the Hamilton of the Convention. But the Hamilton of the later numbers of the Federalist. It is a theory of the Judges as the only true guardians of the Permanent will of the people which is incorporated in the Constitution. The assumption throughout is that the Congress and President cannot be entrusted to interpret that will. It is assumed that if the Court believes that

an act is not in harmony with the Constitution then it is certainly inconsistent with the document.

It is an enlightening commentary upon this theory that in this first case in which a Congressional statue was written by men who helped to write the Constitution while the decision was that of a man who had not taken part in that historic process. Yet Marshall, rather than Ellsworth, or Madison, or Washington, or any other former member of the Convention who was in the Congress of 1789 knew the true meaning of Article III, section 2. What we actually have in this most famous of Constitutional decisions is not protection of the original Constitution but a judicial revision of its meaning. And, too, we have the formal assertion that in the Court is vested the power of determining the meaning of the Constitution."

These two theories, that of a higher law and that of the right of the court to interpret the Constitution in a way in which it seems best suited to the court to meet the social need of the times irrespective of the plan words of the Constitution, constitutes in my submission the unique feature of judicial review as practised in the United States and which distinguish United States judicial review from all other types of judicial review.

In order to explain this difference a little further, perhaps I may say one or two words about the phrase "due process of law" which occurs in the fifth and fourteenth amendments to United States Constitution. This phrase is of great historic antiquity, appearing first in an act of the reign of King Edward III. This act was recited in the Petition of Right and it is quite clear from context that Parliament in England considered it to refer to such illegal practices as the collection of ship money without the authority of an Act of Parliament.

[*The Attorney-General here read sections 2, 3, 4 and 5 of the Petition of Right.*]

No doubt as a result of the influence of the Petition of Right, the phrase found its way into the United States' Constitution. The development of the Marshall doctrine, however, enables the Supreme Court to give to this phrase an entirely different view than that which was obviously intended by the framers of the Constitution and of the amendments. The doctrine of due process of law became in fact a doctrine devoted to the preservation of the rights of contract.

One example may be given from the famous *Dred Scott* case, which established the legality of slavery even in areas where slavery was thought to have been prohibited by law, *Dred Scott* v. *Sandford*, 19 Howard 393 (1857). In the course of his judgment, Chief Justice Taney said that any citizen of any State is entitled to go into the territories and there to enjoy all the rights guaranteed in the first nine amendments to the Constitution. They are entitled to take their property

there, including their right of property in slaves protected by the law. An act of Congress depriving a citizen of his liberty or property in any territory of the United States and here I quote the actual words of the Chief Justice's judgment, "could hardly be dignified with the name of due process of law."

Professor Wright points out that though the Constitution and the Bill of Rights Amendment were all intended to protect individual liberty, in the 62 cases where statutes were declared unconstitutional between 1789 and 1865 only one was a case in which a civil right was protected against legislative action. The case in question was one where the court declared unconstitutional a law which prohibited a trial by jury. As against this there were no less than 26 cases which protected the individual against the impairment of contract.

This tendency continued with increasing emphasis during the years which followed 1865. The highlight is perhaps the case of *Lockner* v. *New York* which the Supreme Court decided in 1905. A law of the State of New York had prohibited the employment of persons in certain fields of activity for more than 60 hours a week. This was held to be unconstitutional by the Supreme Court on the basis of the due process of law clause in the fourteenth Amendment. Mr. Justice Peckham delivering the majority judgment said, "the right to purchase or to sell labour is part of the liberty protected by this amendment, unless there are circumstances which exclude the right" (198 U.S. 45 (1905)).

I make these comments not of course in any way in criticism of the policy pursued by the Supreme Court of the United States and it would be wrong if I were to give a false impression by not referring generally to the very many cases in recent years where the Supreme Court has upheld civil rights on the basis of the provisions, that at the present moment the Supreme Court of the United States is not a great bulwark of liberty.

The point of my argument is very different, it is to show that the extent of judicial review exercised by the Supreme Court of the United States is different in kind from the type of review exercised elsewhere and expresses the courts' view of what should ultimately be the higher law rather than a strict interpretation of the Constitution.

In my respectful submission, the Constitution of Ghana, which is based on the sovereignty of Parliament, does not permit this type of judicial review and therefore in interpreting the Constitution, United States' cases are of no guide whatsoever because they stem from entirely different principles of interpretation.

The fifteen grounds of appeal

Having dealt so far with arguments which I have reduced to writing, I propose now to deal, one by one, *seriatim*, with the fifteen points which constitute my learned friends's grounds of appeal. Important as some of these points are, subject

to your lordships direction. I think it unnecessary to reduce my argument in this case into writing.

General observations on Dr. Danquah's concluding submissions

When I reduced into writing my submissions in regard to the arguments of my learned friend, I had not had the opportunity of listening to his final remarks. Fortunately, as in the case of *Marbury* v. *Madison*, I had anticipated some of the matters to which he would refer, and others of them do not seem to me to fall within the subject of the constitutionality or otherwise of the Preventive Detention Act.

However, it is perhaps convenient to say something at this stage about my learned friend's Irish case — *The State (Burke)* v. *Lennon and the Attorney General*. This authority I hope I may refer to without impropriety as my learned friend's "Ark of the Convenant." In normal times it is kept concealed and hidden away only to be seen by the initiated. In times of crisis, however, the Ark of the Covenant is suddenly rushed into battle and all are given a brief glimpse of it. I am informed by my learned friend, Mr. Amissah, that the Ark has already appeared in two previous habeas corpus applications, though in one it was not brought into battle until my learned friend Dr. Danquah's reply. In this present case, however, it is not referred to in the judge's note of the argument so apparently my learned friend felt that it was of no authority on the "is satisfied" point.

The Irish case is a mysterious one in that I have been unable to find any reference to it or any copy of it but I think that it was decided in either 1939 or 1940. It is therefore significant to note it is not in the fifteen cases cited in *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284, H.L. To the best of my knowledge, it was never cited in any of the subsequent cases in which the nature of statutory powers to be exercised whenever an authority "is satisfied was considered.

It is of course a decision of a judge of first instance, and, while under the Constitution the Supreme Court is entitled to give as much weight to an Irish case of first instance as it gives to one decided in the United Kingdom by the court of last resort, nevertheless, the fact that this authority was apparently never considered or raised by counsel in subsequent cases dealing with the same matter in the United Kingdom makes it difficult to assess its full value.

The meaning given to the words "is satisfied" by Gavin Duffy J. in the Irish case is completely at variance with the opinion both of Lord Atkin and of the majority in the House of Lords in *Liversidge's* case and in *Greene's* case. It is of course a matter for your lordships to decide whether Gavin Duffy J. was right and the Lord Chancellor and the four other Lords of Appeal in Ordinary were wrong in both *Liversidge's* and *Greene's* cases. Since, under the Constitution,

your lordships are not bound to follow any particular decision, this is of course a matter for the court. I would only put this consideration before your lordships. Gavin Duffy J. might well have come to a different conclusion as to the meaning of the words "is satisfied" if he had decided this case after, and not before, the cases of *Liversidge* and Greene. In my respectful submission, the meaning of the words "is satisfied" has been established by a long line of cases, to which I shall make reference when dealing with the specific points of appeal by my learned friend. It is my respectful submission therefore that either the case of the *State* v. *Lennon* can be distinguished on the ground that it was decided on the basis of an Irish Act, which my learned friend has not brought before the court, or alternatively quite simply that in so far as Gavin Duffy J.'s judgment depended upon the interpretation which he placed on the meaning of the words "is satisfied" that judgment was wrong.

In fact, however, the examination of the case, in my submission, shows that it is in the main based upon an interpretation of the Irish Constitution. This Constitution in no way corresponds to that of Ghana. The fact that the only copy of this judgment in Ghana is in the possession of my learned friend makes it difficult for me to deal with it as thoroughly as I would have wished. However, as may be seen from the headnote, the court took into consideration a great number of Articles of the Irish Constitution and your lordships may think that the real basis of the decision turned on the provisions of Irish law, which are in no way applicable to Ghana.

The case was decided mainly under Article 40 of the Irish Constitution, which is concerned with personal rights. It is clear from the structure of the Constitution that this Article is cognisable by the courts when considering the validity of legislation. This appears from a comparison of Article 45 of the Constitution. Article 45 lays down directive principles on so-called policy. The opening words of the Article provide that the application of these directive principles in the making of laws shall be the care of the Irish Parliament exclusively and is expressly withdrawn from consideration by the courts. The absence of such a provision from Article 40, coupled with the wording of Article 34, which lays down the power of the courts makes it quite clear, in my submission, that the provisions of Article 40 were intended to limit the sovereignty of the Irish Parliament. Since this is clear from the Constitution, it must render the case relied upon by my friend quite inapplicable in construing the Constitution of Ghana.

Perhaps I may be permitted to make one final observation. If my learned friend had wished your lordships to study this case during the hearing of the appeal, he should surely have taken steps to have had copies made. In my office, for example, there are photostatic facilities and I would have been very pleased indeed, had I been so invited, to produce a photostatic reproduction of the case

for each of your lordships and for my own use. In my submission, it is highly undesirable that points of law should be raised on the basis of an authority which is the personal property of one member of the Bar and is not to be found in any law library in Ghana. A member of the Bar who wishes to make use of such a case has, in my submission, a duty to see that copies of it are available to the court.

Final observations

My lords, the basic contentions in this matter are extremely simple. Article 20 of the Constitution of Ghana confers on the Parliament of Ghana unlimited legislative authority, except only in regard to amendments to the Constitution. The Supreme Court is therefore only called upon to declare void an Act of Parliament which alters or repeals one of the entrenched clauses or which purports to alter or repeal one of the non-entrenched clauses other than by an Act exclusively devoted to this purpose. The power of the Parliament of Ghana is therefore entirely and completely different from, for example, the power of the Congress of the United States. From the passage in this Constitution, which I have already quoted, the difference is clearly apparent. The very first words of the United States Constitution are as follows:

> "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

This extremely limited grant of authority should be contrasted with the almost absolute powers granted to the Parliament of Ghana under Article 20.

My learned friend, in his argument of yesterday, referred to Australia but the same arguments which apply to the United States of America apply in a large measure to Australia, where under Article 51 of the Australian Constitution there are listed 39 specific subjects in regard to which the Commonwealth Parliament may legislate. It should be noted that these powers are merely concurrent ones and the exclusive legislative powers of the Parliament of Austrialia, as set out in Article 52, are extremely narrow.

As I pointed out earlier in my argument, the functions of a Supreme Court under a federal constitution are, in essence, essentially different from a court of last resort under a unitary constitution. In this regard, it should be noticed that under Article 4, section 1 of our Constitution, Ghana is expressly declared to be a unitary Republic. This provision has legal significance in that it is clear that judicial power does not necessarily extend, as it must do of necessity under a federal constitution, to defining the spheres within which legislative authority may

be exercised. Once given a federal constitution the power of any Parliament established under that constitution must be limited in some respects. The essence of federalism is that there are two or more legislative authorities exercising their functions within their respective fields. In such a case, neither of them can have, by definition, unlimited legislative authority.

In my respectful submission, the court, is therefore not assisted to any great extent by the citation of any case which deals with the powers of any particular Parliament under a federal regime.

In view of what my learned friend said yesterday, and the points raised by your lordships during my address, I may perhaps, before I come to the summary with which I wish to conclude this part of my argument, reiterate two points which I consider are of some importance. Your lordships asked me yesterday what I considered to be the legal effect of the declaration. Under Article 8, section 1, of the Constitution the President is made specifically "responsible to the people." Under Article 13, section 1, he is called upon to undertake this responsibility to the people by making solemn declaration, in the words of the Constitution, "before the people."

The declaration is therefore, in my submission, explanatory of the duties and obligations to the people which the President owes them under Article 8. It is in no sense a limitation on the powers of Parliament which consists not only of the President, but also of the National Assembly itself composed of representatives of the people. In my submission, the authority of Parliament to legislate is clearly and unambiguously expressed in Article 20.

In so far, therefore, as the courts may feel themselves under a duty to interpret the law in accordance with the will of the people, they can only do this by a strict adherence to the wording of the laws passed by Parliament which are themselves an expression of the people's will. Nevertheless, the President's declaration is of value to the courts in indicating the principles upon which Parliament is likely to act, in that it may be presumed that the President would hesitate to assent to an Act which was in his view contrary to the declaration. The declaration therefore, may be of assistance to the courts in cases of genuine ambiguity as to the meaning of any particular piece of legislation. Where, for example, a law is so worded as to be equally open to two possible interpretations, the court would be entitled to presume that the correct interpretation was that which was the more in accord with the principles enunciated in the declaration. This, however, is an entirely different proposition from saying that the courts can disregard the clear meaning of words in an Act of Parliament so as to substitute for them some other meaning which the court thinks might be more in accord with the declaration. Further, the declaration is primarily for the President to interpret and the courts, in my submission, cannot go behind his exercise of discretion. If by assenting to an Act

the President has to decide whether or not that Act is within the terms of the declaration he has made, this is a decision for him to make, and his discretion in making it cannot be questioned by the courts.

In short, the declaration has some legal effect in assisting the court to determine the meaning of legislation in cases of real and genuine ambiguity. It is not, however, a Bill of Rights in the United States sense by which the legal validity of Acts of Parliament may be judged. Its main purpose is moral and political, not legal.

Summary

I would respectfully sum up the main points of my argument on the Constitution with the following propositions:

1. The Preventive Detention Act, 1958, cannot have been invalidated by the Constitution unless the Republican Parliament has no power to pass a similar Act.
2. The Republican Parliament has power to pass a similar Act by virtue of Article 20 of the Constitution, which places no limitation whatsoever on the legislative powers of Parliament except in relation to the amendment to the constitution. The passing of a Preventive Detention Act would not amend any provisions of the Constitution.
3. The power of Parliament is not limited by Article 13(1) of the Constitution. There are no words in Article 13(1) relating to the powers of Parliament. To construe it as limiting legislative power requires therefore the insertion of words which are not there. Even if (which I deny) such words could be implied from the terms of Article 13(1) taken in isolation. they would conflict with the express wording of Article 20. It is an incontrovertible rule of construction that words cannot be held to be implied in one part of a document if they are inconsistent with express words elsewhere in the document.

My lords, it is my respectful submission that the above propositions are more than sufficient to determine the question against my learned friend's contention. That being so, I do not feel it necessary, at this stage, to repeat the numerous other arguments which I have already put to your lordships on the other constitutional points at issue in this case. I turn accordingly to the fifteen grounds of appeal which my learned friend has addressed the court upon in the opening stages of his argument.

I shall deal with them *seriatim* in the order which he followed.

[*The Attorney-General then proceeded to address the court on the 15 grounds of appeal, beginning with ground 14.*]

SUBMISSIONS BY DR. J .B. DANQUAH ON BEHALF OF THE APPELLANTS IN REPLY TO SUBMISSIONS OF THE ATTORNEY-GENERAL

19 - 20 June 1961

May it please your lordships:

I shall reply to the Attorney-General's submissions under three main headings:

I. The scope of judicial review under the Ghana Constitution, 1960;

II. The meaning and effect of Article 13(1); and

III. Is the Preventive Detention Act, 1958 (Act No.17 of 1958), constitutional?

I. *THE SCOPE OF JUDICIAL REVIEW UNDER THE GHANA CONSTITUTION*

The crucial constitutional issue in this case is whether Parliament or its predecessor legislature has acted in excess of its powers under the Republican Constitution of Ghana, 1960, in the enactment of or the continuation of the Preventive Detention Act, 1958. This issue necessarily raises the preliminary question of the power of the Supreme Court of Ghana to interpret the Constitution and to decide whether, in the instant case, the legislature has exceeded its constitutional powers. Thus, your lordships are called upon at the outset to examine the nature and scope of judicial review under the Ghana Constitution. The Attorney-General has urged the following propositions:

1. That judicial review, or the power of the judiciary to determine the constitutionality of legislation, is unique to the United States, or that judicial review as practised in the United States is essentially different from other types of judicial review;
2. That the functions of a Supreme Court under a federal constitution are essentially different from those of a court of last resort in a unitary government;
3. That the Constitution of Ghana is based upon the supremacy of Parliament and does not permit the type of judicial review as practised in the United States.

All of these propositions are erroneous.

Origins of judicial review

It is true that the doctrine of judicial review was first formulated by a national Supreme Court in the United States in the case of *Marbury* v. *Madison,* 1 Cranch 137 (1803) but the origins of the doctrine extend back to Greek and Roman

philosophy. Plato's *Republic* supported the view that there are fundamental principles superior to man-made rules. Aristotle's *Politics* stressed the importance of the Rule of Law. He said, "The law is reason unaffected by desire," and that "surely the ruler cannot dispense with the general principle which exists in law, [for] the rule of law is preferable to that of any individual." See *Politics*, Book III, quoted in Wright, *The Growth of American Constitutional Law* (1942), p.10.

The Roman jurists incorporated Greek philosophy into the great body of law which governed the world long after the fall of the Roman Empire. One of the concepts which persisted in European legal thought was the law of nature. Professor Benjamin F. Wright, upon whom the Attorney-General has relied as an authority, describes this concept as follows:

> "The law of nature was made by no man or group of men. It is behind and superior to human rules. Man cannot alter, but he should conform to the principles which are of eternal validity. The quality of justice inheres in the laws of men only as those laws reflect the laws of nature. It follows that if the rules of men do express the natural law they are thereby endowed with a fundamental character, and they are, therefore, not lightly to be altered."
>
> See *The Growth of American Constitutional Law* (1942), p.10.

From the ancient doctrine of natural law evolved the conception of natural rights which developed in the 16th and 17th centuries and was to be a powerful weapon in the later revolutions. In England it was asserted against the doctrine of the divine right of sovereigns. Professor Wright at pp.10–11 points out that the doctrine of natural rights filtered into the American colonies and became the principal dogma of the American Revolution. "The rights of self-government, of taxation by their own representatives, and of judicial procedure for which the Americans first argued and later fought were set forth as rights guaranteed by the British constitution and the laws or nature."

A further factor in the development of the concept of fundamental law was the "common law tradition that is embodied in the great constitutional documents." Wright says that it was akin to the doctrine of natural law and held that certain fundamental rules of the law were beyond the power of Parliament to alter (p.12). This doctrine of the common law was advanced by Sir Edward Coke in *Bonham's Case* (1610) 8 Co. Rep. 107a; 77 E.R.638. Sir Edward Coke was the great 17th century authority on the English common law. In the *Institutes* he maintained that Magna Charta embodied certain fundamental principles of right and justice,

and that the common law was a further expression of these principles. Therefore, he argued, the Magna Charta and the common law were supreme law, having such force that they controlled both the kind and acts of Parliament. In other words, Coke's proposition was that the king and Parliament were legally limited by the common law.

As Chief Justice of the Court of King's Bench, Coke asserted this doctrine in *Bonham's Case*. Henry VIII had granted a monopoly of medical practice in London to the members of the College of Physicians and m n licensed by them. They were empowered to punish physicians who practiced without the required license. An Act of Parliament confirmed this grant. Bonham, holding a medical degree from Cambridge, came to London to practice but was refused a license. He was then imprisoned and fined by the London College of Physicians for violation of the statute. Bonham started an action for false arrest and imprisonment against the College.

On appeal, the case came before Coke who upheld Bonham, pronounced him innocent on the ground inter alia that the statute in question was void, declaring at 77 E.R. 652 that:

> "And it appears in our books, that in many cases, the common law will control Acts of Parlia·nent, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

Scholars have differed on whether Coke's statement in *Bonham's Case* was an early formulation of judicial review, but his theory was ultimately rejected in England where the tradition of the Supremacy of Parliament won. Professor Godwin Smith, in his *A Constitutional and Legal History of England* (1955) at page 309, made the observation:

> "In the end, the, supremacy of Parliament won. Therefore the idea of a fundamental law broke off short in England. In the American colonies that idea was taken up in the eighteenth century. It seems that the governmental structure of the United States, including the system of judicial review, would have been more intelligible to Sir Edward Coke than the idea of the sovereignty of Parliament."

Thus, a cause which was lost in England was won in America. Through reliance upon natural law and its fundamentality, and the practice of the American colonists of making written statements of their political beliefs, the colonists extended the

principle of the Magna Charta to a logical conclusion — the formulation of written constitutions. These constitutions were considered fundamental law as distinguished from legislative statutes, although none of the colonial constitutions contained any provision for judicial review. (Wright, op. cit. p.11)

Judicial review an outgrowth of written constitutions

I have briefly reviewed the *historical* background of judicial review in order to emphasize to your lordships that the roots of the doctrine reach down to the oldest philosophies of law. What gave the doctrine impetus in the American colonies was not the development of a federal structure of government, but was a natural concomitant of *written constitutions*. Before the United States Constitution was drafted, between 1778 and 1787, some seven cases developed in which the state courts declared state legislation invalid in spite of lack of precedent and lack of express provision for judicial review in the state constitutions. This formal recognition in the state courts was the logical outgrowth of the concept that a constitution which is written and which flows from the people is a limitation upon government. It expresses the supreme will of the people and is thus the embodiment of that will. If the constitution is supreme, the legislature cannot modify it or act against its provisions. Moreover, if the judiciary is an independent branch of government with the right to interpret the constitution, the judiciary has the right to refuse to recognize a legislative enactment which in its opinion violates the constitution. (See Kelly and Harbison, *The American Constitution— Its Origin and Development* (Rev.ed.) pp.98–100).

Far from originating in the United States Supreme Court, therefore, the doctrine of judicial review was practised in the state courts and state laws had been held unconstitutional in twenty instances by state courts between 1787 and 1803 when *Marbury* v. *Madison* was decided. One might say that the practice of judicial review passed from the state courts into the federal judiciary and thus was implicit in constitutional practice. A member State of the United States, for the purposes of its own constitution and where it does not transgress the limits set by the federal constitution, is analogous to a unitary state. It differs from a unitary state in international sovereignty. Within its own constitutional sphere, however, it exercises all the powers of a unitary state.

Judicial review is neither exclusively American nor exclusively an incident of federal systems

Much has been written about American constitutional practise and about the American doctrine of judicial review. This is due in part to the fact that the United States has the first modern written constitution and is thus the oldest country in terms of such constitutional development. But it is essential to recognize that the

concept of judicial review exists independently of the form of government which a state adopts. A Supreme Court of a federal state may perform more complicated functions of judicial review, but the principle is the same whether dealing with federal laws or state laws. A state law may be measured against a state constitution; or it may be measure against a federal constitution. A federal law is always measured against a federal constitution.

In other words, judicial review is a means of measuring ordinary enactments against the entrenched clauses of a written constitution to determine whether or not a particular enactment is in harmony with the entrenched clause of the constitution. The constitution is considered a higher and more fundamental law by reason of the fact that it is a solemn act of the people, sometimes a direct act of legislation by the people at a plebiscite, and by reason of the fact it may not be altered by ordinary enactment. It must be altered or repealed by the extraordinary procedure provided by the constitution. Certainly, when the people legislate directly, by plebiscite or referendum, their act is a higher act than that of their representatives in a legislative body. As Chief Justice Marshall pointed out in *Marbury* v. *Madison*, 1 Cranch 137 at p.176 (1803):

> "That the people have an original right to establish, for their future government, such principles, as in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
>
> This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."

To propose that this fundamental and universal principle of the exercise of their sovereignty by a free people is peculiarly American is to show a shocking misunderstanding of the nature of self-government. To deny that these universal principles have influenced other countries in the development of their constitutions is to deny what is self-evident. One only has to compare Article 1 of the Republican Constitution of Ghana with the opening words of the American Declaration of Independence to see a universal principle repeated in both documents. The Declaration state: "*That to secure these rights [Life Liberty and Happiness] Governments are instituted among Men, deriving their just powers from the consent of the governed.*"

Article 1 of the Ghana Constitution begins, "*The powers of the State derive from the people, by whom certain of those powers are now conferred on the institutions established by this Constitution...*"

What was the noble ideal of the people of the first colony, to break away from British and establish its independence, has now become part of the fundamental law of another former colony of Britain — the Republic of Ghana.

Similarities of constitutional language are not necessarily based upon the copying by one country from the institutions of another, but may well be the expression of the universal principles which are the common aspirations of all free peoples. I respectfully suggest that your lordships bear this in mind when examining the American precedents cited in my submissions.

Let us now examine the Attorney-General's proposition that the functions of a Supreme Court in a federal system are essentially different from those in a unitary state. At the threshold of this examination, it would not be amiss to point out that the issue here is the relation of the individual citizen to the state and not the relation between States of a federal union. This issue is common to all states whether they be federal or unitary.

For your lordships' convenience, I have prepared a chart based upon Peaslee's *Constitutions of Nations* (2nd edition 1956) showing the countries which have express constitutional provisions empowering the judicial department to determine the constitutionality of legislation. This study, with the exception of the Constitution of the Fifth French Republic which I have interpolated, includes only those countries with written constitutions as of 1955. Newer countries like China, Nigeria or Malaya are not included in the study. I have appended this chart to my submissions as Appendix 1.

Peaslee erroneously lists the People's Republic of Mongolia as having the relevant constitutional provision. Exclusive of this error, forty-five of some eighty-odd constitutions have been listed. Of the twenty-eight nations which have constitutions expressly providing for judicial review, eight are the constitutions of federal states and twenty are, in fact, the constitution of unitary states.

Your lordships will note that the United States of America cannot even be considered as a country containing an express provision for judicial review in its constitution. Of the seventeen remaining states which have initiated judicial review without express constitutional provision, or have provided special constitutional tribunals to pass judgment upon questions of constitutionality, or have provisions which may provide for some form of limited review, six are federal states and eleven are unitary states.

Of the twenty-eight states listed by Peaslee as having express constitutional provisions for judicial review, one (the Swiss) dates back to the 19th century; two date back to the second decade of the 20th century; two to the third decade;

three to the fourth; twelve to the fifth and eight to the sixth decade. Stated another way, *eight* were written before World War II; twenty were written after World War II.

These facts suggest that judicial review has become more popular with time. It might also be said that judicial review has been stimulated by the Second World War. It might further be said that its growth has also been stimulated by the creation of the United Nations in 1945. This increasing recognition of judicial review reflects a growing determination on the part of the peoples of modern nations to enshrine the rule of law in the bedrock of their constitutional processes. Moreover, the concentration of power in modern States makes it imperative to ensure that some organ of government will impartially maintain a balance between national security and the freedom of the individual. This balance is best maintained in a growing state by an independent judiciary which is not subject to the passions of political pleasure which tend to impinge upon the executive and legislative departments.

In the light of these considerations, it is grossly misleading to assert that judicial review is an institution peculiar to the United States, or indeed, to any region of the world. Moreover, it is as mistaken to assert that the concept of judicial review is essentially federal as it would be to assert that its nature is peculiarly American. As I have already suggested to your lordships, judicial review springs from written constitutions which define and limit the powers of government and place these limitations beyond the power of the legislature to change by ordinary enactment.

In almost every instance, the former colonies and non-self-governing territories of Britain, beginning with the United States, have had written constitutions which have contained their organic law. By virtue of their colonial status, the colonial parliaments were non-sovereign. As the various former colonies have become independent and promulgated their own constitutions, they have progressively placed limitations upon the powers of government which are not part of the organic law of England.

Supremacy of Parliament and supremacy of the Constitution

I respectfully suggest to your lordships that when a break is made from the English monarchical system and a former colony establishes a government of limited powers under a formal constitution, it has made a substantial departure from the English concept of Parliamentary supremacy. The English lawyer must free himself of his traditional way of looking at constitutional practice when he enters the area of written constitutions. The absence of any legal restraints upon the English parliament makes the phrase "Parliamentary Supremacy" an apt one in describing the English constitutional system. Even so, English legal scholars have challenged the concept of "Parliamentary Supremacy."

Sir Ivor Jennings has observed in *The Law and the Constitution* (3rd. ed.) at pp.138-139:

> "Yet if sovereignty is supreme power, Parliament is not sovereign. For there are many things, as Dicey and Laski both point out, which Parliament cannot do ... Parliament
>
> passes many laws which many people do not want. But it never passes any laws which any substantial section of the population violently dislikes."

And even in the citadel of the institution of Parliamentary supremacy, there comes an echo from Coke's theory of the common law which suggests that if Parliament should go too far, the courts will not be silent. Sir Ivor Jennings continues at p.

> "It is always difficult to prove a negative, and therefore it is virtually impossible to prove that there are no principles of the common law which Parliament cannot repeal. We have not had the extreme cases because Parliament has not been extreme. It has not, for instance sought to extinguish itself, or to prolong its own life indefinitely, or to appropriate all land without compensation, or to dissolve all trade unions, or to introduce slavery, or to forbid all public meetings except by Government party, or to censor all newspapers so as to prevent the case for the opposition to be heard. Probably it never will: but a lawyer ought to be able to say what the answer of the courts would be, and happily we cannot do so because there are no precedents. What can be said is that there is no precedent for declaring an Act of Parliament to be *ultra vires* because it offends against the powers of Parliament conferred by the common law. There are dicta on both sides; but the modern trend is toward admitting the supremacy of Parliament over the common law, perhaps because we have never had to face an incipient dictatorship, whether fascist or communist. In accepting this principle for the time being, however, we should be grateful for Coke's dictum that if the occasion arose, a judge would do what a judge should do."

Thus, the theory of Parliamentary supremacy is open to question even in England when it is contemplated that legislative supremacy will be exercised in such a fashion as to abrogate those ancient liberties embedded in the common law.

When we turn to the Ghana Constitution, we find the term "supremacy of Parliament" both misleading and inaccurate. No lesser personage than the

honourable Chief Justice of this court, Sir Arku Korsah, has declared in a lecture at the Ghana School of Law in November 1960 that:

> "You may ask the question: On which institutions established by the Constitution, are the powers of the people conferred by Article 1, and how are such institutions expected to exercise these powers. It is obvious that the institutions contemplated are the three main branches of government: namely the legislature, the executive and the judiciary. While it is nowhere specifically stated in the Constitution that there should be separation of powers, the intention so to provide may be gathered from the structural organization of the constitution, and the resulting interaction among the three branches of government.
>
> Each of these branches is essentially independent from the other two, though each is at the same time subject to some restraints, which may be exerted by each of the other two co-ordinate arms of government."

His lordship continued:

> "Unlike the United Kingdom where the judiciary evolved as subordinate to the Monarchs of the country who delegated some of their functions to the judiciary, the Supreme Court of Ghana has been created by the same written Constitution which also created the Executive and Legislature, all of which derive the powers from the People who in the last result are supreme authority in Ghana."

Moreover, the Attorney-General has conceded that "Under the Constitution the Supreme Court and Parliament have each different and separate functions to perform. One cannot therefore be said to be superior to the other; both are controlled in their powers and functions by the Constitution."

Later on the Attorney-General reverts to the argument that the Constitution of Ghana is based upon the sovereignty of Parliament and does not permit the type of judicial review that admits of a higher law. This contradictory approach illustrates the inevitable confusion which results from trying mechanically to adapt the English theory of Parliamentary sovereignty to a government of limited powers under a written constitution.

Perhaps it would be helpful here to compare the powers of Parliament under the English constitutional system and under the Ghana Constitution. Sir Ivor Jennings at pp.137–138 sums up the powers of Parliament under the British Constitution as follows:

> "Thus Parliament may remodel the British Constitution, prolong its own life, *legislate ex post facto*, legalise illegalities, provide for individual cases, interfere with contracts and authorise the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Empire, introduce communism or socialism or individualism or fascism, entirely without legal restriction."

The Ghana Parliament is subject to a number of limitations. It may not change the voting age set by Article 1. It cannot change the form of Government of Ghana except in accordance with the provisions of Article 2. It cannot reduce the executive power of the President. (Art. 8) It cannot reduce the judicial power of the courts. (Art. 4) It cannot take away any of the Fundamental Principles set forth in Article 13(1). It cannot affect the appointment of Ministers to the Cabinet or reduce the number of members of the Cabinet below the constitutional minimum. (Arts. 15. 16) Nor can it reduce the number of seats in the National Assembly below the constitutional minimum. (Art. 21) It must convene at least once a year. (Art. 22) It cannot remove judges except in the manner provided by the Constitution. (Art. 45) It cannot change its own composition. (Art. 20(1)) It cannot prolong its life beyond five years. (Art. 23(2)). All of these powers may be exercised by the Parliament of the United Kingdom. Whether or not that Parliament chooses to do so, or refrains from doing so through custom or fear of arousing public opposition, is beside the point. There is no constitutional restriction on the English Parliament.

Thus, to say that the Ghana Parliament is sovereign in the same sense as the English Parliament is to fail to understand the nature of entrenched constitutional limitations. The very nature of an entrenched constitution is inconsistent with the concept of "supremacy of Parliament." All that can possibly be meant by the term when referring to Parliament under the Ghana Constitution is that Parliament has *legislative supremacy*. For that matter, so does the United States Congress have legislative supremacy in matters delegated to it. The powers of the Ghana Parliament cannot be referred to as absolute.

Since the Ghana Constitution contains express limitations upon the powers of Parliament, these limitations would be meaningless unless some organ of government had the power and the duty of determining when these limitations have been disregarded. This power and duty are rightly conferred upon the Supreme Court, whether it is described as interpretation of the Constitution, or determination of *ultra vires* Acts of Parliament, or judicial review.

As your lordship, the Chief Justice has said, "The power of judicial review is not new under the Constitution of the Republic of Ghana." It was provided for in the Ghana (Constitution) Order-in-Council, 1957 (Art. 31(5)). In fact that indential

provision was re-enacted as part of the Republican Constitution of 1960 in Article 42(2).

Nor is judicial review alien to the Commonwealth Countries. I respectfully refer your lordships to the study made by Edward McWhinney, Associate Professor of Law, University of Toronto, entitled *Judicial Review in the English-Speaking World* (Univ. of Toronto Press, 1956) which treats of the modern phenomenon of written constitutions and the courts' work of interpreting them. Professor McWhinney's study "brings together material for comparison from the United States as well as all the Commonwealth courts. He thus affords the reader an opportunity of re-examining his own beliefs concerning the proper function of courts in constitutional issues by providing comparisons and analogies without which sound evaluation is impossible." (See Foreword, p.x).

The courts of India and South Africa have exercised judicial review similar to that practiced in American constitutional law. In the famous case of *Harris* v *Minister of the Interior* (1952) (2) A.D. 428, the South Africa Appellate Division, Supreme Court, struck down the Separate Representation of Voters Act, 1951 (Act 46 of 1951) designed to place Cape Coloured voters on a separate roll from European voters. In his judgment, Chief Justice Cantlivers declared at pp.463–464:

> "Mr. Beyers [for the respondent] then contended that no country which, like the Union, emerged from a Colony into a Dominion within the framework of the British Constitution can be a sovereign state unless it has a sovereign Parliament functioning bicamerally in the same manner as the British Parliament and that if this is not so in the case of the Union, it cannot be a sovereign state unless it breaks completely with its past and abolishes the monarchy. I cannot agree with this contention. It seems to me to be based on the fallacy that a Dominion Parliament must necessarily be a replica of the British Parliament despite the fact that all Dominion Parliaments have constitutions which define the manner in which they must function as legislative bodies
>
> A State can be unquestionably sovereign although it has no legislature which is completely sovereign."

Commenting on this judgment, Professor Hood Phillips, author of a textbook on the constitutional law of the United Kingdom and Commonwealth countries, remarked that this case throws light on the meaning of legislative supremacy.

Since judicial review is a necessary function where written constitutions have entrenched certain limitations upon the powers of the legislature, it is both natural and beneficial for courts exercising this power to examine the cases of the United

States Supreme Court. These cases are merely of persuasive authority, but they represent the growth of judicial statesmanship in the process of interpreting written constitutions and may be of especial interest to countries with a Republican form of government.

To the extent that the Ghana Constitution has assigned the various organs of government their powers, has placed limitations on these powers and has assigned to the Supreme Court the function of determining when these limitations have been passed, to such an extent the Ghana Constitution bears more resemblance to other Commonwealth constitutions than it does to the English Constitution. The similarity inheres in the nature of written constitutions which expressly restrict the manner in which they can be altered. In the case of the United States Constitution, all of the provisions are entrenched whereas in the Ghana Constitution some of the provisions are entrenched.

The adoption of a constitution with entrenched clauses beyond the power of Parliament to alter by ordinary enactment or even by a stated majority – except pursuant to a popular referendum – marks the dramatic departure of the Ghana Republican Constitution of 1960 from the Constitution of 1957. In the 1957 Constitution provision was also made for judicial review, but Parliament had the power to circumvent a judicial decision by altering or repealing the constitutional provision in question. This power has been drastically limited by the 1960 Constitution.

The content of two written constitutions may vary considerably, expressing the uniqueness of the respective peoples involved, but the process of determining the constitutionality of legislation is the same. Thus, reference to American cases for the purpose of examining the process of judicial review – a process which necessarily is absent from English judicial decision – does not in any manner hamper this court in dealing with the unique aspects of the Ghana Constitution.

Judicial review and interpretation of the Constitution

What is this process of judicial review? As I have already tried to show, it involves the determination whether an enactment is repugnant to the Constitution. It is the power and function of the courts to declare what the law is. In a case of constitutionality, the court must examine both the Constitution and the law or enactment in question. If the legal effect of the enactment is inconsistent with the purposes of the Constitution, then one or the other must give way. Both cannot stand as the law. Either the Constitution stands, or the inconsistent law, if enforced, has the legal effect of altering the Constitution by ordinary means – by implication if not expressed as an amendment. This the legislature cannot do where the Constitution provides an extraordinary procedure for amendment. Clearly, it would be acting in excess of its authority, since, in the case of the Ghana Constitution,

constitutional provisions can be altered or repealed only by the procedure set forth in Article 20(2).

The court, therefore, has the duty of declaring which law shall stand. Here, of course, the judges are bound by the Judicial Oath contained in the Oaths Act, 1960 Sched. 1 (C.A.12). The Judicial Oath includes a promise by the judge "to exercise the judicial functions entrusted" to him "in accordance with the Constitution of the Republic of Ghana." Is it possible for him to honour this oath, unless he has the power to examine the Constitution and determine its true meaning? "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government, if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." (See *Marbury* v *Madison*, 1 Cranch 137, at 180 (1803).

Moreover, a judge cannot uphold the Constitution by agreeing with the legality of legislation which is not constitutional. It is erroneous to speak of a law which is unconstitutional but not illegal. If it is unconstitutional, then it cannot be the law.

In Ghana, judicial grant of power to examine constitutionality comes from several sources: the nature of written constitutions, the general grant of judicial power in Article 41, the specific grant of extraordinary jurisdiction in Article 42(2) and the judicial oath. Anyone of these sources is sufficient to vest the Supreme Court in this case with the jurisdiction to question constitutionality when such an issue is raised before them. Hence, the argument that the Ghana Constitution does not permit this kind of judicial review is without foundation in fact.

This type of judicial review is absent in English courts since there is no formal constitution containing provisions which are beyond the power of Parliament to alter or repeal. Thus, there is nothing against which to measure the power of Parliament since its powers are limitless. As I have already indicated, the American Constitution *as a whole* is supreme because all of its provisions are entrenched. In the Ghana Constitution, all provisions are supreme until they are altered in accordance with Art. 20(2). Two things cannot be supreme at the same time. The Parliament cannot be superior to its creator – the Constitution. Thus, Parliament is inferior to the Constitution and subject to its provisions. This is the true meaning, I respectfully submit, of the rule of law upon which, in the words of Dr. Kwame Nkrumah, the Constitution is based. Thus, the term "supremacy of Parliament" is meaningless in relation to the Ghana Constitution.

The courts have both the power and the duty of maintaining the supremacy of the Constitution. This duty is expressed, for example, in the Colombia Constitution of 1945 as amended, which provides:

"*Art. 214.* To the Supreme Court of Justice is entrusted the guardianship of the integrity of the Constitution ...

Art. 215. In every case of incompatibility between the Constitution and the law, the Constitutional provisions shall be applied by preference."

Or, as in the case of the Constitution of Venezuela (1953) the duty may be expressed as follows:

"*Art. 131.* The following are the functions of the Federal Court:

(1) To declare the total or partial invalidity of national or state laws, of regulations and of municipal ordinances or resolutions when they conflict with the Constitution."

Or, as in the Constitution of Japan(1946):

"*Art. 81.* The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act."

Or, as in the Constitution of Burma (1947):

"*Art. 135(2).* If the High Court is satisfied that a case pending in any inferior Court involves or is likely to involve substantially a question of the validity of any law having regard to the provisions of this Constitution, the High Court shall transfer the case to itself for trial."

Or, as in the case of the Constitution of Chile (1925):

"*Art. 86...* The Supreme Court... may declare inapplicable ... any legal provision contrary to the Constitution."

Or as in the Constitution of Honduras (1936):

"*Art. 141.* It is the exclusive power of the courts and other tribunals of justice to judge and execute the judgment. It is their duty to apply the laws in concrete cases legally submitted to their cognizance and to deny their fulfillment when they are contrary to the Constitution."

Or, as in the Constitution of India (1949):

> "*Article 132(1).* An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court ... if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution."

This comparative review of constitutional provisions makes clear the position of a written constitution in the legal structure of a nation and the function of the courts in maintaining the integrity of the Constitution.

Bearing in mind this duty of the courts to uphold the supremacy of the Constitution, how shall it be interpreted? Your lordships, I respectfully submit, must begin with the keystone of the Ghana Constitution, Article 1, which declares "*The powers of the State derive from the people.*" Here, it may be of significance to repeat the warning of Dr. C. Oliver Farran, a former scholar of The Hague Academy of International Law, who has said:

> "Liberty is a state of affairs which is always in danger, and ... the chief danger to its continuance lies not so much in open tyranny — against which we are all on guard — but against veiled tyranny and that insidious power which gradually snuffs out the candles of true liberty and democracy, while flooding the scene with a searchlight of loud proclamations of advancing Democracy and cries of 'For the People'. Let us beware ... of the danger that words may be distorted and retain a seductive apparent value while the reality once indicated by those words has disappeared ... What really matters is that Power should be from the People: only then can Freedom under the Law have any real meaning." (*Atlantic Democracy* (1958), pp.193-4)

Secondly, a constitution must be interpreted in the light of its functions. It is a grant of power. It should not be considered as a detailed code or a mechanistic document. It prescribes the frame or form of government and prescribes the exercise of governmental power. But its functions are broader than this.

As described in 12 *Corpus Juris*, p.675) *et seq.*, the function of a constitution is to protect the people against arbitrary power, and not to legislate in detail but to set limits to the otherwise plenary power of the legislature. It is not primarily designed to protect majorities who are usually able to protect themselves, but to preserve and protect the rights of individuals against the arbitrary actions of those in authority. Emergencies do not authorize the suspension of the constitution and its guarantees, and rules of expedience must not be placed above the constitution.

Thirdly, a constitution cannot be interpreted in the identical manner in which a detailed statute is interpreted. As Lord Bryce has said, "It is plain that the shorter a law is, the more general must its language be, and the greater therefore the need for interpretation. So too the greater the range of a law, and the more numerous and serious the cases which it governs, the more frequently will its meaning be canvassed. There have been statutes dealing with private law, such as the Lex Aquilia at Rome and the Statute of Frauds in England, on which many volumes of commentaries have been written, and thousands of judicial constructions placed. Much more then must be expected to find great public and constitutional enactments subjected to the closest scrutiny to discover every shade of meaning which their words can be made to bear ..." (The American Commonwealth (3rd ed.). Vol. 1, pp.372–374)

Mr. Justice Story, speaking for the Supreme Court of the United States in *Martin* v. *Hunter's Lessee*. 14 U.S. (1 Wheat) 304 at 326 (1816), made the following judicial comment on the United States Constitution:

> "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the event of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."

Yet, while there is a broad grant of legislative power to effectuate the purpose of the constitution, this power must be exercised in accordance with the will of the people. In one of the earliest lower federal court decisions in the United States, eight years before the case of *Marbury* v. *Madison*, Mr. Justice Patterson, speaking for the court in *Van Horne's Lessee* v. *Dorrance* (circuit court of the United States, Pennsylvania District, 1795), 2 Dall, 304 at 308 declared:

"What is a constitution? It is a form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The constitution is certain and fixed; it contains the permanent will of the people and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority which made it.

The life-giving principle and death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit in which it must move. In short, gentlemen, the constitution is the sum of the political system, around which all legislative, executive and judicial bodies must evolve. Whatever may be the case in other countries, yet in this, there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void."

In exercising the function of invalidating laws which are not in conformity with the Constitution, the Supreme Court of the United States has made it abundantly clear that the judiciary will not inquire into the motives or the wisdom of legislatures, but only into their power to enact a statute. See *Arizona* v. *California*, 283 U.S. 423, 455, 75 L.Ed. 1154 (1931); and *United States* v. *Butler*, 297 U.S. I, 56 S. Ct. 312, 80 L.Ed. 477 (1936).

In the *Butler* case, supra, Mr. Justice Roberts observed:

"It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does or can do, is to announce its considered judgment upon the question... This court

neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and having done that, its duty end."

That this method of constitutional interpretation is an important factor in the many transformations of a growing country is emphasized by Professor Wright, who has observed, *op.cit.*,p5–8:

"... the democratic tradition in America is a tradition of constitutionalism as well as of increasingly popular government. Indeed, the period in which the greatest strides towards more popular government were made ... was also the era in which judicial review was expanding most rapidly... Judicial review has not been limited to saying yes or no. For the courts have in sustaining laws done more than give to those laws on authoritative stamp. They have also added to them a reasoned justification. By virtue of the persuasive reasoning which it has added to the new interpretations or adaptations of the Constitution the judiciary has.

This rational reconciliation of a fixed constitution with continuous growth and change has been one of the really essential elements in both the permanence and the flexibility of the Constitution ... Constitutionalism has been one of the most persistent and pervasive characteristics of American democracy. A very large proportion, perhaps the greater part, of American political thought since 1789 might as well be called constitutional theory. It has proceeded upon the assumptions contained in, or derived from, the written Constitution. Because this has been the basis for most political thought, justification of change in terms of constitutional principles has given a vitality and a sanction to constitutional expansion which could have been obtained in no other way. Because the Supreme Court has been the final interpreter of the Constitution that Court has come to be a major symbol of constitutionalism, which is to say that it has been the great symbol of stability and security."

May I respectfully remind your lordships that the American Constitution, in the words of two scholars, "is now the oldest written constitution in the world. It has survived the trials of practical politics, the holocaust of civil war, and the immense and relentless tide of social and economic change induced by the industrial revolution. Drafted for an eighteenth-century agrarian population of less than four million people, the Constitution now functions adequately as the fundamental law of a great urban industrial democracy of some one hundred and

sixty million souls." (Kelly and Harbison, *The American Constitution: Its Origins and Development*, pp.1–2)

If I have stressed this development of the American Constitution, it is because I see an analogy between the problems of a newly established country which had to pull itself up by its own bootstraps and the emerging African states which are now engaged in similar efforts and which together with the United States have derived their legal institutions from a common system of law. The great task of newly independent states is to achieve both stability and flexibility. This has been achieved in one state through the growth of constitutional law. This court stands today at the threshold of the constitutional law of the Republic of Ghana. What it decides will determine the future constitutional development of our country and will affect the liberties of our people for generations to come.

It is in the light of these principles that we must evaluate the Attorney-General's plea for a narrow, strict interpretation of our Constitution. Clearly, constitutions which are written and entrenched, by their very nature, cannot be mechanistic if they are to serve the purposes for which they were adopted.

Broad, general principles cannot be forced into the narrow mould of statutory enactments which may constantly be amended, added to or repealed. A constitution in a growing nation is itself a vital growing part of that nation requiring the highest order of judicial statesmanship to determine its true meaning. Generic terms like "freedom," "justice," the "will of the people." "access to the courts," must be given concrete meaning which deepens and grows as the political and social institutions of the country mature. A narrow, mechanistic interpretation of the Constitution, particularly in the sphere of fundamental liberties, can only throttle the growth of the country and its free institutions and hobble its development.

The plain meaning of abstract words in a written constitution requires considerably more effort and insight by the court than the more precise meaning of the words in a statute of limited objectives. Broad principles demand a broad and imaginative construction for they deal with objectives far wider than those narrow objectives of a particular statutory enactment. These principles, as I have indicated, represent a form of law higher than that of ordinary statutes. They tend to be fixed, but must have sufficient flexibility in their application to guide the destiny of a growing country.

For example, if the interpretation as to the meaning and effect of Article 13(1) as conceived by the Attorney-General is accepted by your lordships, it would mean that any person can be deprived of his liberty for five years without a judicial determination of his guilt or innocence. During that period he is robbed of the right to earn his living and maintain his family or to pursue his vocation. Moreover, he suffers the penalty of the loss of a valuable political right – he is

disqualified from standing for office as a member of the National Assembly for a further period of five years after a Preventive Detention Order has ceased to be of effect. The National Assembly Act, 1959 (Act No.78 of 1959), disqualifies for membership any person against whom an order under the Preventive Detention Act, 1958 (Act No.17 of 1958) is in force or has been in force at any time in the previous five years (s.4(2)). This most valuable, most inalienable right of liberty, we are told, must await the exercise of a political right at the next election. Such an interpretation would be a monstrous conception of personal liberty. A personal right cannot be postponed to await an election. It demands a remedy which is immediate.

Thus, I must reiterate to your lordships what I have said in my earlier submissions, that constitutional provisions for the security of person and property must be liberally construed.

The U.S. Constitution and the Ghana Constitution

Although I do not wish to trouble your lordships with a too detailed reply to every small part of my learned friend's submissions, there is one statement made at the outset of his submissions which is so astonishing that I must need refer your lordships to it. In discussing the Constitution of the United States, my learned friend there asserts that:

> "... it is most desirable to utter a warning against accepting American authorities on judicial review which have their origin in the provisions of the United States Constitution, which do not exist in the Constitution of Ghana."

It is of course perfectly easy, as my learned friend has done, to create the illusion of wide disparity between the United States Constitution and the Constitution of Ghana. The curious fact is, however, that Chief Justice Marshall in *Marbury* v. *Madison* based his foundation of judicial review not on provisions so clear-cut that they even later attained the dignity of being, included by Mr. Peaslee as being explicit grants of the power of judicial review, but on the following sixteen words of Article III, Section 12, Paragraph 1, of the United States Constitution, "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution." Is it true, then, as my learned friend has done in his submissions, to argue that:

> "Judicial review, in the sense in which it exists in the United States, is generally acknowledged as a particular United States institution springing from the particular form of the United States Constitution"?

Which are more explicit, the sixteen words of the United States Constitution or the thirty-two words of Article 42(2) in the Ghana Constitution:

> "42.(2) The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution ..."?

Of course there are differences between the Constitution of the United States and the Constitution of Ghana, but as to the existence of judicial review, are these differences so significant? It is not the American precedents that one should follow; it is not the American cases and controversies which should determine the outcome of the instant case; it is the American *reasoning* on the nature of a written Constitution as opposed to a perpetually flexible and expanding Constitution which must be taken seriously. This reasoning was applied over the fulcrum of the sixteen words quoted above. It took its origins in the concept of a disciplined constitutional document, which needed to seek explanation and arbitration in the only organ of national government which was *capable of giving ultimate meaning to the existence of the* constitutional rules.

My learned friend has drawn your Lordships' attention to Lord Atkin's reference to Humpty Dumpty in *Liversidge* v. *Anderson*. With specific reference to the case before this court, may I in turn draw your lordships' attention to Mr. Lewis Carroll's work, and quote from Chapter XII of *Alice's Adventures in Wonderland* (MacMillan, Minature Ed., 1907), pp.184-185:

> "At this moment the King, who had been for some time busily writing in his notebook, called out 'Silence!' and read out from his book 'Rule Forty-two. *All persons more than a mile high to leave the court.*'
>
> Everybody looked at Alice.
> 'I'm not a mile high,' said Alice.
> 'You are,' said the King.
> 'Nearly two miles high,' added the Queen.
> 'Well, I sha'n't go, at any rate,' said Alice; 'besides, that's not a regular rule: you invented it just now.' 'It's the oldest rule in the book,' said the King. 'Then it ought to be Number One,' said Alice. The King turned pale, and shut his notebook hastily."

My lords, I do not say, as my learned friend suggests that I have, that because both the Constitutions of the United States and of our country are written, then

we should follow the American law and the prophets. What I do say is that the United States Constitution contains no specific grant of the judicial power to review legislation, and that our Constitution does. What I do say is that Chief Justice Marshall's reasoning may be applied *a fortiori* to our Constitution, the only alternative being that of dismissing the documentary dignity of our Constitution from consideration. Is it possible, my lords, to have a situation where the Constitution is nothing but a formal testimonial to the grandeur of the State, whose provisions and whose very essence may be interpreted by those organs of national government whose activity the Constitution was instituted to control? For if the Parliament may interpret howsoever it wishes the immutable and entrenched *fonds de pouvoir* granted by the people of the Republic of Ghana, then that grant must logically suffer dilution and erosion until the conflicts of interest and of justice result in a perpetual interview not dissimilar to that which I have just quoted between Alice and the King and Queen.

My learned friend has referred to an omission by me of a discussion of Article 20. He has made, however, two assertions which demand comment.

The first is contained in my learned friends summary of the meaning of Article 20, where he submits:

> "(c) The Articles which are not entrenched can only be altered by an Act which specifically amends the Constitution. In other words, no constitutional provision can be impliedly repealed."

One of the submissions which I place before your lordships is this, in the form of an alternative argument: *either* the Constitution of 1960 has rendered the Preventive Detention Act, 195R, void and of no effect, *or else* it has not done so. *If* it has *not* done so, then the Preventive Detention Act, 1958, is void for a different reason, in that its *effect* is to alter or amend an entrenched clause of the Constitution, while its form is not such that may constitutionally allow of such implied repeal. In other words, my learned friend has in fact underscored one of the basic points of my argument. No constitutional provision, he has submitted, can be impliedly repealed. If this is true, then the Preventive Detention Act, which attempts to effect such an implied repeal, is void.

The second assertion by my learned friend is that:

> "It should be noticed that in this detailed and careful definition of the powers of Parliament there is no mention of Parliament's powers being limited in any way by Article 13(1)."

Indeed there is no mention of 'Parliament's powers being limited in any way by Article 13(1). But there is mention of Parliament's powers being limited by Section (4) of Article 20 in relation to power reserved to the people in Article 13(2). Nor is there any mention in Article 20 of Parliament's power being limited in any way by Article 21, which specifies the composition of the National Assembly: or by Article 22, which regulates the sessions of the National Assembly: or by Article 23, which regulates the dissolution of the National Assembly: or by Article 24, which stipulates the procedure required for assent by the President. It would be tedious to expand illustrations of limitations on Parliamentary powers which have *prima facie* being omitted from a catalogue which should, according to my learned friend's point of view, be reproduced in the body of Article 20. The entire concept of a written constitution is in fact a limitation on the powers of Parliament. Even though there is no explicit recital of limitation by Articles 21 or 24 contained in Article 20, can it be seriously argued that in the exercise of the judicial oath to uphold the Constitution, your lordships would be incompetent to rule that a certain Act was not in fact constitutionally passed, if *ex hypothesi* that act were passed by members of the National Assembly who were not "elected in the manner provided by a law framed in accordance with the principle set out in Article One of the Constitution," (Article 21 (2)) or if *ex hypothesi* that Bill had received an equivocal and incorrect significantion by the President (Article 24(1))? The very logic of this proposition is too plain to be controverted. Is there a recital, in Article 20 of such controls on the powers of Parliament? But if such constitutional control exists, does it in fact fall by virtue of its omission from Article 20? Have Articles 21 and 24 above-mentioned become of no significance? Has Article 20 removed the application of the Test of the Constitution? Such a position, my lords, simply leads us into a labyrinth of pointless disputation.

It is a well-known rule of statutory construction that clauses should be interpreted and construed to give a meaning to the document in which they are contained. In the case of a written constitution, this principle should be applied the more strongly, to avoid crippling any part of a document which in fact represents the sovereign enactment of the people of Ghana, "In exercise of our undoubted right to appoint for ourselves the means whereby we shall be governed."

What, then, is the "sovereignty of Parliament" as expressed in Article 207 It is essentially contained in paragraph 5 of Article 20, which says that "No person or body other than Parliament shall have power to make provisions having the force of law except under authority conferred by Act of Parliament." This is legislative supremacy; this is right and proper. But it is not Parliamentary supremacy, because how can a Parliament established by a Constitution be supreme over the Constitution which established it? Can the created ever take precedence over the creator? Parliament is a creature of the Constitution of 1960, and is necessarily

restricted by the existence of that document. Our Parliament would only be sovereign if no clauses in the – 1960 Constitution were entrenched; then it could act like the Parliament of the United Kingdom, and add at will to the documents of constitutional significance which give it its authority. Since there are areas, by Article 20, where Parliament may not legislate, is it not equally true that there are other areas which control and establish the existence of Parliament, which may not be contradicted?

Parliament, then, is seised of legislative supremacy under the 1960 Constitution. What, then, of Article 20(6), which states:

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

The meaning of this clause rests on what was meant by the word "limitation," and by the phrase, "the power of Parliament to make laws." There are two theories open to your lordships in your interpretation of this sentence: either it means:

Parliament can do anything it wishes except fail to follow the prescribed amendment procedure in cases where it is necessary.

Or else it means:

> Parliament as constituted in accordance with other articles of the Constitution, and therefore limited by such other articles of the Constitution, may produce legislation as it wishes except that it may not legislate without appropriate procedure in an area reserved to the people.

The first interpretation would permit of Parliament's being able to pretend that it is fully constituted in accordance with Article 21, even were it not in fact so constituted. The second interpretation forbids such a result. Which is in harmony with the purpose, the spirit, the letter, and the fact of our Constitution? The answer is too plain to demand statement.

What then is the meaning of Article 20? This is clearly an article which states procedural law governing the process of legislation. It states the existence of Parliament, the conferring of legislative power, and it proceeds to forbid divestment of legislative power, to require certification by the Speaker in certain instances, and states that Parliament should be legislatively supreme. In the sixth paragraph it then refers to "the limitations referred to in the preceding provisions of this Article," and is it not clear that these limitations must be procedural? They are limitations on the power of legislation as a function of its technique. If this is so, then Article 20(6), when it refers to "no limitation whatsoever," must present us with the same concept of *limitation*, as was expressed earlier in the very same

sentence. The word "whatsoever" simply extends this concept of limitation to cover all possible variants of itself. What it does *not* do is to remove the essential of substantive limitations of the Constitution of 1960, operating as a whole on the Parliament to provide the permanent and perpetual limitation of constitutional creation.

This interpretation is difficult, but the words of Article 20(6) are in fact words which are difficult to understand. They may only be properly understood when "the power of Parliament to make laws" is seen as the power to legislate in certain areas of procedural requirement. Parliament has no ability to ensure that it has made *effective* laws: the determination of this question is by the nature of the written' constitution, for the court. Parliament may observe its limitations under Article 20, and may produce a law. But this law may be unconstitutional, not *a priori,* only as a result of its having been tested by this court. Constitutionality and effectiveness are not concepts which attach themselves in the first instance to legislation at the moment of the President's assent thereto. They are words which apply only when the constitutional process of measurement is fulfilled. And such a process may only be fulfilled and completed by the decision of the Supreme Court.

My lords, why else have you taken your oaths of office? Why else is the Constitution recited as the first among the laws of Ghana, in Article 40? Why else has the judicial power of the State been conferred by Article 41? Why else, my lords, does Article 42(2) give you jurisdiction in all matters where a question has arisen whether "an enactment was made in excess of *the powers conferred on Parliament by or under the Constitution*?" My lords, if you were to be forbidden to determine the constitutionality of legislation by standards other than those expressed in Article 20, why is Article 42(2) not worded as follows:

> The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers of Parliament as subject to the limitations contained in Article 20...?

In conclusion, my lords, if it is your province and only yours to determine the *constitutionality* of legislation, is this not the same as saying that it is your province to decide the *effectiveness* of legislation? And if this is true, does this not make quite clear the meaning of Article 20(6): "the power of Parliament *to make laws*?". The power to make a law is the power to make a law which has the force of law unless it is unconstitutional. If the only way a law can be unconstitutional is to be so declared by this court, then the power to make a law is the power to make a law which has the force of law until it is declared to be in conflict with the Constitution by the Supreme Court. And if this is so, my lords, does it not clarify the fact that what are expressed in Article 20 are in fact limitations on the power of Parliament *to make* laws, and that there must exist entirely separately from

this Article other *limitations on the power of Parliament to make effective and constitutional laws*?

II. *THE MEANING AND EFFECT OF ARTICLE 13*

My lords, in his submissions concerning the nature and effect of Article 13(1), my learned friend has made several assertions which I should like to consider in turn.

First, it has been argued that Article 13 is of political and moral significance only, that its function is to serve as a yardstick by which the electorate may measure the President's performance when an election occurs. As an illustration of the tradition in which the Presidential Declaration is supposed to have been conceived, my learned friend cited the Coronation Oath, 1688 (1 Will. &. Mar.c.6). As I have stressed before, in the interpretation of a written constitution, the duty of a court is to give as much meaning to its various provisions as possible. Is it meaningful to say that Article 13(1) "is in no sense part of the general law?" Why then is it contained in the Constitution, and not in a special part of the Consequential Provisions Act? Is it a realistic suggestion to say that Article 13 is of no effect other than that of a moral sanction, or to argue that its best effect is that of a political yardstick? Are political judgments made by the electorate usually informed with a fine sense of constitutional legality? Is it then a yard-stick which is five yards long?

My learned friend has also submitted that if any clause of Article 13(1) is to be enforceable, then they must all be enforceable. And, most ingeniously, he has suggested that the seventh clause, that relating to a fair share of the produce of Ghana, becomes an absurdity if it is deemed to be enforceable. My learned friend has neglected to consider the other side of the coin of enforceability; as provisions in statutes mayor may not be self-executing, so may provisions in statutes be mandatory or prohibitory.

It may indeed be an absurdity for the Supreme Court to issue an order to Parliament forbidding them to adopt budget resolutions on the grounds that they did not secure, in the view of the Supreme Court, a fair share of the produce of the country to some particular individual who claims to be affected, but would it be an absurdity for the Supreme Court to declare unconstitutional an Act which *on its face* denied "a fair share of the produce" (*in haec verba*) to certain individuals who may be designated by the Minister of the Interior? Certainly not. Nor would it be absurd for this court to declare unconstitutional the Preventive Detention Act, which *on its face* denies a court hearing to individuals designated as detainees. In the alternative, although it is difficult to suggest that an individual could obtain the prerogative writ of *mandamus* from this court, compelling the

President to guarantee and preserve the institution of chieftaincy in Ghana, is it so difficult to conceive of the Supreme Court refusing to declare unconstitutional a statute which *on its face* purported to destroy and eliminate the institution of chieftaincy?

Indeed, as my learned friend has pointed out, the language of the Declaration of Article 13 is precatory rather than mandatory. Does this imply that precatory pronouncements contained in the constitution itself are to no effect? What is their effect, then? Is it to enable individuals to sue the President, or to seek his removal? I need not concede that these remedies would be too extreme. What remedy could be suggested, then, to make Article 13 meaningful? The remedy of God's vengeance for the breach of a moral obligation, or the remedy of a political campaign at five-year intervals? The former need not really be recited in any law or constitution, and the latter will inevitably occur no matter how much recitation has been indulged in.

But if this court is able to pass on the constitutionality of legislation, does not this remedy immediately suggest itself as being neither too extreme nor too feeble to have been intended? Is it not a moderate and effective sanction to be able to plead that certain legislation is *on its face in utter disharmony* with those principles which the President was bound, by law, to declare as his fundamental principles?

The distinction between the oath and the declaration has been made; but the combination of oath and declaration in two successive articles of a brief constitution demands further attention. By Article 12, the President is bound to swear that he will "preserve and defend the Constitution," and that he will "do right to all manner of people according to law." In the first analysis, does not the oath to preserve and defend the Constitution extend to preserving and defending the meaningfulness and effect of its provisions? And if this is so, is the President not to some degree bound, not only to *make* his declaration immediately after his assumption of office, but to give meaning to his declared "adherence to the following fundamental principles"? Is "adherence" transitory, that it may be forgotten over night without compunction? Is the meaningfulness of adherence to fundamental principles in fact preserved by the existence legislation which flies in their face?

I have previously mentioned the suggestions made by the White Paper and by other pre-referendum sources, that the Declaration of Fundamental Principles was to be inserted in the Constitution because it was intended to protect certain fundamental rights. Is the right of election a sufficient protection, or is the celestial vengeance? Does not the right of election afford itself *in any case*, through other constitutional provisions? Is it not ultimately far more meaningful to protect these rights by refusing to render effective any legislation which clearly and consciously contradicts on its face the substance of the declared fundamentals?

My lords, when the President swears to do "right" to all manner of people, are we told what "right" means? It is an abstraction, difficult to empirical verification. In the *very next Article of the Constitution*, my lords, the President recites his adherence to nine detailed fundamental principles. If his oath to do "right" cannot in some degree or other be said to be an oath to do what is immediately thereafter stated to be his fundamental principles, then the conclusion one must draw is that the President's fundamental principles are not right, or that his principles do not conform to what he thinks is right. This is not to suggest that the President has solemnly sworn to do all his fundamental principles, one by one; but it is to say that Article 13 is of more significance and should be of more significance than that of "a political yardstick." of "a moral sanction." My lords, it is *at least* of sufficient significance for this court to be able to rule that legislation repugnant to *it on its face* is void, or to rule that the President could not possibly have intended to assent to such legislation without more.

III. *IS THE PREVENTIVE DETENTION ACT, 1958, UNCONSTITUTIONAL?*

1. *The Preventive Detention Act. 1958, is unconstitutional because of a prima facie conflict with the terms of the Constitution*

(a) *It is prima facie contrary to the Constitution*

(i) *Conflicts with provisions of Article 13(1)*

My learned friend has stated that in his submission, the "right of access to the Courts" contained in Article 13(1) must "mean the type of access which the petitioners are enjoying at this moment." I cannot understand how the words "right of access to courts of law" can be tortured into any such construction. My learned friend has been assiduous in his submissions that this court give the language of the Constitution its plian meaning. Taken in conjunction with the letter and the spirit of the other clauses of Article 13, and with the letter and the spirit of the national motto of the Republic of Ghana, is it consonant with freedom and justice that "right of access to courts of law" means, not that detainees be able to question their detention in the same way that a common criminal accused is able to question his indictment, but that such detainees are able to question the legality of the Act which deprives them of their full and fair hearing? Or the mechanical correctness of the orders by which they have been detained? Is this what is meant by "the right of access to courts of law" in the President's solemn declaration of fundamental principles? If it is, then it is only by virtue of a tortuous and unfair construction which, in my submission, is utterly out of keeping, with traditions of customary, statutory and constitutional interpretation, as well as with the entire spirit and intent of the Ghana Constitution of 1960.

My learned friend has also submitted to your lordships that freedom and justice must often, in order to be maintained and honoured, tolerate strong and severe repressive measures of the civil body politic. But is this the plain meaning of the words, taken in conjunction with the declaration respecting access to courts? It is for you, my lords, to say what the Constitution means. It is this court, my lords, which must say whether freedom and justice are in fact being honoured or maintained by an Act under which Ghanaian citizens may be detained for vaguely-worded and unspecified threats to the security of the state, for periods up to five years, and in the conditions of the criminal gaols.

(ii) *Conflict with the rule of law on which the Constitution is based*

As I have mentioned previously, in his broadcast of 6 March, 1960, Dr. Kwame Nkrumah announced to the people of Ghana that the projected Constitution was based firmly on the rule of law and was to leave no scope for arbitrary action. The government reserved to itself a certain leeway of change, to make provisions more effective, better to fulfill the intention of the people of Ghana and of the Constituent Assembly so convened. By all the statements released to the people, whose act of referendum was an expression of their sovereign will and a relinquishment of the powers of formulation and decision which could, in effect, have been retained by the government without the necessity of resorting to a referendum ... by all the statements released to the people, they were to approve of the Draft Constitution and the Constituent Assembly was in duty bound, not to follow, word for word, the Draft Constitution, but to pass on a final draft Constitution based on the same broad principles as the one submitted to the people. By no stretch of the imagination, I respectfully submit to your lordships, can the identity of broad principles exclude *that principle on which the Constitution was "firmly based"* — that of the rule of law.

I will not detain your lordships with a recital of the results of the recent Lagos Conference of the International Commission of Jurists, which specify what they deem to be the "Rule of Law." It is hard to say what vague phrases such as this mean. It would be impertinent to suggest that this court should be bound by the decision of an international commission of jurists meeting in Lagos. But it is not so difficult for your lordships to say what in fact is incompatible with the narrowest possible definition of the "Rule of Law."

I respectfully submit, then, to your lordships that the basing of this Constitution on the rule of law could not have been altered by the Constituent Assembly. I further submit that the most restrictive possible definition of the rule of law will still point to the essential inhumanity and arbitrariness of enactments such as the Preventive Detention Act, 1958. To be permitted to detain citizens such as the applicants in the instant case in prison for a period of up to five years, with ill-

defined charges, vagueness and generality of expression in the detention order, with no opportunity to be heard before a disinterested tribunal, with no opportunity to cross-examine witnesses, or to ask for the production of evidence against them, with full and complete restriction of their lives to prison routine, and without the safeguards normally given in this Republic to a common criminal accused – is this, my lords consonant with an expression of the rule of law? Indeed these applicants might have committed crimes, or they might have done acts contrary to their duties as citizens, but that is not the issue before your lordships. The issue before your lordships is whether these applicants have a right to be heard on these charges, or even to hear themselves with some decent degree of specificity what it is that they are supposed to have done. The rule of law at least states, finally, that men have the right to be heard before an impartial tribunal when their liberty is threatened. Even if the President and the Minister of the Interior were to sit in concert on the case of each and every one of the petitioners, would they be able to be as impartial as a court of law? Is either of them a judge'? Does not the minister responsible for detentions have some interest in seeing that he has made those detentions for good cause? My lords, I would respectfully submit that this result is the same as allowing the Attorney-General of a state to investigate, to prosecute and *then to serve as judge and jury in a given cause.*

(iii) *The Preventive Detention Act Requires a Fair Hearing*

My lords, the Preventive Detention Act, 1958, in its section 2(2), states that a person detained under the Act must be given an opportunity to make representations to the President with respect to the order under which he is detained. Again, the President must be "satisfied" that the detention order is necessary to prevent that person acting in a manner prejudicial to the defence of Ghana, the relations of Ghana with other countries, or the security of the State. (see s.2(1)) Although it is an interesting question whether the "representations" contemplated by section 2(2) of the Act can be meaningful representations if they are not heard by the President *impartially*, the question becomes more than interesting when the language of the President's oath in Article 12 of the Constitution is recalled to mind. The President has sworn "to do right to all manner of people," and if this oath is seen against the broad foundation of the rule of law that the President has himself announced, I respectfully submit to your lordships that the President is now bound by his oath to give a fair and full hearing to the representations made to him by those whom he has detained. And since, my lords, it is *a priori* impossible for the President ever to give a person detained by his own order as full and fair a hearing as is required by his own oath of office, I

submit that the Preventive Detention Act, 1958, is again unconstitutional on its face.

(iv) *The Preventive Detention Act is either an unconstitutional grant of judicial power or must require the proper exercise of powers granted*

My lords, I continue with two further arguments. First, the very language of the Preventive Detention Act, 1958, requires that the President be *satisfied*, and this duty, seen in the light of the 1960 Constitution, is an unconstitutional wresting of the judicial function from the judiciary of this Republic; and my second submission is that even if this judicial function can constitutionally be vested in the executive branch, then it must nevertheless be performed in a judicial manner and not in an executive manner.

My first submission, my lords, is simple. Article 41(2) states that "Subject to the provisions of the Constitution, the judicial power of the State is conferred on the Supreme Court and the High Court, and on such inferior courts as may be provided for by law." Your lordships' attention is respectfully drawn to the language of this sentence, which does *not* say "subject to the provisions of earlier legislation," or "subject to the provisions of the Preventive Detention Act, 1958," but which, subject only to the Constitution, confers the judicial power of the State on the courts. Furthermore, it does not say "and on such other organs as may be provided for by law," which might thereby render the Preventive Detention Act constitutional, but it says "on such inferior *courts* as may be provided for by law." Can it be denied, my lords, that the exercise of Presidential judgment as to the existence of good cause for the detention of an adult citizen without trial for five years, is the naked exercise of a judicial function? It may be given other names, my lords, but judicial it remains and judicial it will always be. And if the power exercised be judicial, my lords, then that power must be part of the judicial power of the State. And if it is conferred on a politically elected officer, be he President, Minister, or Member of Parliament, the fabric of our Constitution has been torn and its symmetry totally disrupted. In the Irish case which has previously formed the subject of discussion, my lords, Mr. Justice Gavan Duffy writes, at (1940) Irish Reports, page 152:

> ... the administration of justice is a peculiarly and distinctly judicial function, which, from its essential nature, does not fall within the executive power and is not properly incidental to the performance of the appropriate functions of the executive; consequently a law endowing a Minister of State, any Minister, with these powers is an invasion of the judicial domain and as such is repugnant to the Constitution.

State (Burke) v. *Lennon and the Attorney-General.*

I most respectfully submit that for identical reasons, my lords, the Preventive Detention Act cannot be said to conform to the Constitution of the Republic of Ghana. If it does not so conform, it is repugnant thereto, and if it is repugnant thereto, it must by necessity fall.

As for my second submission, my lords, in this same case, at (1940) Irish Reports 149 and 150, Mr. Justice Duffy has again written the following:

"First, the Minister, to have the right to intern, must be satisfied that the person concerned is in fact engaged in specific activities; that is the kind of question that one may fairly classify as a "jury question;" if he finds against the man on that issue of fact, the Minister, before he can intern, must consider whether those activities by that person are calculated to prejudice the peace, order or security of the State and be satisfied that they are ... it is emphatically not a matter of discretion, which the Minister is free to determine as he feels inclined in accordance with his view of the public interest; it is essentially a matter of fact to be determined with due regard to the evidence ... it is clear that so far as his investigation has now gone, the Minister in this weighing of the evidence has been acting judicially."

My lords, can it be denied that the force of reason impels us to this conclusion as well? This Act, in this Republic, at this time, seen against the background of the President's respect for the rule of law, and in the context of his Oath and of his Solemn Declaration, must require that the President give a full and fair hearing to the applicants. In this most important case, my lords, in this cause which is now before this court and in which are raised the first basic immutable constitutional principles of this Republic, I submit that your lordships cannot but agree that an Act such as the preventive Detention Act cannot and does not satisfy the most slovenly conception of a full and fair hearing. No matter how impartial or how judge-like is a President in the exercise of his powers of decision, he cannot by legislative grace or executive magic supply the bedrock requirements of the judicial process, namely the right of an accused person to be confronted by witnesses against him, or the right of an accused to hear the evidence against him. This is not contemplated by the Act in so many words, but in order for this Act not to fall it must at least *recite* these principles. To refer to the appellants as "detainees" and to argue that they do not fall in the same category as that of a criminal "accused," is not only to fly in the face of reason and honesty, but is also to place the rights of an accused murderer higher than the rights of a person accused of impinging on the vague concept of state security.

(b) *Is the Preventive Detention Act saved by the Constitution (Consequential Provisions Act, 1960 (C.A.8)*?

The Attorney-General has urged that the Preventive Detention Act is expressly continued by the Constitution (Consequential Provisions) Act, 1960 (C.A.8). Here again the Constitution itself is declarative of the law. The Constitution (Consequential Provisions) Act cannot continue a law which has been silently destroyed by the enactment of the Constitution.

In this connection, my lords, a comment is in order upon the Attorney-General's reliance upon Maxwell's *Interpretation of Statutes* to the effect that repeal by implication is not favoured and that such an *interpretation* should not be adopted without some strong reason or unless it inevitable. It is interesting to note that the Attorney-General failed to call to your Lordships' attention to the nineteen cases immediately preceding his citation which support the doctrine of implied repeal. I respectfully refer your lordships to pages 166-173, and particularly to page 172 wherein it is said, "An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation." This is precisely the argument that I have urged upon your lordships; that the Preventive Detention Act is repugnant to the whole spirit, tenor and letter of the Constitution and thus may be held to be impliedly repealed by the enactment of that Constitution.

Moreover, the presumption that the legislature did not intend to repeal a law without expressing such an intention is overcome by the inevitability of a coalision between the Preventive Detention Act and the principles which are at the foundation of the Constitution. This forms a sufficiently strong reason for holding the former law to be impliedly repealed.

2. *The Preventive Detention Act, 1958 is unconstitutional because the evil which it Purport to cure is not reached by the remedy sought and the Act in operation tends to subvert the Constitution which is the foundation of the State*

It should be well known to you, my lordships, that the threat of Preventive Detention has already begun to stifle the creative impulses of the people of Ghana and to fill them with fear and intimidation. A new country cannot be built upon fear and long endure as a free country. Nor can it be soundly built when ordinary standards of justice are disregarded. For what purpose, my lordships, has a struggle been waged to free our people from foreign rule if self-government brings to us only a further denial of our basic liberties? A country which must rely upon preventive detention in the absence of a declared emergency cannot be a healthy country.

Reasonable men agree that the maintenance of the stability and security of a new state is vital to the life of that state. Equally vital, however, is keeping alive the spirit of liberty which was the creative force which brought the new state into being. Without that spirit of liberty, the vitality of the state will be sapped, its foundations will decay and the victory independence will degenerate into a hollow mockery.

The learned Attorney-General has stressed the threat of political assassination in a newly established state in justification of the Preventive Detention Act. Can it seriously be argued that political assassination is unique to new countries? The recent assassination of Generalissimo Trujillo of the Dominican Republic suggests another reason. The Dominican Republic, as your lordships well know, is one of the oldest states in the Western Hemisphere which threw off the yoke of colonial rule. Moreover, Generalissimo Trujillo was in power for 30 years and had instituted every conceivable technique of authoritarian control to prevent loss of power. When he was shot he was on his way to visit his mother and had three machine-guns in his car.

Political assassination in the most well-established country is one of the risks of public life and the wielding of political power. It may also be the result of dissatisfaction among people whose liberties are being threatened or destroyed and who have become convinced that they cannot achieve a change of conditions without resort to violence. Preventive detention for long periods of time without the right to be heard by an impartial tribunal may well create the conditions of unrest and disillusionment which encourage the emergence of a political assassin This risk is reduced when the people are in possession of their liberties and their loyalty to the state is encouraged by the preservation of safeguards to their basic rights.

The fear of political assassination must have a basis in fact to warrant preventive action.

It cannot be based upon mere suspicion. There are well-tested procedures for determining such fact which have been worked out by courts of law over the centuries and which have been adapted to the operation of administrative bodies and tribunals.

To hold that preventive detention without procedural safeguards is necessary for the maintenance of the security of the state is to admit that the courts of law are unable to determine the guilt or innocence of persons suspected of subversion by time-tested procedures. It is to admit the bankruptcy of judicial procedure. It is also an admission that a new nation dedicated to freedom and justice is incapable of meeting the challenge of its own declared objectives. I cannot believe that this

is the judgment of our nation. Nor can I believe that your lordships will permit the dignity and noble traditions of the courts of law to suffer such an ignominious fate.

In the Attorney-General's written submissions, he makes a reference to the killing of Prime Ministers in Burma, Pakistan and Ceylon, and the killing of Ghandi, the founder of India, in India, and would give these experiences in other countries as a sign that the danger of political assassination threatens also in Ghana, a newly established state. He sees the danger of a threat against "the Constitution and those who have been appointed by the people to exercise power under that Constitution."

I respectfully submit that this suggestion of assassination is not a tribute to the traditions of Ghana. Our connection with Western Europe is nearly 500 years old. Our experience of direct British rule lasted for 113 years. The Portuguese were with us for 171 years and the Dutch 277 years. Never once, throughout the struggle for independence, from 1867, did we kill or assassinate a representative of the British power. On the contrary, at the height of the crisis in 1948 it was in British power, a Police Superintendent called Imary, who killed or assassinated Sergeant Adjetey and his colleagues at the Christiansborg Crossroads.

The unfavourable comparison of Ghana with what the Attorney-General calls "most developed countries" or "newly established states" is therefore an insult to our Ghanaian name and tradition.

It ought at all times to be remembered that although our Ghanaian material civilization has not been of the highest, in so far as human relations and cultural values are concerned, we in Ghana give no concessions to any nation on earth. That is to say, we do not think we are inferior to any nation on earth in the matter of culture and good manners. It is true that in respect of material civilization, the building of cities of fine building, a store of fine arts, such as come by writing, sculpture, painting and the like, as well as motor cars and atomic bombs and sputniks, there are people around us in the outside world who are a long way ahead of us.

But material civilization is not the essence of human progress. The essence of human progress is social and political Culture. And in respect of that we in Ghana are second to none. Indeed, it will be recalled that our human relations and cultural values are so highly developed that we are dissatisfied with a ruler or Chief we have a perfect machinery for getting rid of him. We depose him. We do not cut off his head or assassinate him.

In the early years of the present century, so impressed was a former English Governor of this land, Sir Hugh Clifford, a scholar and a gentleman, that he wrote of our democracy in the *Edinburgh Review* that it was of the highest type, the type that Western Europe was then trying to achieve.

Therefore if, as the Attorney-General suggests, the Preventive Detention Act was introduced because other countries have been killing their Prime Ministers, he must be assured that it was not in accord with our Ghanaian personality and tradition for him to have agreed to the introduction of such a law here. It will be better for Ghana and, in accord with her traditions, for laws to be introduced which, instead of increasing tension and bitterness, and creating an atmosphere calling for the quiet hand of the assassin, would create an atmosphere of tolerance, of freedom, of free discussion, and what English men call fair play and give and take.

In my respectful submission, the Preventive Detention Act, based on the philosophies and experiences of other countries, is a mongrel unfit for Ghana. For that consideration alone, on legal as also moral, political and philosophical grounds, the Act should be declared contrary to our Ghanaian way of life, contrary to our Constitution, and therefore dangerous and void.

Lastly, I come to two matters: At two places in his speech, the learned Attorney-General makes unhistorical references to Ghana and tries to give the impression that the 1957 Constitution was forced on the people of Ghana by the legislature and the power of the United Kingdom, and not by the legislature of the then Gold Coast. In fact he says the people of Ghana were given by the United Kingdom a constitution *not of their own making*.

Anyone acquainted with the history of the last days of the struggle will underscore this as utter nonsense. Anyone acquainted with the last chapter in Dr. Nkrumah's autobiography entitled *Ghana*, the chapter entitled "The Hour of Triumph," would know that to state that the Constitution of Ghana was not of our own making is to stultify the meaning of the glorious struggle.

At p.238 of his autobiography, Dr. Nkrumah quotes from his triumphal statement to the House of 19 September 1956, thus:

> "We are determined to play our part in drafting a constitution which will satisfy the genuine aspirations of every lover of freedom.
>
> The Government proposes that this Assembly shall have ample opportunity to debate and determine our constitution. To this end the Government will at the earliest practicable date publish a White Paper setting forth the detailed provisions of the proposed constitution. Subject to the ultimate responsibility of this Assembly, which cannot be abrogated, the Government will be willing to discuss the constitutional questions with representatives of the Opposition, should they desire it, outside the House before the debate."

Dr. Nkrumah adds at the same page, "This was greeted by loud cheers from both sides of the House."

At page 239, Dr. Nkrumah says:

> "The finalising of our constitution necessitated speedy action and in order that no time should be wasted, I had cancelled the Cabinet Recess. The White Paper would, I promised, be published as early as was practicable. We were anxious to produce a constitution which would satisfy the genuine aspirations of the chiefs and people and we were approaching the task with the best interests of the nation at heart."

Students of our history, in particular, the students of our constitutional history, are aware that the Order in Council was essentially a reproduction or what was contained in the Government of Ghana's own White Paper, and the perpetual reference to a constitution of our own making" being forced upon us is a tribute neither to Dr. Nkrumah nor to the general population of Ghana, who went into this thing with their eyes open. If anyone was at the time deceiving the people to believe that the White Paper was our own, that is another matter. But the White Paper, upon which the Constitution was based, was drafted by Dr. Nkrumah's second Cabinet of Ghana.

Finally, in this great struggle for your lordships to determine whether Parliament has power to pass an Act to affect the fundamental guarantees in Article 11(1) of the Ghana Constitution, I think your lordships can consider the answer given by the Attorney-General in his submission as a complete admission that Parliament has not the power.

> "The main issues of this appeal are, in my submission, two. First there is the question of the meaning and effect and purpose of Article 13(1) of the Constitution. Clearly this Article is of great importance. It expresses that fundamental philosophy of the Constitution in that the President must make the declaration at the time that he assumes office and that *Parliament cannot delete any paragraphs in the declaration without first obtaining the approval of the people.*"

The essence of the objection against the Preventive Detention Act of 1958 is that in it, and by it, Parliament has essayed to delete certain paragraphs of Article 13(1). The Attorney-General uses the word "delete" but the words in Article 13(2) is "alter" or "change." I respectfully submit that the words have the same

meaning. If, therefore, it is admitted that Parliament cannot alter or change any provision or paragraph in Article 13(1) is the Preventive Detention Act of 1958 which has essayed to delete, change or alter certain of the provisions, such as the right of the individual to free movement, not repugnant to the Constitution, and therefore void? Can Parliament without the declaration of an emergency and the approval of the people, restrict the individual's movements and enjoyment of freedom?

That, my lords, is the simple question. The second question raised by the Attorney-General, namely: "How should the Supreme Court exercise its power of examining the constitutionality of any law?" requires but a simple answer. The answer is contained in Article 42(2) of the Constitution: To declare that the particular legislation is in excess of the powers conferred on Parliament. This court is used to giving judgments upon considerations of fact and law, and what this court is required to do in this instance, is to give judgment according to the evidence, and according to the admissions and the law. The Preventive Detention Act of 1958 deletes or changes or alters provisions of Article 13(1) and is therefore unconstitutional and void.

Personal attack by Mr. Bing: Reply by Dr. Danquah

In Mr. Goeffrey Bing's reply as Attorney-General, certain painful attacks were made against me personally. I consider it my duty and right to reply to such personal attacks and to point out to the learned Attorney-General that he is mistaken to involve me in these habeas corpus proceedings as if I were the person on trial, or to involve himself, as the Attorney-General who has been advising the Government throughout the period of the era of preventive detention, as if he were the person on trial. In my respectful submission, there is no personal element in this matter in so far as the lawyers are concerned. But there are very grave issues at stake.

The issues at stake are, first, the good name and prestige of Ghana, whether she can hope to build a nation with bitterness at home and to lead the nations of Africa if oppressive laws and the suppression of liberty are the normal ways of existence in Ghana. Can Ghana's earnest desire to secure political freedom for the entire African continent convince anyone when Ghana herself denies political freedom to Africans within her own borders? As the first of the colonial territories south of the Sahara to become free of the old oppression, is Ghana not to set a high standard of political and personal freedom among African states, or is Ghana to appear in a congress of African states as guilty of legal oppression of her citizens?

The second issue at state, in addition to the prestige of Ghana, is the dignity and reputation of this court as a jealous guardian of the liberties of the individual

as against the power of the state, and as the highest repository of Ghana's greatest wisdom in law and justice.

Whatever the outcome of these marathon proceedings, whether in the end there should prevail what, in my respectful submission, is guaranteed and entrenched in the Constitution, namely the fundamental authority of the people to "maintain and preserve freedom and justice" as well as right, or whether in the end, instead of maintaining and preserving right, freedom and justice, there should prevail what the learned Attorney-General conceives to be the authority of Ghana's Head of State, namely, that the President is endowed by Parliament with power to exercise an absolute discretion to imprison his own countrymen without trial and without question by the superior courts of the land. I am in a position to assure your lordships that these personal attacks by the Attorney-General will not succeed in their obvious intent to dissuade me from my set course of helping, to the best of my energy and ability, to liberate this land from all kinds of oppression, a colonial or post-colonial oppression, and from all kinds of oppressors, native or expatriate.

But I must answer these attacks lest they be recorded for a precedent that it is proper and allowable in your lordships' court for the Attorney-General (appearing before you in respect of a representation that a certain Act of Parliament is repugnant to the Constitution) to present to your lordships a written document in which, instead of defending the clear and strong case made against the offending Act, he, the Attorney-General, turns his venom against me, and does what certain lawyers do, when they know that they are defending a lost cause, namely, to turn round and abuse the plaintiff's attorney.

Of the many attacks made against me in his written submissions I would direct your lordships' attention to four:

First, the Attorney-General has made it appear to your lordships that I reason like Humpty Dumpty and that I conceive of your lordships' court as a corporate Humpty Dumpty.

Secondly, the Attorney-General suggests that I gave your lordships the childish impression, to quote his own words, that "all written constitutions are the same."

Thirdly, he suggests that for some obscure reason I "preferred" to quote from the ninth, and not from what he calls "the tenth or vintage edition" of *Maxwell on Interpretation of Statutes*.

Fourthly, and this is, a grave accusation of dishonesty or fraud, the Attorney-General suggests that I have turned a certain authority into my "Ark of the Covenant" concealed and hidden away to be suddenly rushed into battle in a mysterious manner.

1. *Humpty Dumpty*

As regards my being a Humpty Dumpty your lordships will remember that in the course of my submission I made a point, evident in the English war-time cases, that in war time or on occasions of emergency, declared to be so, certain canons of interpretation which imply a curtailment of the liberties of the individual, even a suspension of the Habeas Corpus Acts, had been relied upon by the English judges. For instance, in his judgment in *Liversidge* v. *Anderson* [1941] 3 All E.R. 338 at p.366, H.L., Lord Macmillan referred to the situation in Britain as giving rise to "extraordinary interferences with the citizen's most cherished rights of person and property."

I submitted to your lordships that as the Ghana Preventive Detention Act was not passed as a war-time measure, nor in the face of an emergency (in fact the Emergency Powers Act, 1957 (Act No. 28) was available at the time of the passage of the Preventive Detention Act, 1958, but it was not used), the English cases arising from war-time regulations in respect of the 1914 to 1945 wars, had no application to the entirely different circumstances of the Preventive Detention Act in Ghana. I supported this argument with the authority of the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, P.C., that the decision in *Liversidge's* case was not to be regarded as laying down any general rule of construction in respect to the words used in the war-time regulations.

In his written answer the learned Attorney-General did not choose to make a direct reply to my decisive and authoritative submission. He did not deny that the cases cited in Smith J.'s judgment *Re Okine* [1959] G.L.R.1 were all war-time decided cases, based on the war regulations of 1914–1945.

What the learned Attorney-General tried to do was to poke fun at the unassailable fact and to suggest to your lordships that to say that the canons of interpretation of emergency legislation should not be applied to canons of peace time legislation was to speak or reason like Humpty Dumpty. He added that in calling on your lordships to make a distinction between war-time and peace-time legislation I had thereby suggested that, to quote his own words, "the Supreme Court of Ghana should consider itself a kind of corporate Humpty Dumpty."

The learned Attorney-General's point seems to be that it is a Humpty Dumpty kind of reasoning to suggest that the special canons of interpretation adopted for emergency legislation in special circumstances should not be applied to ordinary or common law cases. But if the learned Attorney-General had given himself time to look at the Interpretation Act, 1960 (C.A.4), section 17, he would have discovered that while the courts of Ghana are permitted to guide themselves with any exposition of the common law by any court in any country, the same latitude is not extended to the courts in respect of the exposition of statute laws by the

courts of foreign countries. I refer in this respect to section 17(4) of the Interpretation Act, 1960:

> "In deciding upon the existence or the content of a rule of the common law... the court may have regard to any exposition of that rule by a court exercising jurisdiction in any country."

In the face of this, and in the face of the fact that the judges of England held strongly that the war-time emergency regulations called for different considerations, and that in fact they looked upon the Emergency Powers (Defence) Act, 1939 (2 & 3 Geo.5, c.62), as affecting a suspension of the Habeas Corpus Acts, would the Supreme Court of Ghana err like a Humpty Dumpty if your lordships avoided and eschewed the English war-time cases in your interpretation of our Ghanaian peace-time cases?

Perhaps an effective answer to the learned Attorney-General's way of thinking can be found in the words of Lord Macmillan in the *Liversidge* case. The noble Lord said at [1941] 3 AII E.R. 318 at p.366, H.L.:

> "... in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure ... There could be no clearer evidence of the intention of Parliament to authorise the abrogation in the public interest and at the absolute discretion of the Secretary of State, of the ordinary law affecting the liberty of the subject ..."

And Lord Wright said at p.372, "If extraordinary powers are here given, they are given because the emergency is extraordinary, and they are limited to the period of the emergency."

Again Lord Finlay in *R.* v. *Halliday* [1917] A.C.260 at p.270, H.L.:

> "The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges etc., had to be guarded against. The restraint imposed may be a necessary measure of caution, and in the interest of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship

which is consistent with the object of the regulation appears to have been taken."

Lord Dunedin (p.270) and Atkinson (p.271) held the same view.

2. *Written Constitution*

As regards written constitutions, the learned Attorney-General reduced my submissions into fallacious syllogism, with an undistributed middle, and attempted to make me look childish in your lordships' eyes. He gave as his syllogism with the major premise, thus:

1st "Constitutions can be reduced into two classes, written and unwritten.

2nd "All written constitutions are the same. (*His minor premise*)

3rd "In which case, it follows, thirdly that the United States Constitution can be used to interpret the Constitution of Ghana." (*Conclusion*)

That is the learned Attorney-General's syllogism. In elementary logic we call this kind of reasoning a *non sequitur*. I dread to think that this is how the government of Ghana is being advised from day to day in laws affecting six and three-quarter million people of Ghana.

3. *Maxwell on the Interpretation of Statutes*

The learned Attorney-General suggested in his written submissions that I had "preferred" to quote from the ninth edition of Maxwell, instead of from what he calls "the tenth or vintage edition," the Granville Sharp edition.

The attempt here is to create prejudice against me and against the authority quoted by me. But the term "vintage" is used by connoisseurs of wine in reference to age and not to recency. A certain type of wine is looked upon as of good and respectable vintage if it is old and celebrated; the newer wine of today as not yet achieved any fame and is only used by amateurs. Maxwell's ninth edition is older than Granville Sharp's tenth edition.

4. *The Ark of the Covenant*

The learned Attorney-General, Mr. Geoffrey Bing, makes a pernicious suggestion that I had kept or concealed the Irish case of *The State* (*Burke*) v. *Lennon*, as my own Ark of the Covenant, and that only the initiated were allowed to see it, but that in time of crisis I rushed the Ark of the Covenant into battle to give all a brief glimpse of it. He actually suggests that if I had wished your lordships to study the case during the hearing of the appeal, I should surely have taken steps to have had copies made, and that there are photostat facilities in his office and he would have been very pleased indeed, had he been invited, "to produce a photostatic reproduction of the case for each of your lordships and for his own

use." The Attorney-General winds up his remarks about my Ark of the Covenant with a description of it as my personal property.

My lords: That is perhaps an apt remark. The pamphlet of the Irish case became my personal property not at my own seeking, but providentially through Mr. K. Bentsi-Enchill who delivered it to me as a gift from Mr. Sean MacBride. So also, curious to note, was the Ark of the Covenant of the Bible. It was the personal property of the Israelites. The contents were providentially given to them through Moses, handed to him personally by God on Mount Horeb. When the Ark of the Covenant was opened by the Israelites it was found to contain two tablets of the law. When I opened the Irish case I found it contained two judgments, that of the High Court and that of the Supreme Court.

But the Attorney-General's complaint is that being my personal property, I have kept it to myself. The Philistines had a similar complaint against the Jews. At the battle of Ebenezer, in the year 1141 B.C. they defeated the Israelites and captured the Ark of the Covenant from them. They took it to their god Dagon. A few days later they returned it safely to the Israelite because on the first occasion when Dagon, their own Philistine god saw it, "he fell upon his face to the earth before the ark of the Lord." The next day the Philistines set up their god Dagon before the Ark, but the next morning, Dagon had again fallen upon his face to the ground, "and the hand of Dagon and both the palms of his hand were cut off upon the threshold; only the stump of Dagon was left to him." (1 Sam. 5, 1-5).

May it please your lordships: The pernicious suggestion by the learned Attorney-General that I conceal the Irish case from the courts and only produce it mysteriously in a crisis is not borne out by the facts. As far back as January 1960, the relevant parts of the Irish case required by the appellants for the representation were quoted in full at paragraphs (14), (15) and (16) of the petition to the Governor-General. My learned friend, as adviser to the Governor-General, must have seen it. The Minister of the Interior also saw it, Mr. Battcock the Solicitor-General who came to plead the case of the respondents before Sarkodee Adoo J. also saw it. But in no case did either the Attorney-General, the Minister of the Interior, or the Solicitor-General, demand to see the authority cited by me, or challenge me to authenticate it. The Attorney-General has had at least a year brooding over the Irish case. As he says himself, during the last two and a half years I have often quoted it in these habeas corpus proceedings in which he either appeared himself or sent some one from his office to appear. On at least two occasions I left the entire copy with the judges, but somehow the Ark of the Covenant was returned to me without comment. If the Philistines returned the Israeli Ark of the Covenant to them, am I to be blamed that the judges of the High Court also returned my Ark of the Covenant to me without calling upon the Attorney-General's Office to make Photostat copies for everybody's use?

My lords: I respectfully submit that it lowers the standard of practice in your lordships' august court for the Attorney-General himself to appear before you with his arms full of abuses for his learned friend on the opposite side. I do hope that in your lordships' decisive judgment in this matter you will take opportunity to assert your authority and secure a high respect and prestige for your lordships' court from the Attorney-General's Office.

Respectfully submitted.

Re AKOTO and 7 Others

IN THE SUPREME COURT

28th August, 1961

KORSAH, C.J., VAN LARE AND AKIWUMI, JJ.S.C.

The appellants were arrested and placed in detention on the 10th and 11th November, 1959 under an order made by the Governor-General and signed on his behalf by the Minister of the Interior under section 2 of the Preventive Detention Act, 1958 (No. 17 of 1958). Their application to the High Court for writs of *habeas corpus ad subjiciendum* was refused. They appealed and counsel on their behalf argued seven main points, namely:

(1) The learned judge acted in excess of jurisdiction in refusing the application without making an order for a formal return.

(2) By virtue of the Habeas Corpus Act of 1816 the court is required to enquire into the truth of the facts contained in "The Grounds" upon which the Governor-General was satisfied that the order was necessary to prevent the appellants from acting in a manner prejudicial to the security of the state.

(3) The Minister of Interior who signed the order for and on behalf of the Governor-General was actuated by malice.

(4) The grounds upon which the appellants were detained do not fall within the ambit of the expression "Acts prejudicial to the security of the state".

(5) By virtue of section 3 of the Criminal Procedure Code, Cap. 10 of the Laws of the Gold Coast (1951 Rev.) now section 1 of the Criminal Procedure Code 1960 (Act 30), the Governor-General is precluded from exercising the powers conferred on him under the Preventive Detention Act, to make an order for the arrest and detention of the appellants without trial except in accordance with the Criminal Procedure Code.

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

(7) The Preventive Detention Act not having been passed upon a declaration of emergency is in violation of the Constitution of the Republic of Ghana.

The appellants' application for *habeas corpus* was supported by affidavit with exhibits disclosing *(a)* the order of detention, *(b)* the written information furnished with it in accordance with the requirements of the Act, *(c)* written representations by the detainees to the Governor-General and *(d)* the reply of the Governor-General. An affidavit was filed on behalf of the Minister of the Interior which stated that the detention order was made in good faith and that the Governor-General was satisfied that the "order is necessary to prevent the persons detained from acting in a manner prejudicial to the state. The grounds of detention served upon the said detainees contain particulars of the previous acts upon which the conclusion of the Governor-General is based".

Held: (1) the affidavits disclosed all the facts relevant for determining whether the writ should issue or not. Rule 14 of Order 59 does not oblige a judge to make a formal return in every case. He is entitled to dispose of the case on the affidavits. Dicta of Goddard, L.J. in *R.* v. *Home Secretary, Ex parte Greene* [1941] 3 All E.R. 104 at p. 123 applied;

(2) although the Habeas Corpus Act, 1816, is a statute of general application, it does not apply to this case because the Act under which the appellants were detained vests plenary discretion in the Governor-General (now the President) if satisfied that such an order is necessary. Upon production of the order the only question which has to be considered is its legality. If the order is lawful the detention is lawful: *Liversidge* v. *Anderson* [1942] A.C. 206, H.L. followed;

(3) the court can only look into allegations of bad faith by high officers of the state if there is positive evidence, which is singularly absent in this case: *Nakkuda Ali* v. *M. F. De S. Jayaratne* [1951] A.C. 66 at p. 77, P.C. cited;

(4) the term "security of the state" is not limited to the defence of Ghana against a foreign power, and the powers of the Preventive Detention Act may be invoked where the basis of law is sought to be undermined and attempts are being made to cause disruption in the normal functioning of government;

(5) the Preventive Detention Act is to be distinguished from the Criminal Code, (Act 29), in that the code concerns itself with acts already committed whereas the Act is aimed at preventing the future commission of acts prejudicial to the safety of the state;

(6) Article 13 (1) of the Constitution imposes only a moral obligation upon the President of Ghana. Throughout the declaration, which is similar to the Coronation Oath of the Queen of England, the word "should" is used and not

"shall". The declaration does not constitute a bill of rights and does not create legal obligations enforceable in a court of law;

(7) the effect of Article 20 of the Constitution is that Parliament is sovereign and its legislative powers are qualified only with respect to the entrenched Articles thereof;

(8) the Preventive Detention Act, 1958, is therefore not contrary to the Constitution and Parliament is competent to pass such an act even in peace time.

Cases referred to:

(1) *R.* v. *Home Secretary, ex parte Greene* [1942] 1 K.B. 87; [1941] 3 All E.R. 104, C.A.

(2) *Liversidge* v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.

(3) *R.* v. *Home Secretary, ex parte Budd* [1942] 2 K.B. 14; [1942] 1 All E.R. 373, C.A.

(4) *Nakkuda Ali* v. *M. F. De S. Jayaratne* [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214, P.C.

APPEALS against a refusal of application for grant of *habeas corpus ad subjiciendum*. The facts are set out in full in the judgment of the Supreme Court.

Dr. J. B. Danquah for the appellants.

G. Bing (Attorney-General) with him *A. N. E. Amissah* for the respondents.

Korsah, C.J. delivered the judgment of the court. The appellants were arrested and placed in detention on the 10th and 11th November, 1959, under an order made by the Governor-General and signed on his behalf by the Minister of Interior under section 2 of the Preventive Detention Act, 1958.[1] The order reads:

"L.N. 310

THE PREVENTIVE DETENTION ACT, 1958

THE PREVENTIVE DETENTION ORDER (No.5) 1959

WHEREAS the Governor-General is satisfied that this Order is necessary to prevent the persons in the Schedule to this Order acting in a manner prejudicial to the security of the State:

Now THEREFORE, in exercise of the powers conferred on the Governor-General by section 2 of the Preventive Detention Act, 1958, it is hereby ordered as follows:

1. (1) This Order may be cited as the Preventive Detention Order (No.5), 1959.

(2) This Order shall take effect at 7 o'clock in the afternoon of 10th day of November, 1959.

2. (1) The persons described in the Schedule to this Order shall be taken into custody and detained under section 2 of the Preventive Detention Act, 1958.

(2) Subject to the power under section 3 of that Act to suspend, vary or revoke this Order, and subject to subsection (3) of section 5 of that Act, the period of which the persons described in the Schedule to this Order are to be detained shall be for a period of five years.

SCHEDULE

Name	Further Particulars
1. BAFFOUR OSEI AKOTO	... Senior Linguist to the Asantehene of House No. O.1. 141, Ashanti New Town, Kumasi.
2. PETER ALEX DANSO ALIAS KWEKU DANSO	... Lorry Dirver, of House No. M.E. 70, Kumasi.
3. OSEI ASSIBEY MENSAH	... Storekeeper, House No. M.E. 60, Ashanti New Town, Kumsi.
4. NANA ANTWI BUSIAKO ALIAS JOHN MENSAH	... "Nkofohene" of Kumasi of House No. O.B. 473 Mbrom, Kumasi.
5. JOSEPH KOJO ANTWI-KUSI ALIAS ANANE ANTWI-KUSI of Kumasi.	
6. BENJAMIN KWEKU OWUSU	Produce Manager, of House No. B.H. 149, Asafo, Kumasi.
7. ANDREW KOJO EDUSEI	... Auctioneer and Letter Writer of House No. O.1. 165, Ashanti New Town, Kumasi.
8. HALIDU KRAMO	... Transport Owner of House No. S. 51, Suame, Kumasi.

Made at Accra this 10th day of November, 1959.

By the Governor-General's Command.

A. E. INKUMSAH
Minister of the Interior"

It is admitted that the order is regular on its face, that it was duly signed by the Minister of Interior, and that the appellants are the persons named in it.

The main issues raised by counsel for the appellants are that:

(1) The learned judge acted in excess of jurisdiction in refusing the application without making an order for a formal return.

(2) By virtue of the Habeas Corpus Act of 1816 the court is required to enquire into the truth of the facts contained in "The Grounds" upon which the Governor-General was satisfied that the order was necessary to prevent the appellants from acting in a manner prejudicial to the security of the state.

(3) The Minister of Interior who signed the order for and on behalf of the Governor-General was actuated by malice.

(4) The grounds upon which the appellants were detained do not fall within the ambit of the expression "Acts prejudicial to the security of the state".

(5) By virtue of section 3 of the Criminal Procedure Code, Cap. 10 or the Laws or the Gold Coast (1951 Rev.) now section 1 of the Criminal Procedure Code, 1960 (Act 30), the Governor-General is precluded from exercising the powers conferred on him under the Preventive Detention Act, to make an order for the arrest and detention of the appellants without trial except in accordance with the Criminal Procedure Code.

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

(7) The Preventive Detention Act not having been passed upon a declaration of emergency is in violation of the Constitution of the Republic of Ghana.

On the first issue, it is observed that the application of the appellants for the writ of *habeas corpus* is supported by affidavit with exhibits disclosing all the material

facts essential to determining the regularity of the order, namely: (*a*) the order of detention, (*b*) the written information furnished in accordance with the requirements of the Act, (*c*) the written representations by the detainees to the Governor-General, and (*d*) the reply of the Governor-General.

There is little wonder, therefore, that upon service of the copies of the motion and other relevant papers on the respondents, the Permanent Secretary of the Ministry of Interior, on behalf of the Minister, filed an affidavit which briefly stated the following additional facts:

> "1. Since 1st July, 1959, matters relating to preventive detention, other than the statutory power conferred on the Minister responsible for Defence by section 3 (2) of the Preventive Detention Act, 1958, have been placed within the portfolio of the Minister of the Interior.
> 2. I am authorised to say that the Preventive Detention Order (No.5) 1959 (L.N. 310) was made by the Governor-General in good faith under section 2 of the Preventive Detention Act, 1958, and the making therefore was duly signified in good faith by the Minister of the Interior.
> 3. The reason for the making of the said Order is as set out in the recital thereto, namely that in accordance with the provisions of section 2 of the Preventive Detention Act, 1958, the Governor-General is satisfied that the said Order is necessary to prevent the persons detained acting in a manner prejudicial to the security of the State. The grounds of detention served upon the said detainees contain particulars of the previous acts or conduct upon which the conclusion of the Governor-General is based."

In these circumstances we consider that all the facts relevant for determining whether the writ should issue or not having already been disclosed in the affidavits filed, a formal return was unnecessary and that the learned judge was entitled to dispose of the application upon the affidavits. It is not disputed that (*a*) the appellants belong to the class of persons to whom the Preventive Detention Act applies, (*b*) that they are the persons mentioned in the order, and (*c*) the order was made by the competent authority.

It was further contended on behalf of the appellants that where a judge does not order a release under rule 14 of Order 59 of the Supreme [High] Court (Civil Procedure) Rules, 1954, he is obliged to order a formal return to the writ. We do not accept this view as a correct interpretation of rule 14 which reads:

> "On the hearing of the application the Judge may, in his discretion, order that the person restrained be released, and the order shall be a sufficient

> warrant to any gaoler, constable or other person for the release of the person under restraint."

We are clearly of opinion that rule 14 does not make it compulsory that in every case the judge should order a formal return. In this view, we are fortified by what Goddard, L.J. (as he then was) said in *R.* v. *Home Secretary, ex parte Greene*:[2]

> "To avoid any misunderstanding, I desire to add that, both in the present case and in *R.* v. *Home Secretary, ex p. Lees* the applicants themselves exhibited to their affidavit copies of the orders under which they were detained, and no question was raised as to the accuracy of the copies. However, cases may arise where persons who are detained, whether under defence regulations or otherwise, do not, and perhaps cannot, inform the court of the order or warrant under which they are detained. In such a case, if the court sees fit to grant an order *nisi* or summons to show cause, it will be necessary for the person who has the custody of the prisoner to make an affidavit exhibiting the order or warrant under which he detains the prisoner. Although, as I have pointed out above, the old procedure did not require a return to be verified, at any rate in the first instance, modern practice does require an affidavit, and care should be taken in these cases under the regulations to exhibit the actual order signed by the Secretary of State, which alone is the authority for detaining the prisoner."

On the second issue, the contention is that by virtue of section 3 of the Habeas Corpus Act, 1816,[3] the court was bound to enquire into the truth of the facts alleged in the grounds upon which the Governor-General was satisfied that the order was necessary to prevent the appellants acting in a manner prejudicial to the security of the state. There is of course the preliminary question whether the Habeas Corpus Act, 1816,[3] is a statute of general application within the meaning of section 14 of the Supreme Court Ordinance, 1876.[4] In our opinion it is a statute of general application, because the act was law in force in England on the 24th July, 1874, and there are no local circumstances which can possibly operate to exclude its application in this country. The question the Habeas Corpus Act, 1816, raises is one of procedure. At common law the return to a writ of habeas corpus could not be controverted but the 1816 Act permitted the court to enquire into the truth of the facts set forth in the return if ordered, except in cases where a detention order is made for the security of the state and the administrative plenary discretion is vested in the person making the order as decided in *Liversidge* v. *Anderson*.[5] Following the above decision, we hold that although the Habeas Corpus Act, 1816, is a statute of general application it does not apply in this case

because the Preventive Detention Act under which the appellants are detained vests plenary discretion in the Governor-General, (now the President), if satisfied that such order is necessary. The court could not therefore enquire into the truth of the facts set forth in the grounds on which each appellant bas been detained.

In this matter we are guided by the legal principles enunciated in the decisions in *Liversidge* v. *Anderson;*[5] *R.* v. *Home Secretary, Ex parte Greene*;[6] *R.* v. *Home Secretary, Ex parte Budd.*[7] In these cases the question raised was whether it was open to any court to enquire into the reasonableness of the belief of the Secretary of State in the matters in which regulation 18B (1) required him to have reasonable cause to believe before a detention order could be made. It will be noted that under the Preventive Detention Act, the Governor-General, if satisfied that it is necessary, may make the order for the detention of the person or persons named. On this point, Lord Greene, M.R. in *ex parte Budd, supra,* said:

> "It is clear that, if the courts have no power to inquire into the reasonableness of the belief of the Secretary of State in the matters in which he is required to believe, they can have no power to inquire into the grounds of his satisfaction in regard to matters of which he is required to be satisfied."[8]

We may also refer to the opinion of the majority of the House of Lords on this issue in *Liversidge* v. *Anderson.*

Viscount Maugham said:

> "The result is that there is no preliminary question of fact which can be submitted to the courts, and that, in effect, there is no appeal from the decision of the Secretary of State in these matters, provided only that he acts in good faith."[9]

Lord Macmillan said,:

> "...I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law may disagree with him..."[10]

Lord Wright said:

> "On the view which I have formed that there is under reg. 18B no triable issue as to reasonableness for the court, these authorities

> cease to be of any value. As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds, and to act accordingly. No outsider's decision is invoked nor is the issue within the competency of any court."[11]

Lord Romer said:

> "...if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted unless it can be shown that he was not acting in good faith, and the onus of showing this would lie upon the plaintiff."[12]

Upon the principles so clearly enunciated by the majority of the House of Lords in *Liversidge's case,* Lord Greene said in *ex parte Budd*:

> "It is scarcely necessary to say that language used in earlier decisions which may suggest that the courts may inquire into the reasonableness of the belief of the Secretary of State cannot now be regarded as correct."[13]

Upon the production of the order the only question which has to be considered is its legality; if the order is lawful the detention is lawful.

Thirdly, even if good faith is impugned, it is clear from the decided cases, that the burden of proof is on the person who alleges it, and not on the constituted authority, in this case the Minister of Interior, to disprove it. In this matter the main ground alleged for impugning malice is that on the next day after their detention the Minister informed the appellants that the grounds of their detention would be sent to them, and that they would be permitted to see their lawyers to make representations, and further that the government wished to do them as much justice as possible. It is further alleged that the Minister addressed the appellants thus: "Some of you may not be guilty of the crimes charged, and if you make representations your cases would be considered," and further that in answer to a remark by one of the appellants that he had seen the "warrant of arrest" with many names on it; some of them struck out, the Minister replied: "You sit down in Kumasi and Alex Osei holds a pistol in each hand shooting at women in the streets of Kumasi. When we were fighting the British for freedom we were arrested." Upon this, it is urged that because there is no return filed or no denial by the Minister concerned there is therefore evidence from which malice must be inferred.

Assuming that the Minister made the statement attributed to him, it cannot be held to be evidence of malice; on the contrary it could support the view that the Minister acted promptly by informing the appellants of their rights and advised them that under the Act they were entitled to make representations to the Governor-General, which advice the appellants acted upon. The fact that their representations to the Governor-General did not result in their release is not evidence of malice nor is the allegation that the Minister had accused them of complicity in street shooting in Kumasi. We agree with the opinion expressed by the learned judge of the court below that these allegations do not constitute evidence of bad faith or malice.

The courts must presume that high officers of state have acted in good faith in the discharge of their duties. It will be wrong in principle to enquire into the *bona fides* of Ministers of State on a mere allegation of bad faith by a petitioner. The court can only look into allegations of bad faith if there is positive evidence, which is singularly absent in this case—*Nakkuda Ali* v. *M. F. De* S. *Jayaratne*.[14]

It is fourthly contended that the grounds for the detention served on the appellants did not disclose that they were suspected of preparing to commit acts prejudicial to the security of the state, within the ordinary meaning of the expression "security of state" and that the intention of the Preventive Detention Act was to prevent persons acting in a manner prejudicial to the defence of this country. i.e. from foreign power.

It is clear from section 2 of the Preventive Detention Act, 1958, that power to make a detention order is not limited to the defence of Ghana against a foreign power; on the contrary the section specifically empowers the Governor-General to make such an order in respect of:

> "(*a*) the defence of Ghana,
> (*b*) the relations of Ghana with other countries, or
> (*c*) the security of the State:"

We cannot therefore accept the narrow interpretation which counsel for the appellants seeks to place on the purpose of the Act. We agree with appellants' counsel that as a guide to what acts may be adjudged to fall within the expression "the security of the state" one may look at those offences under Part IV, Chapter 1, of the Criminal Code, 1960,[15] or under Title 23 of the Criminal Code, Cap. 9,[16] now repealed, under the heading "Offences against the safety of the State." It will be observed that this includes a large number of offences which have nothing to do with the defence of Ghana or with foreign countries, but in respect of which the Governor-General may if satisfied that the order is necessary, make an order under the Preventive Detention Act, 1958. The object of the Act is to

restrain a person from committing a crime which it is suspected he may commit in the future. Its aim is to prevent the commission of acts which may endanger public order and the security of the State.

The grounds for the detention of each of the appellants attached to the affidavit in support of the application for *habeas corpus* are:

1.

"BAFFOUR OSEI AKOTO

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in these Regions.

2.

PETER ALEX DANSO alias KWAKU DANSO

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in October 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with other persons who have adopted a policy of violence as a means of achieving political aims in those Regions.

3.

OSEI ASSIBEY MENSAH

Acting in a manner prejudicial to the security of the State, in that you have advocated and encouraged violence in the Ashanti and Brong-Ahafo Regions and generally have adopted and have associated with other persons who have adopted a policy of violence as a means of achieving political aims in those Regions.

4.

NANA ANTWI BUSIAKO alias JOHN MENSAH

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in October, 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with other persons who have adopted, a policy of violence as a means of achieving political aims in those Regions.

5.

JOSEPH KOJO ANTWI-KUSI alias ANANE ANTWI-KUSI

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in September, 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with others who have adopted, a policy of violence as a means of achieving political aims in those Regions.

6.

BENJAMIN KWAKU OWUSU

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in those Regions.

7.

ANDREW KOJO EDUSEI

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in April, 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with other persons who have adopted, a policy of violence as a means of achieving political aims in those Regions.

8.

HALIDU KRAMO

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in those Regions."

It cannot be denied that in these circumstances, the Governor-General may order the detention of these persons if satisfied that the order is necessary to prevent the persons concerned from acting in a manner indicated which cannot fail but be prejudicial to the security of the state. Where the very basis of law is sought to be undermined and attempts are made to create a state of affairs which will result in disruption, and make it impossible for normal government to function, the Governor-General would be justified in evoking the special powers under the

Preventive Detention Act to prevent those whom he is satisfied are concerned in it, acting in a manner prejudicial to the security of the state.

Fifthly, in our view, section 3 of the Criminal Procedure Code,[17] to which we have been referred which reads:

> "(1) All offences under the Criminal Code shall be enquired into, tried and otherwise dealt with according to the provisions of this Code.
> (2) All other offences shall be enquired into, tried and otherwise dealt with according to the provisions of this Code, subject, however, to the provisions of any Ordinance regulating the manner or place of enquiry into, trial or other dealing with such offences"

merely makes provisions for trial of offences committed, but cannot operate to restrain the exercise of powers of detention for prevention of acts calculated to be prejudicial to the safety of the State. The mischief aimed at by the Preventive Detention Act is in respect of acts that may be committed in the future, whereas the Criminal Code concerns itself with acts which have in fact been committed.

By notice filed during the pendency of this appeal, counsel for the appellants invoked the powers of the Supreme Court under section (2) of Article 42 of the Constitution to declare the Preventive Detention Act invalid on the ground that it was made in excess of the power conferred on Parliament.

Counsel submitted:

> "1. That the Preventive Detention Act, 1958, was made in excess of the power conferred on Parliament by or under the Constitution with respect to Article 13 (1) of the Constitution, that until that Article is repealed by the people, (*a*) freedom and justice shall be honoured and maintained, (*b*) no person should suffer discrimination on grounds of political belief, and (*c*) no person should be deprived of freedom of speech, or of the right to move and assemble, or of the right of access to the courts of law.
>
> 2. That the Preventive Detention Act, 1958, is contrary to the Declaration of Fundamental Principles solemnly subscribed to by KWAME NKRUMAH on accepting the call of the people to the high office of PRESIDENT OF GHANA and to which HE adhered upon that declaration, namely that "The powers of Government spring from the will of the people and should be exercised in accordance therewith", in particular, with reference to the honouring and maintaining of freedom and justice, prohibition of discrimination on grounds of political belief, non-

deprivation of the freedom of speech, or of the right to move and assemble without hindrance or of the right of access to the courts of law.

3. That the Preventive Detention Act, 1958, which was not passed upon a declaration of emergency or as a restriction necessary for preserving public order, morality or health, but which nevertheless placed a penal enactment in the hands of the President to discriminate against Ghanaians, namely to arrest and detain any Ghanaian and to imprison him for at least five years and thus deprive him of his freedom of speech, or of the right to move and assemble without hindrance, or of the right of access to the courts of law, constitutes a direct violation of the Constitution of the Republic of Ghana and is wholly invalid and void."

Article 42 (2) reads:

"The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution and if any such question arises in the High Court or an inferior court, the hearing shall be adjourned and the question referred to the Supreme Court for decision."

As the legal issues arising from those questions could not properly be raised and or determined at the High Court we deemed it appropriate to grant the leave sought, and the issues have been accordingly argued in the course of this appeal.

All the grounds relied upon appear to be based upon Article 13 of the Constitution. It is contended that the Preventive Detention Act is invalid because it is repugnant to the Constitution of the Republic of Ghana, 1960, as Article 13(1) requires the President upon assumption of office to declare his adherence to certain fundamental principles which are:—

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

That freedom and justice should be honoured and maintained.

That the union of Africa should be striven for by every lawful means and when attained, should be faithfully preserved.

That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity.

That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.

That Chieftaincy in Ghana should be guaranteed and preserved.

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

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance or of the right of access to courts of law."

This contention, however, is based on a misconception of the intent, purpose and effect of Article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable.

We may now consider the effect of the Constitution of the Republic of Ghana, 1960, with regard to the Preventive Detention Act, 1958, enacted by the Parliament of Ghana under the Ghana Constitution Order in Council, 1957.[18] We observe, that by the Constitution (Consequential Provisions) Act 1960[19] enacted by the same Constituent Assembly which enacted the Republican Constitution, the Preventive Detention Act, 1958 was amended thus: In section 2, in subsections (3), (4) and (5) of section 3, and in subsection (2) of section 4, for "Governor-General" in each place where it occurs substitute "President". Also that by Article 40 of the Republican Constitution, 1960, the laws of Ghana comprise, *inter alia,* enactments in force immediately before the coming into operation of the Constitution, *a fortiori,* the Preventive Detention Act, 1958 being law in force in Ghana at the time the Constitution was enacted and having been amended by the same body which enacted the said Constitution, it cannot be denied that it must have been the intention of the people of Ghana by their representatives gathered in a Constituent Assembly to retain the Preventive Detention Act, 1958 in full force and effect. The contention that the legislative power of Parliament is limited by Article 13 (1) of the Constitution is therefore in direct conflict with express provisions of Article 20. We hold that the Preventive Detention Act does not constitute a violation of the Constitution of the Republic of Ghana, consequently it is neither invalid nor void.

We are of opinion that the effect of Article 20 of the Constitution which provides for "The Sovereign Parliament", is that subject to the following qualifications, Parliament can make any law it considers necessary. The limitations are that (*a*) Parliament cannot alter any of the entrenched articles in the Constitution unless

there has been a referendum in which the will of the people is expressed; (*b*) Parliament can however of its own volition, increase, but not diminish the entrenched articles; (*c*) the articles which are not entrenched can only be altered by an Act which specifically amends the Constitution.

It will be observed that Article 13 (1) is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the Constitution where a duty is imposed the word "shall" is used, but throughout the declaration the word used is "should". In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.

On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of Article 13 (1) do not create legal obligations enforceable by a court of law. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

We do not accept the view that Parliament is competent to pass a Preventive Detention Act in wartime only and not in time of peace. The authority of Parliament to pass laws is derived from the same source, the Constitution, and if by it, Parliament can pass laws to detain persons in wartime there is no reason why the same Parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the State in peace time. It is not only in Ghana that Detention Acts have been passed in peace time.

Finally, the contention that the Preventive Detention Act, 1958, is contrary to the Constitution of the Republic of Ghana is untenable and for the reasons indicated the appeal is dismissed.

Appeal dismissed.

END NOTES

[1]Act No. 17 of 1958.
[2][1941] 3 All E.R. 104 at p. 123.
[3]56 Geo 3, c. 100.
[4]No. 4 of 1876.

[5][1941] 3 All E.R. 338, H.L.
[6][1941] 3 All E.R. 3104 C.A.
[7][1942] 1 All E.R. 373, C.A.
[8]*Ibid* at p. 374.
[9][1941] 3 All E.R. 338 at p. 348.
[10]*Ibid* at p. 370.
[11]*Ibid* at p. 378.
[12]*Ibid* at p. 384.
[13][1942] 3 All E.R. 373 at p. 375.
[14][1951] A.C. 66 at p. 77, P.C.
[15]Act 29
[16](1951 Rev.)
[17]Cap. 10 (1951 Rev.)
[18]No. 277
[19]8 & 9 Eliz. 2, c. 41.

51, 112, 118