THE JURISPRUDENCE OF GHANA'S 4TH REPUBLICAN CONSTITUTION

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A DISSERTATION PRESENTED TO THE FACULTY OF LAW, UNIVERSITY OF GHANA, LEGON, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE LLB. (HONS.) DEGREE

FACULTY OF LAW

UNIVERSITY OF GHANA

LEGON

JUNE, 2011

THE JURISPRUDENCE OF GHANA'S 4TH REPUBLICAN CONSTITUTION

LONG ESSAY BY

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LLB 2011

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SIGN: …….

To the GOD of Natural Law

TABLE OF CONTENTS

TABLE OF REFERENCES

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TABLE OF CASES

TABLE OF STATUTES

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ACKNOWLEDGMENT

My sincerest thanks to:

Dr. Appiagyei-Atua: for his excellent assistance and supervision. Your scholarship cannot go unmentioned.

Ex-President J.J. Rawlings, Justice S.A. Brobbey (Supreme Court) and Prof. E.V.O. Dankwa: for accepting to be interviewed and permitting that your views be included in this research work.

Messrs Anthony Forson, Jr. (Member, Consultative Assembly) and Charles Stanley-Pierre (Chairman, Committee on State Policy of the Consultative Assembly): for accepting to be interviewed and permitting that your views be included in this research work. Your role in this research helped to settle the issue on whether the Indemnity Clauses were smuggled into the 1992 Constitution.

The friends in Parliament, Messrs Boateng, Sefah and Bismark: who helped me find the 'travaux préparatoires' of the 1992 Constitution when everybody seemed to think they were missing in all of Ghana. Bismark - you were wonderful in sticking all the numerous torn and scattered pieces together and running the copies.

Jossie: for all the miscellaneous help, including reading over the script and making the needed corrections!

God bless you all!

Chapter I

Introduction

What philosophy of law underlies Ghana's 4th Republican Constitution of 1992? What are the envisaged ends of law and justice under this Constitution? What are the envisaged governance structures and mechanisms to achieve these ends of law and justice? Is Ghana achieving these envisaged ends of law and justice? Does the nation have any need to re-examine its concepts and ideas of law and justice?

These questions are obviously relevant to both the ruler and the ruled; to the person administering justice and to the one seeking justice. These are questions that touch on the future, aspirations and development of the nation. They are questions that touch on the rights, "liberty, equality of opportunity and prosperity"[1] of the people and their posterity.

In legal enquiry these are questions of jurisprudence – legal philosophy. These questions are reposed in this research paper as what is "The Jurisprudence of Ghana's 4th Republican Constitution"?

But what is jurisprudence? What is its role in law? Of what use is a jurisprudential enquiry into a Constitution?

[1] *The Preamble, Constitution of the Republic of Ghana, 1992*

Archer and Apaloo JJ.A. in *Sallah v Attorney-General*[2] seemed to find scant use of jurisprudence in interpreting the constitution.

Archer J.A. remarked that:

> "No system of jurisprudence, however popular, be it analytical positivism, the pure theory or the historical can assist the courts in this country in their interpretation of the Constitution … The constitution is the safest leader of the army of judges – not esoteric legal philosophies".[3]

Apaloo J.A. expressed a similar opinion as:

> "The literature of jurisprudence is remote from the immediate practical problems that confront judges called upon to interpret legislation or indeed to administer any law."[4]

Adam Smith and other jurisprudence jurists have, however, pointed out some usefulness of jurisprudence. This has encouraged this present work of enquiry into the Jurisprudence of the 4th Republican Constitution.

Adam Smith opines that "Jurisprudence is the theory of the rules by which civil governments ought to be directed. It attempts to show the foundations of the different systems of government in different countries and to show how far they are founded in reason."[5] In another work he further says it is an inquiry "into the general principles which ought to be the foundation of the laws of all nations."[6]

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[2] *Sallah v. Attorney-General*, 2G&G 739(2d) 1319
[3] Ibid., *Sallah v. Attorney-General* per Archer @1334
[4] Ibid., *Sallah v. Attorney-General* per Apaloo @1366
[5] Adam Smith, *Lectures on Jurisprudence: Report of 1762-3* (Clarendon Press, Oxford, 1987) Vol.1 p.5
[6] Adam Smith, *Juris Prudence – Notes from the Lectures on Justice, Police, Revenue, and Arms Delivered In the University of Glasgow. MDCCLXVI. Report Date 1766.*

Other scholars and jurists have also written in support of the need for jurisprudence. Llewellyn is of the opinion that "Jurisprudence means to me any careful and sustained thinking about any phase of things legal, if the thinking seeks to reach beyond the practical solution of an immediate problem in hand. Jurisprudence thus includes any type at all of honest and thoughtful generalization in the field of the legal."[7]

C.K. Allen shows the place of jurisprudence when he said "Jurisprudence is the scientific synthesis of laws' essential principles."[8]

Roscoe Pound also contributed to the issue when he said "Jurisprudence means 'the science of law' i.e. 'an organized and critically controlled body of knowledge both of legal institutions and legal precepts and of the legal order, that is, of the legal ordering of society."[9]

It is assumed that in all communities which reach a certain stage of development there springs up a social machinery of abstract rules we call law.[10] It is therefore to be expected that there shall be a strong interaction between these abstract rules, the machinery for their application, and the life of the people. These interactions culminate in the creation of a legal system for the settlement of disputes and to secure an ordered existence for the community.

[7] Llewellyn, *Jurisprudence*, 1962, p.372, loc. cit. infra note 10 *B. Obinna, Okere*
[8] C.K. Allen, *Legal Duties,* 1931, p.19, loc. cit. infra note 10 *B. Obinna, Okere*
[9] Roscoe Pound, *Jurisprudence, Minnesota,* 1959, Vol. I, p.8, loc. cit. infra note 10 *B. Obinna, Okere*
[10] B. Obinna, Okere, University of Nigeria, Enugu: *The Relevance and Teaching of Jurisprudence*, p.28

The legal system will additionally be expected to be part of the social machinery used to enable planned changes and improvements in the organization of society to take place in an ordered fashion to achieve the ends of law and justice.[11]

J.W. Harris also describes the role of jurisprudence. He identified that the pressure of social needs that law satisfies vary from community to community. Jurisprudence, he points out, studies the methods by which these social needs are met rather than the particular and peculiar solutions proposed for each community.[12] It is therefore expected that the jurisprudence of law, justice and governance of any nation will be a major tool for the realization of the aspirations of the people and their posterity.

Jurisprudence involves an all embracing and critical examination of law – its origin, purposes, manifestations, efficacy, validity, sanction, justice and morality, universality or relativity of values, sovereignty, rights and duties, ownership and possession, status and legal personality. These are questions of immense relevance to the ordering and organization of any society[13].

Jurisprudence, according to J. W. Harris, foists on us the deepest questions about the nature of man or society, and causes us "… to take up an overt moral or political stance".[14]

Philosophers have long held the view that every man [and for that matter, every society], needs and has a philosophy as the totality of his ideas and convictions because reason is basic to and

[11] *Loc. cit.*
[12] *Op. cit. p.29*
[13] *Loc. cit*
[14] J.W. Harris, *Legal Philosophies, (*Butterworths, London, 1980). Preface.

characterizes man. "Man is by definition a rational creation, because he is, by nature, endowed with that mysterious faculty of reason"[15]; "*cogito, ergo sum"*[16] *(I think; therefore I am).*

Issues of the Research

The issues this research has attempted to deal with are:

1. With Ghana's constitutional set-goal of exercising "our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity"[17], it interrogates the philosophy of law, justice and politics that the framers of the 4th Republican Constitution had in mind when they put this document together.
2. The extent to which we have seen this philosophy "play out" in the operationalization of the Constitution,
3. Does this philosophy need rethinking in each generation to enable us achieve the set goal.

Goal of the Research

It is therefore the aim of this present work to investigate and document what it is that can be said to be the jurisprudential basis of law, justice and governance under Ghana's 4th Republican Constitution. It is to show the basis of the system of governance of our country under the 1992 Constitution, and the extent of consistent reasoning that founded our Constitution.[18]

[15] Nathaniel Micklem, *The Theology of Politics*, (Oxford, 1941), p.55.
[16] René Descartes, *Le Discours de la Methode, 1637*.
[17] Op. cit. supra note 1 *The Constitution, 1992*
[18] Ibid, supra note 5 *Adam Smith*

Methodology

1. Literature Review: the work was started with a general literature review which identifies key and relevant theories of law which could have influenced the framers of the constitution.
2. To answer the question of the specific philosophies of law behind the 1992 Constitution to achieve the goal of this research, answers were sought mainly from the pages of Ghana's 1992 Constitution, proceedings of the Consultative Assembly as well as some Supreme Court decisions.
3. Other sources were interviews with the following five key persons who were directly involved in the creation and operationalisation of the 1992 Constitution:
    i. Professor E.V.O. Dankwa who was a member of the Committee of Experts which wrote the proposed Constitution, an input document for the Consultative Assembly.
    ii. Justice S.A. Brobbey (Supreme Court) who was the chairman of the Legal and Drafting Committee of the Consultative Assembly which framed the final draft of the Constitution before it went through the referendum.
    iii. ex-President J.J. Rawlings, who as head of state, initiated and supervised the creation of the 1992 Constitution and also became the first President under the Constitution for its initial period of eight years.
    iv. Messrs Anthony Forson, Jr. (Member, Consultative Assembly) and Charles Stanley-Pierre (Chairman, Committee on State Policy of the Consultative Assembly). They were specifically interviewed on whether the Indemnity Clauses were "smuggled" into the 1992 Constitution.

Chapter Breakdown

The research report is presented with the following breakdown of chapters:

Chapter I Introduction: Justification of the research, issues addressed, goal of the research, methodology and its significance.

Chapter II Brief constitutional history of Ghana.

Chapter III Literature Review: Looks at various philosophies of law which could have influenced the framers of the Constitution.

Chapter IV The jurisprudence of the US and UK Constitutions: Looks at the effects on their countries and provides the basis for comparison with the jurisprudence of Ghana.

Chapter V The jurisprudence of Ghana's 4th Republic Constitution: interrogates the jurisprudence of the Constitution through the Constitution itself, proceedings of the Consultative Assembly, Court cases and interviews with two key participants in the creation of the constitution and a former head of state.

Chapter VI Conclusion: Summary of research findings.

Chapter VII Recommendations to achieve the goals of the Constitution

Appendix: Jurisprudence in operation. Summary of interviews with key persons in Ghana who were involved in the creation and operationalisation of the Constitution: Prof E.V.O. Dankwa, Justice S.A. Brobbey (Supreme Court) and ex-President J.J. Rawlings.

The significance of the Research

1. Documentation of the thematic 'theories of law' underpinning key Articles of the 4th Republican Constitution.
2. Documentation of the jurisprudential mindset of some key persons involved in the creation and operationalization of the Constitution.
3. Documentation of the opinions of some key persons involved in the creation and operationalization of the Constitution on whether Ghana is achieving the aims of the Constitution.
4. Provide material for possible injection into the teaching of jurisprudence in Ghana.
5. Recommendations on whether the philosophical basis of the Constitution needs a rethinking in our generation for the refocusing of law, justice and governance on the goals of rights, liberties and prosperity of the people and their posterity.
6. Provide material for further research into the jurisprudential basis of the major Constitutions of Ghana before 1992 (discussed under the Constitutional History of Ghana in Chapter II).
7. Provide material for further research into the trajectory of jurisprudence in Ghana. This shall aim at further investigation of possible reasons for the history of jurisprudence in Ghana and, for that matter, the contribution of law to the current state of development of Ghana, as well as how law can further contribute to the desired development of Ghana.

Chapter II

The Making of the 4th Republican Constitution

I.1 A brief Constitutional History of Ghana

Ghana, situated in West Africa, is bordered on the south by the Atlantic Ocean, on the west by la Cote d'Ivoire, north by Burkina Faso and east by the Republic of Togo. It has a land mass area of 238,533 sq. km. [19] and a population of 24,233,431 (according to 2010 population census data)[20].

Ghana gained independence from British rule on 6th March, 1957, and adopted this name. Prior to this the territories of what we call Ghana now consisted of the Gold Coast, Ashanti, the Northern Territories of the Gold Coast, and Togoland under United Kingdom Trusteeship.

The British Crown is said to have assumed jurisdiction of the Gold Coast in 1821[21]. The history of the four centuries before this event is described to be one of shifting of populations, in which tribal systems were modified by wars and invasions and also by the

[19] Online: Ghana's Official Website <http://www.ghana.gov.gh/> last visited April 1, 2011.
[20] Dr. Grace Bediako, Government Statistician, report on Preliminary Results of Ghana's 2010 Population Census, *The Daily Graphic* (February 4, 2011) p. 1
[21] F.A.R. Bennion, *The Constitutional Law of Ghana,* (Butterworth & Co Ltd., London, 1962) p.3

activities of traders [including slavery] from almost every European country[22]. The Colony is said to have settled after the Fanti Bond of 6th March, 1844[23] [24].

The major Constitutions under which the Gold Coast (pre-independence) and Ghana (post-independence) have been governed have been documented as follows:[25] [26] [27] [28]

1916 – Clifford Constitution

1925 – Guggisberg Constitution

1946 – Burns Constitution

1950 – Coussey Constitution

1954 – Nkrumah Constitution

1957 – Independence Constitution

1960 – [1st] Republican Constitution

1966 – 24th February, Military Coup Proclamation – National Liberation Council (NLC)

– up to 1st October, 1969

1969 – 2nd Republican Constitution

1972 – 13th January, Military Coup Proclamation – National Redemption Council (NRC)

– up to 9th October, 1975

1975 – Military Coup Proclamation – NRC (Establishment) Proclamation (Amendment)

[22] Loc. cit.
[23] David Kimble, A Political History of Ghana. The Rise of Gold Coast Nationalism – 1850-1928 (Clarendon Press, Oxford, 1963)
[24] Adu Boahen, Ghana: Evolution and Change in the Nineteenth and Twentieth Centuries (Longman Group Ltd., London, 1975)
[25] Op. cit. supra note 21 F.A.R. Bennion
[26] Kofi Kumado and S.O. Gyandoh Jr. (editors), Gyandoh and Griffiths' Sourcebook of the Constitutional Law of Ghana, 2ed. (Black Mask Ltd., Accra, 2009) – 1 G&G 1 (2d), 1 G&G 707 (2d).
[27] S.Y. Bimpong-Buta, *The Role of the Supreme Court In The Development of Constitutional Law In Ghana,* (Advanced Legal Publications, Accra, 2007)
[28] Maxwell Opoku-Agyemang, *Constitutional Law and History of Ghana,* 2009

Decree, 1975 (NRCD 360) -- (SMC I)

1978 – 5th July, Military Coup Proclamation – Supreme Military Council -- (SMC II)

1979 – 4th June, Military Coup Proclamation – Armed Force Revolutionary Council (AFRC) – up to 24th September, 1979.

1979 – 3rd Republican Constitution

1981 – 31st December, Military Coup Proclamation – Provisional National Defence Council (PNDC) – up to 7th January, 1992.

1992 - 4th Republican Constitution - The Constitution of the Republic of Ghana, 1992

I.2 Creating the Constitution

The 3rd Republican Constitution was suspended when Dr. Hilla Limann's government was overthrown by the PNDC, led by Flt. Lt. John-Jerry Rawlings on 31st December, 1981. Ghana was therefore governed under a new constitution, the Provisional National Defence Council (Establishment) Proclamation, 1981 (P.N.D.C.L.42), until 1992.

By 1992 the post-independence governance experience of Ghana had been characterized by coups d'état and revolutions. ('Revolution' as in Kelsenite terms as a change not anticipated by the Constitution - as used in *Mitchell v DPP*[29], *Sallah v A-G*[30], *The Lakanmi Case*[31], *Ekwam v Pianim (No 2)*[32]. Ghana had been governed under military constitutions for 60% of its post-independence history. It was therefore not surprising

[29] *Mitchell and Ors v DPP and Anor [1986] LRC (Const)* per Haynes, P. @p.47e-f
[30] *Sallah v. Attorney-General, 2G&G 739(2d)* per Anin J.A. @1337
[31] *E.O. Lakanmi and Kikelomo Ola v The Attorney-General (Western State)* S.C. 58/69 (unreported) - Nigeria
[32] *Ekwam v Pianim (No 2) & Ors 2G&G 1825(2d) per Acquah JSC @2173 per Atuguba JSC @2180*

that throughout the regime of the PNDC, there were agitations from the people and organized groups like the Ghana Bar Association and Christian Churches for a return to civilian rule. Additional pressure came to bear on the PNDC for a return to civilian rule when it adopted economic policies with the assistance of the World Bank and International Monetary Fund. The liberalizing tendencies around the world generated by the collapse of communism in the former Soviet Union and Eastern Europe also produced additional pressures for a return to civilian rule[33].

The PNDC decided to return the country to civilian rule due to the "cumulative effect of its own programmes and the internal and external pressures". This decision resulted in the making of the 4th Republican (1992) Constitution. By "its own programmes" is meant the search of the PNDC "for a true democratic form of government for the country, based on mass participation in decision making".[34]

The PNDC which had in 1982 set up the National Commission for Democracy (NCD) [possibly as a successor for the country's former electoral commission] subsequently gave it an additional function to pursue its "democratic objectives". The NCD, chaired by Justice D.F. Annan, a member of the PNDC, is therefore said to have laid the groundwork for making the 1992 Constitution.

The NCD took steps to demarcate the country into districts, electoral areas, zones and units for local government purposes. The NCD launched a pamphlet, known as the **Blue**

[33] Kwadwo Afari-Gyan, *The Making of the Fourth Republican Constitution of Ghana,* (Friedrich Ebert Foundation, Ghana Office, Accra, 1995)
[34] Ibid. Kwadwo Afari-Gyan

Book, in July 1987. In this it laid down a framework for a new system of local administration. It also spelt out the modalities for popularly electing representatives to District Assemblies as local government bodies. It carried out a registration of the country's voting population of persons who were 18 years or older between October and November, 1987. As the last stage of these initial steps the NCD invited the Ghanaian public to submit views on the country's future system of government[35].

The stage was therefore set for the participation of Ghanaians in the making of the 1992 Constitution. The NCD conducted elections in 1988/1989 to the District Assemblies. The District Assembly was conceived by the PNDC as the highest political authority at the district level with deliberative, legislative and executive jurisdiction in their specified areas. It was to have responsibility for the overall development of the local area.

Between 5th July and 9th November, 1990, the NCD held public seminars in all the ten regions of the country. The aim was to solicit the views of individuals and organizations on the nature, scope, and content of the future constitutional order. The seminars were well-attended and the proceedings were widely publicized on radio and television and in the newspapers. Certain concrete things emerged from the seminars. For example, while it was well known that the PNDC was not favourably disposed towards party politics, the seminars brought it out clearly that multi-party politics had strong countrywide support[35].

The NCD published a report of its findings entitled "Evolving a True Democracy" in 1991. In it the NCD admonished, among others, that Ghana's new constitution "must

[35] Ibid. Kwadwo Afari-Gyan

reflect the experiences of the past, capture the energy and dynamism of the present, and project a future that is creative and directed by a clear vision of a better life for those to come"[36].

The PNDC accepted the NCD report and tasked a Committee of Experts, chaired by Dr. S.K.B. Asante, to formulate proposals for a new constitution. This committee was formed on 17th May, 1991, and presented their report to the government on 31st July, 1991. For its input, the Committee of Experts had specific directions from the PNDC for provisions in the proposed constitution. Among others, these included a president and prime minister [split] executive and the District Assembly concept. Additional inputs were the NCD report and the past Constitutions of Ghana (1957, 1960, 1969 and 1979).

The PNDC accepted the proposals for a new constitution produced by the Committee of Experts. A "broad-based national consultative body", the Consultative Assembly, was then convened to produce a proposed constitution.

The Consultative Assembly [1992 Constitution] had a total membership of 260. It was made up of: 117 persons elected by the District Assemblies (including Municipal and Metropolitan Assemblies) and 121 persons elected by 62 identifiable bodies (including Fishermen, Taylor and Nursing Associations, etc.) and not more than 22 persons appointed by the PNDC. Two of the identifiable bodies – the Ghana Bar Association (GBA) and the National Union of Ghana Students (NUGS) – refused to send representatives to the Assembly. The Assembly was thus composed of 258 members.

[36] Ibid. Kwadwo Afari-Gyan

Inaugurated on 26th August, 1991, the Consultative Assembly submitted a draft constitution to the PNDC on 31st March, 1992. Significant changes were made to the proposal for the new constitution submitted by the Committee of Experts. Notably was the rejection of the president/prime minister "split" executive directed by the PNDC to be a provision in the new constitution. The PNDC nonetheless accepted the draft constitution, the work of the Consultative Assembly, without any changes.

An Interim National Electoral Commission conducted a nationwide referendum on the draft constitution on 28th April, 1992. The Referendum question was:

> *Do you approve of the draft constitution presented by the Consultative Assembly to the PNDC on March 31, 1992 and published in the Gazette as the Constitution of the Republic of Ghana to come into force with effect from January 7, 1993?*

The constitution was approved in the referendum by 92.6% of the valid votes cast.[37]

Following this approval the ban on political party activity was lifted on 15 May, 1992; presidential elections followed on 3 November; parliamentary elections were held on 28 December; and Ghana's Fourth Republic was inaugurated on 7 January, 1993, when the new constitution [the 4th Republican Constitution] came into effect[38].

[37] Ibid. Kwadwo Afari-Gyan
[38] Ibid. Kwadwo Afari-Gyan

Chapter III

Literature Review – The Philosophical Options

II.1 Some Common Theories of Law

Standing Orders number 116 of the Consultative Assembly provided for the Committee of Experts' assistance to the Assembly. When the Speaker, Pe Rowland Adiali Ayagitam II (Chiana Pio), put the question whether this assistance should be sought, Dr. Tony Aidoo (Committee for the Defence of the Revolution - CDR), in agreeing with Mr. Martin Amidu (Chair of the House Committee and CDR representative), said of the proposal for the new constitution:

> "… seventy-five percent of that document is based on their **philosophical arguments** …"[39] (emphasis mine).

Before breaking into specialized committees, members of the Consultative Assembly were asked to speak on the general principles underlying the constitution. In making their contributions Prof. Kwame Arhin (PNDC appointee) and Mr. Julius D. Fummey (Akatsi District Assembly) said respectively[40]:

> "I understand by general principles, the general, fundamental assumptions that ought to underlie the proposed constitution of Ghana … Taken together, the

[39] Kwadwo Afari-Gyan, *The Making of the Fourth Republican Constitution of Ghana,* (Friedrich Ebert Foundation, Ghana Office, Accra, 1995), p.34
[40] Ibid. Kwadwo Afari-Gyan. pp.35-36

fundamental assumptions, the **aims and objectives** define the **character** or the **spirit** of the constitution …" (emphasis mine).

"I think at this preliminary stage, what we are expected to be talking about are the **general principles** underlying the constitutional proposals before us. At a later stage, we shall have the opportunity to grapple with the real details" (emphasis mine).

What were these "**philosophical arguments**" that could possibly have influenced the "**fundamental assumptions**", the "**aims and objectives**", the "**character"**, the "**spirit**" or the "**general principles**" underlying the 4th Republican Constitution? What jurisprudential thinking could have influenced the framers of the Constitution? What known theories, principles and philosophies of law were available and could have influenced the framers of the Constitution even if they set out only to perform a "down-to-earth task" as observed by Apaloo JA on the framing of Ghana's 2nd Republican Constitution[41]?

As seen from the foregone paragraph, in spite of the cynicism of Apaloo JA[42], some of the persons directly involved in the crafting of the Constitution believe the Constitution has a "spirit"

[41] Op. cit., *Sallah v. Attorney-General* per Apaloo @1365 *"What about the members of the Constituent Assembly itself? A good many of them are by any standards, distinguished scholars but the vast majority of them are men of average learning with worldly wisdom and informed by an intelligent understanding of the English language. How many of these persons would have read Kelsen or would have considered his … philosophic theories of any relevance in the discharge of the down-to-earth task which was assigned to them, namely, to draft a Constitution for Ghana in a language understandable, so to speak, by a man in the street?"*

[42] Loc. cit. *Sallah v Attorney-General* per Apaloo @1365

or "general principles"; what Adam Smith calls "foundation of the laws"[43]; or what I have called in this research "philosophies of law" or "jurisprudence".

The main philosophies of law discussed in this chapter include Natural Law, Legal Positivism, Realism, Sociological, Historical, Customary, and some theories of Rights. These are common philosophies that could have influenced framers of the 4th Republican Constitution.

In view of their relative remoteness from mainstream Ghanaian legal philosophies, Islamic law, Socialism and Marxism have been omitted here as possible sources of influence. However, Colonel Muammar Gaddaffi's "Third Universal Theory" is admitted as a possible influence on our Constitution. This is due to the revolutionary setting of the framing of the Constitution and the apparent alliance between the leaders of Ghana's revolution and the Great Socialist People's Libyan Arab Jamahiriya revolution at the time.[44]

II.1.i Natural Law

As a philosophy of law, Natural Law was derived from a general tendency to have a standard by which law and justice will be measured. It has evolved over time. However the string of justification has been derived from the assumption that man derives his

[43] Op. cit. supra note 5 Adam Smith

[44] Open and public assertions abound of Col. Gaddaffi's support of the 1981 Revolution in Ghana led by Flight Lt. Jerry Rawlings. See Online: <http://www.bbc.co.uk/news/world-africa-12585395>. Accessed 23rd April, 2011.

humanity from nature. It must therefore be in conformity with nature that we derive standards for our laws to preserve our humanness[45] [46] [47] [48] [49] [50].

Friedman, writing on Natural Law observed thus: "[t]he history of natural thought is a tale of the search of mankind for absolute justice and of its failure. Natural law has fulfilled many functions. Natural law has at different times been used to support any ideology."[51]

According to Lloyd[52] the essence of Natural Law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles constitute Natural Law. This, he says, is valid of necessity because the rules governing correct human conduct are logically connected with immanent truths concerning human nature. Natural Law is believed to be a rational foundation for moral judgment.

Natural law is thus described as consisting of a series of propositions derived from nature through a process of reasoning[53]. Law is seen by the Natural Law school to have a normative character with "ought" propositions. Law is therefore composed largely of prescriptive patterns of behavior with ethics and ideals having a role that may not be

[45] Lord Lloyd of Hampstead and M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 5ed. (Stevens & Sons, London, 1985)
[46] Raymond Wacks, *Philosophy of Law – A Very Short Introduction,* (Oxford University Press, London, 2006)
[47] R.W.M. Dias, *Jurisprudence,* 2ed. (Butterworths, London, 1964)
[48] L B Curzon, *JURISPRUDENCE Lecture Notes*, (Cavendish Publishing Limited, London, 1995)
[49] L B Curzon, *JURISPRUDENCE Q&A SERIES*, 3ed. (Cavendish Publishing Limited, London, 2001)
[50] CAVENDISH lawcards series: Jurisprudence, 3ed. (Cavendish Publishing)
[51] Friedmann, W., *Legal Theory* (Stevens and Sons (1967)) pp 95-97
[52] Op. cit. supra note 45 Lord Lloyd, p.93
[53] Op. cit. supra note 46 Raymond Wacks, p.18

minimized easily. "Natural Law" has therefore become a compendious term for the ideal element in law, serving as a fixed point of reference and comparison[54].

Developed over a period of more than 2,500 years, Natural Law has enjoyed the most lucid history over all philosophies of law. It has changed over time, but has never lacked constancy.

As early as the archaic ages of 5th Century Greek history, the philosopher **Helsiod** taught that law descended from the "gods" and is an order of peace founded on fairness. It obliges men to refrain from violence and to submit disputes to an arbiter. He pointed out the conflict of two orders of law (the "gods" and men), both claiming exclusive allegiance. This was a period of polytheism.

In the ensuing period of the creation of arts, crafts and industry, 5th Century Sophists (including Socrates, Plato, Aristotle, Protagoras and Antiphon) taught that Natural Law need not descend from the "gods", but can be discerned by human reason and insight. They reasoned that Law is a human invention, born of expediency and alterable at will. They postulated that Law must be reason, separated from passion. Reason must be made sovereign. Equity should be introduced to cure the hardships caused by the rigidity of law.

Over the classical Roman epoch (1st Century BC - 3rd Century AD), a period of philosophical thinking, the Stoics, taught that Natural Law should be derived through

[54] Op. cit. supra note 47 R.W.M. Dias, p.495

rationalism. Philosophers of this age included Zeno, Cicero, Ulpian and Seneca. They taught that laws are rational rules derived by men from reason in the universe. It is in the nature of men to derive good laws, they taught. Unjust law is therefore no law. Slavery, they taught is contrary to nature; they advocated a world-state.

The medieval period followed the era of the Stoics. This was the Scholastic period during which Judo-Christian doctrines dominated most of the known world. The rationalism of the Aristotelian era was combined with Christian dogma by philosophers like St. Augustine and St. Thomas Aquinas. Natural Law possibly enjoyed its most glamorous era in this epoch. They taught that Law is an ordinance of reason promulgated by him who has the care of the community. It has the essential characteristic of attempting to achieve the ultimate divine and eternal good of men. It is for the common good of the community. Unjust, unreasonable law is not law and must be resisted. Unless resisting it will create worse evil through scandal and disturbance.

St. Thomas Aquinas who dominated this period specifically taught that though the concept of law is unified, it could be divided into four categories: *lex aeterna*, *lex divina*, *lex naturalis* and *lex humana*. The *lex aeterna* is divine reason and wisdom known only to God for the direction of all movements in the universe. The *lex divina* is the law of God reduced into writing in the Scriptures. The *lex naturalis* is the incomplete, imperfect reflection of *lex aeterna* through human reason or the participation of the eternal law in rational creatures. The *lex humana* is the promulgated ordinance of reason for the common good and made by him who has care of the community.

With the waning of the church's influence on the state, the Classical period which followed the medieval period, was characterized by secularism. This was an age of reasoning devoid of Christian dogma. This period continued through the 18th Century. Philosophers of this era included Hugo Grotius, Thomas Hobbes, Spinoza, Pufendorf, Wolff, Montesquieu, Machiavelli, David Hume, Adam Smith, John Locke and Jean-Jacques Rousseau. In this era, Natural Law was made devoid of religion, and rather justified through the "social contract". At the roots, the political theory of the "social contract" thought was that "no man can be subjected to the political power of another without his own consent"[55]. What the individual consents to in the social contract differs according to the particular values of the contract theorist.

Law is the command of the sovereign for the protection of liberty, peace and prosperity of the individual (Locke, Montesquieu), or of the community (Rousseau), or of the state (Machiavelli).

Liberty, peace and prosperity are natural, self-evident and inalienable, they taught.

Bad law should therefore be resisted (Locke, Hobbes, Montesquieu).

The Sovereign should exercise self-restraint; he cannot be restricted because the community 'created' him through the "social contract" (Grotius, Pufendorf, Hobbes).

After a period of lapse for Natural Law due to Legal Positivism holding sway during the 19th Century, Natural Law saw a renaissance in the 20th Century. This was largely instigated by the aftermath of the world wars such as the *Nuremberg war trials*[56] of

[55] John Locke: *Two Treatises of Government, vol 2* cited in supra note 45 Lloyd

[56] *The Nuremberg Trials were a series of twelve military tribunal trials, involving over a hundred defendants and several different courts. They took place in Nuremberg, Bavaria, Germany from 1945 to 1949. They were held by the main victorious Allied forces of World War II, mainly for the prosecution of prominent leaders of the defeated*

senior Nazi officials. It became necessary to invoke laws that would make it possible to punish war offenders whose actions though cloaked by posited law, were considered morally reprehensible. One of the trials, for instance, considered the criminal responsibility of judges who enforced immoral [posited] laws.[57]

Theorists of the 20th Century Natural Law renaissance include Lon Fuller[58] and John Finnis[59].

Natural Law has always had to defend its appeal to higher morals to derive law; deriving the 'ought' from the 'is' in a normative sense[60]. Lon Fuller and John Finnis therefore sought to solve this "problem". They brought Natural Law into the 20th Century with their work of delimiting Natural Law's resort to the metaphysics in order to create the needed "moral standards" for law.

Lon Fuller therefore taught that law on its own, has an inner morality which can be derived without resorting to metaphysical sources. What is the minimum morality required to make law law? In analogous terms, a strict procedure may be followed to make a perfect table. Similarly, the procedural version of natural law can be determined and when followed, we can make laws that are morally good, he argued.

Nazi Germany. It included the trial of 21 of the most important captured leaders of Nazi Germany, though several key architects of the war (such as Adolf Hitler, Heinrich Himmler, and Joseph Goebbels) had committed suicide before the trials began. Online:
<http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.html> Accessed 23rd April, 2011.

[57] Loc. sit. Online: Nuremberg Trials

[58] Lon Fuller - *The Morality of Law* (1969), cited in supra note 45 Lloyd p.184

[59] John Finnis - *Natural Law and Natural Rights* (1980), cited in supra note 45 Lloyd p.203

[60] David Hume - *Treatise of Human Nature* (ed 1777), cited in supra note 45 Lloyd p.33

John Finnis on the other hand argued that humans normally tend to practically pursue what is reasonable and good for their dignified existence. Therefore to discover what is morally right, all we need to ask is "what is reasonable"? What "goods" do we need to lead fulfilling lives? Combining these "goods" with "practical reasonableness" could make us create the immutable and universal principles of natural laws. We need not resort to metaphysics, we need not to derive 'ought' from 'is', Finnis taught.

Natural Law has therefore, over the past 2,500 years, been taught to be the immutable standard by which our laws and rights can be measured, no matter how derived. They are thought to be self-evident, universal and inalienable.

II.1.ii Legal Positivism

Theorists in the Legal Positivism school identify law's necessary requirement for certainty, clarity and predictability as a basis for the rejection of the Natural Law school. They argue that the validity of any law should be traced to an objectively verifiable source. They refute the existence of any necessary connection between "law" and "morality". Laid down law, they argue, should be separate from the law as it morally ought to be[45 46 47 48 49 50].

Legal Positivism became predominant in the 19th Century against the background of the weakening of the Church's influence on world affairs. The period was also characterized by the growth of capitalism and the deification of the state, mostly in Eastern Europe.

This school generally holds that law is that which has been posited under the authority of the community. It is excluded from all norms which claim to have transcendental source. Law is what "is", not what "ought" to be.

Original proponents include Jeremy Bentham[61] [62] and John Austin[63]. Contemporary proponents include H.L.A. Hart[64], Hans Kelsen[65] and Joseph Raz.[66]

Jeremy Bentham criticized Natural Law as nothing but 'private opinion in disguise'. He described unwritten law as vague and uncertain. He advocated that through codification, posited law could deal with the chaos created by the Common Law through Natural Law.

The central feature of Austin's philosophy of law is that law is a command of the sovereign backed by sanctions. 'Positive Law' is a command emanating from the sovereign. Anything that is not a command is not law. This sovereign is a determinate human superior not in the habit of obeying a like superior, and habitually receives obedience from the bulk of the society. The sovereign is essential, indivisible and illimitable.

[61] J. Bentham - *A Fragment on Government*, cited in supra note 45 Lloyd p.272
[62] J. Bentham - *An Introduction to the Principles of Morals and Legislation (1970),* cited in supra note 45 Lloyd p.272
[63] J. Austin - *The Province of Jurisprudence Determined* (ed Hart (1954)), cited in supra note 45 Lloyd p.295
[64] H.L.A. Hart - *The Concept of Law,* cited in supra note 45 Lloyd p.269
[65] Hans Kelsen - *The Pure Theory of Law* (1934-1935), cited in supra note 45 Lloyd p.348
[66] Joseph Raz - *The Purity of the Pure Theory* (1981), cited in supra note 45 Lloyd p.385

The key questions Legal Positivism sets out to answer include 'what is law', 'what is the source of law' and 'what are its functions'?

Hart, on the other hand, shows the conceptual context in which law emerges and develops and the actual social practices of communities that are needed to explain the source of law. He sees law as a system of rules. All societies have social rules, which comprise of habits and obligations. The rules of obligation are further comprised of moral and legal rules. The legal rules are divisible into primary and secondary rules. Primary rules, as a result of human limitations, tend to proscribe the use of violence, theft, deception, etc. A legal system therefore must consist first of "primary rules." Primary rules however have the defects of uncertainty, rigidity and inefficiency. They are valid if they follow from the "secondary rules." We can view the evolution of a secondary rule structure as a sign that a legal system is maturing[67]. Secondary rules serve to remedy the deficiencies of primary rules. They fall into the categories of rules of recognition, rules of change and rules of adjudication. Hart thus provides answers to the question of the source of law. He identified a legal system as a system with (a) valid rules of obligations that are generally obeyed, including rules of recognition, and (b) officials accept and obey secondary rules from an 'internal point of view'.

He however admitted a minimum content of Natural Law to cater for the human frailties of 'vulnerability', 'approximate equality', 'limited altruism', 'limited resources' and 'limited understanding and strength of will'. These human frailties require rules to protect life and property and to ensure promises are fulfilled. This minimum content of natural law does not derive from morals and neither does it ensure a fair and just society.

[67]On-line: http://www.hku.hk/philodep/courses/law/Hart%20hnd05.htm date accessed: 10th April, 2011

Validity of the legal system is independent of its effectiveness. But for rules to be valid, the entire legal system must be effective. Hart therefore saw law as a complex social practice or set of practices.

Hans Kelsen in his support for the legal positivism school explained the source of law using a hierarchy of norms. Each norm is authorized by another norm. At the basis of every legal system is the Basic Norm (*Grundnorm*) or "constitution in the legal-logical sense" (*Verfassung im rechtslogischen Sinne*)[68] or Originary Norm (*Ursprungsnorm*)[69]. (This latter term he reportedly later dropped to remove any concept of time element of the *Grundnorm*). The validity of the *Grundnorm* cannot depend on any other norm. It exists only in 'juristic consciousness'. It is a non-juridical-norm; a premise (*Hypothese*)[70]. Kelsen compared it with *pacta sunt servanda* which he described as the most important norm of international customary law and which also formed part of the *Grundnorm* of International Law.[71] (Kelsen had previously considered *pacta sunt servanda* as the Grundorm of International Law). The Grundorm is presupposed, though not arbitrarily, by reference to whether the legal order as a whole is 'by and large' effective. It has no specific content as a legal construct. Law thus excludes that which cannot be objectively known – ethically cleansed from the impurities of morality, psychology, sociology and politics. Law has but one purpose: the monopolization of force.

[68] Julius Stone, *Legal System and Lawyers Reasoning*, (Standford University Press, Stanford, CA, 1964), p.124
[69] Abiola ojo, *The Search for a Grundnorm in Nigeria – The Lakanmi Case*, (Article - 1973), p.2
[70] François Rigaux, *Hans Kelsen on International Law*, European Journal of International Law (Vol. 9 (1998) No. 2), Online: http://207.57.19.226/journal/Vol9/No2/art6-02.html Last accessed 24April2011
[71] Loc. cit. François Rigaux

Joseph Raz argues that law is autonomous. It is the ultimate source of authority and can guide our behavior in a way that morality cannot do. Law is therefore pure, and must not be confused with the inevitable, desirable non-autonomous feature of judicial reasoning. Raz therefore saw law as a simple social fact. The identity and existence of a legal system may be tested by reference to three elements: efficacy, institutional character and sources. For Raz, the existence and content of every law may be determined by a factual enquiry about conventions, institutions and the intentions of participants in the legal system. Law is therefore pure and devoid of morality.

Under legal positivism therefore, Bentham and Austin (classical positivists) saw law as a set of commands issued by a sovereign who could only be disobeyed on the pain of sanctions. Hart saw law as a complex social practice. It is a system of primary and secondary rules validated by rules of recognition. Kelsen saw law as primary norms which are directives to officials to apply sanctions under some circumstances. Raz saw law as a simple social fact identified by its efficacy, institutional nature and source. For these theorists, a single type of general standard constitutes law. All else that did not fit into the boundaries set for identifying such law were legally irrelevant.

II.1.iii Scandinavian Realism

The Scandinavian Realism school is opposed to any metaphysical argument in jurisprudence. They favor only that which the senses can experience and so hold

natural law as illusory. Law arises from the brain's response to stimuli. For this school, law can be explained purely in terms of observable facts[45 46 47 48 49 50].

Theorists in this school include Axel Hägerström[72], Karl Olivecrona[73], Anders Vilhelm Lundstedt[74] and Alf Ross[75].

Hägerström viewed legal concepts as meaningless unless associated with remedies and other practical legal processes. He saw "justice" as a highly subjective state of affairs which we approve. He saw what he called the "word-magic" as being at the base of legal procedures, incantations of which modified reality.

Olivecrona found "rights" to be a feeling of strength and sensation of power with no equivalent existence in the empirical sense. He saw commands as "independent imperatives" which we are molded from childhood to obey. A valid command always implied a personal relationship; rules of law he therefore saw as no commands. He taught that the law forms our morality, not the other way round. He said that though the making of new "imperatives" presupposes a legal system already in existence, we cannot trace law to its ultimate historical origin. This is because however far back we go there is always some social organization in existence. Therefore for him, the origin of law is purely a question of factual and historical

[72] Axel Hägerström - *Inquiries into the Nature of Law and Morals (1953),* cited in supra note 45 Lloyd p.824
[73] *K. Olivecrona - Law as Fact, 1ed (1939),* cited in supra note 45 Lloyd p.829
[74] A.V. Lundstedt - *Legal Thinking Revised* (1956), cited in supra note 45 Lloyd p.849
[75] A. Ross - *On Law and Justice* (1958), cited in supra note 45 Lloyd p.852

origins of the growth "out of customary, magico-religious rules found in ancient societies."

Lundstedt viewed 'rights' and 'duties' as mere labels. A legal order, in his view, is essential to maintain society. Law therefore is a fact of social existence, everything else is illusory. Feelings of justice do not direct the law, they are rather directed by the law.

Ross' contribution to the Scandinavian Realism school is that law is a system of normative rules. 'Justice' is an expression of emotion taking the form of view that rules ought to be applied correctly and impartially. Legal rules are primary (how we ought to behave) and secondary (sanctions and conditions of operations).

II.1.iv American Realism

The basic tenet of American Realism defines law as what law does. Law is what the judges do, not the rules that guide them[45 46 47 48 49 50].

American Realist theorists include William James[76], John Dewey[77], Karl Nickerson Llewellyn[78] and Oliver Wendell Holmes[79].

[76] William James - *Pragmatism* (1907), cited in supra note 45 Lloyd p.726
[77] John Dewey - *Logical Method and Law* (1924) 10 Cornell Law Quarterly 17, cited in supra note 45 Lloyd p.728
[78] K. Llewellyn - *Some Realism about Realism* (1931) 44 Harv.L.Rev. 1222, cited in supra note 45 Lloyd p.739
[79] Oliver Wendell Holmes - *The Path of the Law* (1897) 10 Harv.L.Rev.457-478, cited in supra note 45 Lloyd p.717

William James expounded legal pragmatism and favored facts and actions. He rejected pretended absolutes and origins. He taught that 'anything of practical effect is real'. 'If an idea works when applied to a set of fact of experience, then the idea is real and useful.'

John Dewey advocated that judges should adopt logic relative to consequences, not antecedents, and pursue continuous and vital adaptation of law.

Llewellyn considered law as in a flux and not static. Law is a means to a social end. He considered the traditional concepts and legal rules as not providing full descriptions of what the courts do.

Oliver Wendell Holmes stressed the empirical and pragmatic aspects of law and advocated for the separation of law and morals. He rejected concepts of jurisprudence that are incapable of verification. Holmes emphasized that the life of the law is experience and logic. In his famous saying, "the prophecies of what the courts will do in fact, and nothing pretentious, are what I mean by the law", he emphasized his view of the court's role in saying what the law is. He saw the judge as being under the influences of moral and political theories, and intuitions of public policy and prejudices common to men. He taught that law is a set of consequences emerging from the practices of the courts, not a system of reason, not deductions from principles. He saw law as predictions of the incidents of public force through the instrumentality of the courts. Though it may seem so, Holmes did not reject principles and theories of law; he rather advocated for valid principles and sound theories to ensure accurate predictions of law.

II.1.v Sociological School

According to Lloyd[80] some of the ideas found in the thinking of jurists who adopt a sociological approach to the legal order are:

- Belief in the non-uniqueness of law: a vision of law as but one method of social control,
- Rejection of a "jurisprudence of concepts," the view of law as a closed logical order, and,
- Rejection of naturalism and the viewing of reality as socially constructed.

An overriding question in sociological jurisprudence is whether law can be used for the purposes of social engineering and, if so, to what effect? Further questions in answering this question are: does law function as an instrument outside particular interests in some neutral way, as Roscoe Pound thought, or is it the result of the operation of interests?

The essence of the Sociological School is that law is a social phenomenon reflecting human needs. It functions as an organized system, and embodies within its fundamental principles and substantive rules the basic values of a society[45 46 47 48 49 50].

Roscoe Pound[81] wrote of the sociological movement in jurisprudence as 'a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern.'

[80] Op. cit. supra note 45 Lloyd
[81] Roscoe Pound, Mechanical Jurisprudence (1908), referenced in Supra note 48

Those who have provided the intellectual foundation for the Sociological School include R. von Jhering[82], Eugen Ehrlich[83], Emile Durkheim[84], Max Weber[85], *and* Roscoe Pound[86].

The central theme of Jhering's doctrine was to define the very purpose of law as *social.* The existence of law could only be justified as protecting the interests of society and of the individual by coordinating those interests, and minimizing the possibility of conflict. He asserted that every single legal rule owed its origin to some purpose, some practical motive. He advocated for the coordinated use of the 'egoistical levers' (of reward and coercion i.e. private gain and the threat of sanctions) and 'altruistic levers' (sentiment of duty) of law to achieve social ends. The law is to assist to the end of balancing *purposes and principles*. He taught that society's purposes and standards will change from time to time. There was therefore no justification for reliance on 'immutable natural laws' as guides for social and legal activity. 'Purpose is all and purpose is relative.' 'Law is the mediator, the balancer, the harmonizer.'

Ehrlich on the other hand recognized that the center of gravity of legal development lies in society itself; not in legislation, not in juristic science, not in judicial decisions. He differentiated 'norms for decisions' (what we generally call 'laws' and meant for adjudication of disputes) and 'norms for conduct' (self-generating social rules which form the 'inner order' of associations and accepted by society). These were re-

[82] R. von Jhering - *Law as a Means to an End* (Trans. 1924), cited in supra note 45 Lloyd p.586
[83] Eugen Ehrlich - *Fundamental Principles of the Sociology of Law* (Trans. 1936), cited in supra note 45 Lloyd p.601
[84] Emile Durkheim - *The Division of Labour in Society* (1893), cited in supra note 45 Lloyd p.598
[85] Max Weber - *Law in Economy and Society* (1968), cited in supra note 45 Lloyd p.587
[86] Roscoe Pound - *Outlines of Lectures on Jurisprudence* 5ed (1943), cited in supra note 45 Lloyd p.609

characterized as ‘positive law’ and ‘living law’. Legislators and judges, he advocated, must recognize the ‘gap’ between these laws and give expression to the community’s innermost feelings. Ehrlich advocated for continuous analysis of judicial decisions, formal regulations, perceptions and activities of society to reveal ‘living law’ as an amalgam of formalities, current social values and perceptions of society.

Durkheim viewed the phenomenon of law as an ‘index to the level of development’ within a community. He suggests that it ought to be possible to deduce from the evidence of a given form of law the type of social organization within which it flourishes. The repressiveness, for example, of criminal punishment in a society, reflects the level of development.

Max Weber on the other hand, approaches the issue of sociological jurisprudence from the angle of law and power. He emphasized that the essence of social order is to be found in norms and the power to enforce them. Law cannot be effective in the absence of power. Power is the ability to affect the will and behavior of others. To realize the sociological purposes of law, it is important that power must be legitimate. Obeying laws because there is a general belief within society that the enforcing power is legitimate creates a rational legal system. This is a requirement to achieve the social ends of law, according to Weber.

Roscoe Pound sees law as a social institution. Its purpose is to satisfy individual and social wants. Pound sees the balancing of interests (individual, public, social) as a direct

problem for the legislator and jurist. He advocates for the recognition and definition of interests. This demands an inventory and classification of interests; decisions on the selection of interests to be legally recognized; and systematic study of the means of securing recognized interests. He argues that from a functional point of view, law is really an attempt to reconcile, harmonize or compromise overlapping or conflicting interests. He rests the brunt of the 'social engineering' function of society on the legal order. He does not advocate rules only as the means of achieving this, but gives a complete list as *Rules, Principles, Conceptions and Standards*.

II.1.vi Historical School

The historical school in jurisprudence teaches that a legal system can only be understood through its historical roots and patterns of development. This is rooted in the belief that knowledge of the past is essential for a comprehension of the present[45 46 47 48 49 50].

Key proponents of this school include Friedrich Karl von Savigny[87] and Sir Henry Maine[88].

von Savigny saw law as reflecting the historical experience, culture and 'spirit' of the people, the *volksgeist*. Ancient custom guides the rise of law. Growth of legal principles is more of the effect of 'silently operating forces' over time, rather than deliberate decisions. von Savigny taught that law grows through custom and

[87] F.K.von Savigny - *Of the Vocation of Our Age for Legislation and Jurisprudence*(1814) referenced in Supra note48
[88] Sir Henry Maine - *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861), cited in supra note 45 Lloyd p.895

popular faith; law comes from the people and develops like a language.

Sir Maine suggested that legal ideas and institutions have their own lives and course of development. Evolutionary patterns of growth may be deduced from historical evidence. He rejected theories of law that are based on man's rational nature. He preferred to stress the importance of gradual and historical development of man's deep instincts, emotions and habits. He saw law as a late-stage development in a slowly-evolving pattern of growth. Law, he said, evolved through three distinct but connected stages: personal commands and judgments of patriarchal rulers; custom upheld by judgments; and law as a code through the spread of writing. At this last stage of code, a progressive society moves from ***status to contract*** in the development of law.

von Savigny and Maine's ideas of law were rooted in the ideas of Rousseau and Edmund Burke. They espoused the mystical sense of unity and organic growth in human affairs; the mysterious entity of the collective will; the organic roots of society; and a certain mysterious force which moves society. Their ideas were also rooted in Oswald Spengler's concept of states and institutions following the natural cycles of birth-growth-decline.

The ideas of Herder and Hegel also influenced von Savigny. They projected the uniqueness of every historic period, civilization and nation. They taught that no nation is intrinsically superior to another. Each nation possesses its own individual character and qualities. History is the life of the community but not the exploits of kings. They rejected a universal natural law as inimical to the *volksgeist*.

II.1.vii Customary Law School

What Customary Law is and what its influence has been on laws and Constitutions has always been a subject of great debate.

Jeremy Bentham seeks to minimize the effect and influence of customary law in any legal system. He says it is "unwritten and are nothing but so many autocratic acts or orders, which, in virtue of the more extensive interpretation which the people are disposed to put upon them, have somewhat of the effect of general law."[89]

Prof Llewellyn in agreement with Jeremy Bentham says [customary law is] "too blunt and confused to serve in careful analysis".[90]

A discussion of Customary Law is always confronted with scope and meaning. Does Customary Law therefore have the necessary content to influence a Constitution?

Other jurists have not precisely agreed with the views of Jeremy Bentham and Llewellyn. Prof. Allen has noted that customary law arises spontaneously through societal interactions; through arbitral or judicial decisions.[91]

[89] *The Collected Works of Jeremy Bentham Of Laws in General – edited by H.L.A. Hart (*University of London, The Athlone Press, 1970)
[90] Edwin Patterson, *Jurisprudence. Men and Ideas of the Law*, 1ed. (The Foundation Press Inc., Brooklyn, 1953), p.224
[91] Allen, *Law in the Making*, 3ed. 1939, Chpts I, II. Passim

Customary Law and its influence on law is said to have been 'romanticized' by the German historical school and English writers from Fortescue to Blackstone; and by 19th Century anthropologists.[92] St. Thomas Aquinas recognized the law creating power of Custom when he said "Customs which manifest the free consent of the whole people is law".[93] Hans Kelsen agrees with Aquinas. He says "… custom is a law-making procedure in the same sense as legislation."[94]

There is yet another view that accepts the influence of Customary Law but only as court decisions. Brown, an English writer has said customs are not law until recognized and enforced by the courts.[95]

Commenting on the "interaction between indigenous [customary] and national constitutional law", Goldschmidt has noted that "although there is no *communis opinio* on its impact and interest today, its existence is generally accepted."[96]

Writing on the influence of Customary Law on Ghanaian jurisprudence Josiah-Ayeh has observed that despite the "…tensions between Parliament, courtroom and society" that contemporary customary law in Ghana is subject to, it "… constitutes a distinct legal tradition at the heart of Ghanaian law…".[97] [98]

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[92] Salmond, *Jurisprudence,* 7ed. 1924, Chpt IX
[93] St. Thomas Aquinas, *Summa Theologica, Treatise on Law (II.I) Q.97 Art 3 (Dominican Father's trans. 1927), pp. 79-81*
[94] Dr. Han Kelsen, *General Theory of Law and State (1945), 128*
[95] Brown, *Customary Law in Modern England,* (1905) 5 Col. L. Rev. 561, 582-3
[96] Jenny E. Goldschmidt, *National and Indigenous Constitutional Law in Ghana,* London 1981
[97] N.A. Josiah-Aryeh, CUSTOMARY LAW IN THE TWENTY-FIRST CENTURY A SURVEY OF GHANAIAN CUSTOMARY LAW 2006 (Article)
[98] *N.A. Josiah-Aryeh, A GHANAIAN LEGAL TRADITION (Article)*

While the Courts in Ghana admitted Customary Law as fact through "referees" in 1876[99], it is no longer the case. The current situation is that 'any question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact"[100] [101].

Furthermore, through the Courts Act[102] [103], customary law textwriters like Sarbah[104], Hayford[105], Danquah[106], Ollennu[107], Bentsi-Enchill[108], Kludze[109] and Asante[110] have been considered positive influence on Ghanaian jurisprudence[111] [112].

Customary Law is thus largely accepted as an influence on law and Constitutions.

II.2 Hohfeldian Rights

The subject of rights is central to law and to jurisprudence. Ginsberg[113] has drawn attention to the wide significance of rights in any society. A person's rights to liberty, property, etc, he says, presuppose his capacity and ability to claim the initiation of

[99] Section 19 of the Supreme Court Ordinance, 1876 of the Gold Coast
[100] Section 67(1) of the Courts Act, 1960 (CA 9)
[101] Section 55(1) of the Courts Act, 1993 (Act 459)
[102] Section 67(2) of the Courts Act, 1960 (CA 9). See text repeated in Infra Note 103
[103] Section 55(2) of the Courts Act, 1993 (Act 459) provides as follows: "If there is doubt as to the existence of content of a rule of customary law relevant in any proceedings before a court, the court may, adjourn the proceedings to enable an enquiry to be made under subsection (3) of this section after the court has considered submissions made by or on behalf of the parties and after the court has considered reported cases, **textbooks** and other sources that may be appropriate to the proceedings."
[104] *J.M. Sarbah, Fanti Customary Laws ,* London 1968 (first published 1897)
[105] *J.E. Casely-Hayford's Gold Coast Native Institutions*, London 1970
[106] *J.B. Danquah's Akan Customary Laws, London 1928a and Cases in Akan Customary Law,* London 1928b
[107] *N.A. Ollennu's Principles of Customary Land Law in Ghana and Law of Testate and Intestate Succession in Ghana,* London 1966
[108] *K. Bentsi-Enchill, Ghana Land Law,* London 1964
[109] *A.K.P. Kludze, Ewe Law of Property,* London 1973
[110] *S.K.B. Asante, Property Law and Social Goals in Ghana,* Accra 1975
[111] Op. cit. supra note 97 N.A. Josiah-Aryeh
[112] Op. cit. supra note 98 N.A. Josiah-Aryeh
[113] Morris Ginsberg - *Justice in Society* (Penguin Book, Baltimore, 1965) referenced in supra note 48 Curzon

activities which will recognize and protect those rights in the event of their being challenged, ignored or invaded. His moral and legal rights become manifest in society's reactions to those who reject his claims. Ginsberg views a person's 'duties' as constituted by what society expects him to contribute to its well-being[114].

Some jurists have contended that the essence of law is about the enunciation, interpretation and protection of rights[48]. Law, it has been argued, is about rights (and its correlative duties) and the procedural systems for the resolution of disputes (for failing to acknowledge rights).

John Locke[115] viewed the *social contract* under which man forfeited some of his freedom, to preserve the natural rights to life, liberty and property, and the enjoyment of private rights: the pursuit of happiness. To John Locke, natural rights derive from natural law, that is, from reason. Locke sees natural rights as dictated by nature, forbidding us from harming each other in 'life, health, liberty, or possessions'. These rights are God given.

Pufendorf[116] wrote that man has a right to "his body, to the fruits of his labour, and the fulfilling of contracts".

John Rawls[117] sees all members of society as having moral obligations and duties imposed by law to uphold its system of human rights. Basic rights would include the

[114] Op. cit. supra note 48 Curzon s.23.1.1
[115] Op. cit. supra note 55 John Locke
[116] Pufendorf - *De Iure Naturae et Gentium* (1672) referenced in supra note 48 Curzon
[117] John Rawls - *Political Liberalism* (1993) referenced in supra note 48 Curzon

right to life, security, personal property, enjoyment of the rule of law, liberty of conscience, freedom of association and the right to emigrate. The rights system of the society provides the legitimacy and decency of its legal order.

Ronald Dworkin[118] [119] in his handling of rights and equality, attempts to fuse law and political ideology. He sees them as having close links, co-existing as aspects of social aspirations and activities. He advocates that an analysis of rights demands the examination of their place within the 'wide culture, and very purpose, of social and political awareness'.

Dworkin interestingly rejects both natural law and positivism. He asserts that rights have no metaphysical character. Neither do we get helped by the positivists making law as 'all-or-nothing' mere rules, and the unreal separation of law and morals. He explains that the legal system, and the place of rights within it, requires the involvement of discrete rules, statutes, and the standards provided by policies and principles. A judge does not create law, he only balances the weight of principles in the law to arrive at judgment. Rights emerge in this process of balance of principle weights. Rights, he said, express a 'community of principles'. Law to him is an 'embodiment of rights and responsibilities'. Rights are therefore not esoteric; they have no metaphysical sources [as proposed by Aristotle and John Locke]. An individual's claim in society depends on the practice and the justice of its institutions: political and legal. Existing political rights are only enforced, not created, by judicial decisions. For example, anti-slavery laws increasingly emerged as respect for human dignity intensified.

[118] Ronald Dworkin - *Taking Rights Seriously* (1978) referenced in supra note 48 Curzon
[119] Ronald Dworkin - *Law's Empire* (1986) referenced in supra note 48 Curzon

Rights are now held all over the world as the basis of an effective political democracy. *The Charter of the United Nations (1945)* affirm faith in 'fundamental human rights, in the dignity and worth of the human person, in the equality of men and women and in the equality of nations large and small'.[120]

The Universal Declaration of Human Rights (1948) recognizes the fundamental rights necessary for a civilized society including equality before the law, freedom of thought and religion, freedom of peaceful assembly, protection from arbitrary arrest.[121]

The European Convention on Human Rights (1950) (ECHR) seeks to protect the right to life, liberty and individual security; it also outlaws torture, slavery, discrimination against gender, race, colour and religion; it protects freedom of religion and conscience.[122]

The African Charter on Human and Peoples' Rights (1981) recognizes that 'fundamental human rights stem from the attributes of human beings … that the reality and respect of peoples rights should necessarily guarantee human rights'. It guarantees equality before the law, the right to liberty and security of the person, equality before the law, freedom of conscience and the right to property.[123]

Despite the ubiquitousness and pervasiveness of rights in law and legal systems, the nature and meaning of rights have remained debatable and the subject of much enquiry. John Locke sees human rights as obvious derivates from natural law and reason.

[120] The Charter of the United Nations (1945), Preamble
[121] The Universal Declaration of Human Rights (1948), Preamble, Arts 9,10,18,20
[122] The European Convention on Human Rights (1950) (ECHR), Preamble, Arts 2-5,9,14
[123] The African [Banjul] Charter on Human and Peoples' Rights (1981), Preamble, Arts 3,7,14,19

Gewith[124] describes human rights as 'rights which all persons equally have simply insofar as they are human'.

Feinberg[125] defines rights as 'generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably." John Finnis[126] classifies as an absolute human right 'not to have one's life taken directly as a means to any further end'.

Attempts at defining what rights are varied[45 46 47 48 49 50]:

Allen has defined it as 'the legally guaranteed power to realize an interest'.

Holland has described it as 'the capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others.'

Holmes has called it '[n]othing but permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force.'

Radin has argued that in Sale of Goods, Y's duty to transfer the property in goods is X's right. Y's duty does not follow from X's right, neither is it 'caused' by that right. Radin therefore argues that a right is a duty. Rights and duties are neither separate nor capable of being interpreted as different aspects of the same theory.

[124] Alan Gewirth - *Epistemology of Human Rights (1984)* referenced in supra note 48 Curzon
[125] Joel Feinberg - *Social Philosophy* (1983) referenced in supra note 48 Curzon
[126] John Finnis - *Natural Law and Natural Rights (1980),* cited in supra note 45 Lloyd

The question of definition of 'rights' still remains. It is however largely avoided by jurists as rightly pointed out by Radin: "[t]hose of us who have learnt humility have given over the attempt to define law".[127]

Owing to the resultant 'chameleon-hue' of definitions and vocabulary of 'rights', Hohfeld[128] produced an analysis of 'rights' to help clarify the vocabulary. In his famous work he created what he called the 'the lowest common denominators of the law' in terms of the functions of rights. He also produced jural relations of rights based on 'opposites' and 'correlatives'.

Hohfeld's Jural Relations of Rights:

Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

To resolve the ambiguity of vocabulary concerning 'rights', Hohfeld argued that the normative statement "X has a right to R" could mean any of the following:

(i) Y has a duty to let X do R, so that X has a 'claim-right' against Y;

[127] Max Radin, *A Restatement of Hohfeld,* (51 Harvard Law Review, 1145)
[128] Wesley Newcombe Hohfeld - *Fundamental Legal Conceptions As Applied In Judicial Reasoning* (1919) cited in supra note 45 Lloyd

(ii) X is free to do or refrain from doing something. It is only a question of what X may do; not what Y must do (or not do); this right is called a 'privilege' or '**liberty'**;

(iii) If for instance, it is a 'right' to foreclose a mortgage or sell property, then Hohfeld called this 'right' 'power**'** – X may voluntarily act to change a legal relation affecting him and others whether or not X has a 'claim-right' or 'privilege';

(iv) Where Y lacks the power for a voluntary act to affect any of X's legal relations, then this 'right' of X is called 'immunity'.

Having established these four 'atomic' elements of rights – right (or claim-right), privilege, power and immunity, Hohfeld analyzed the jural relations among them.

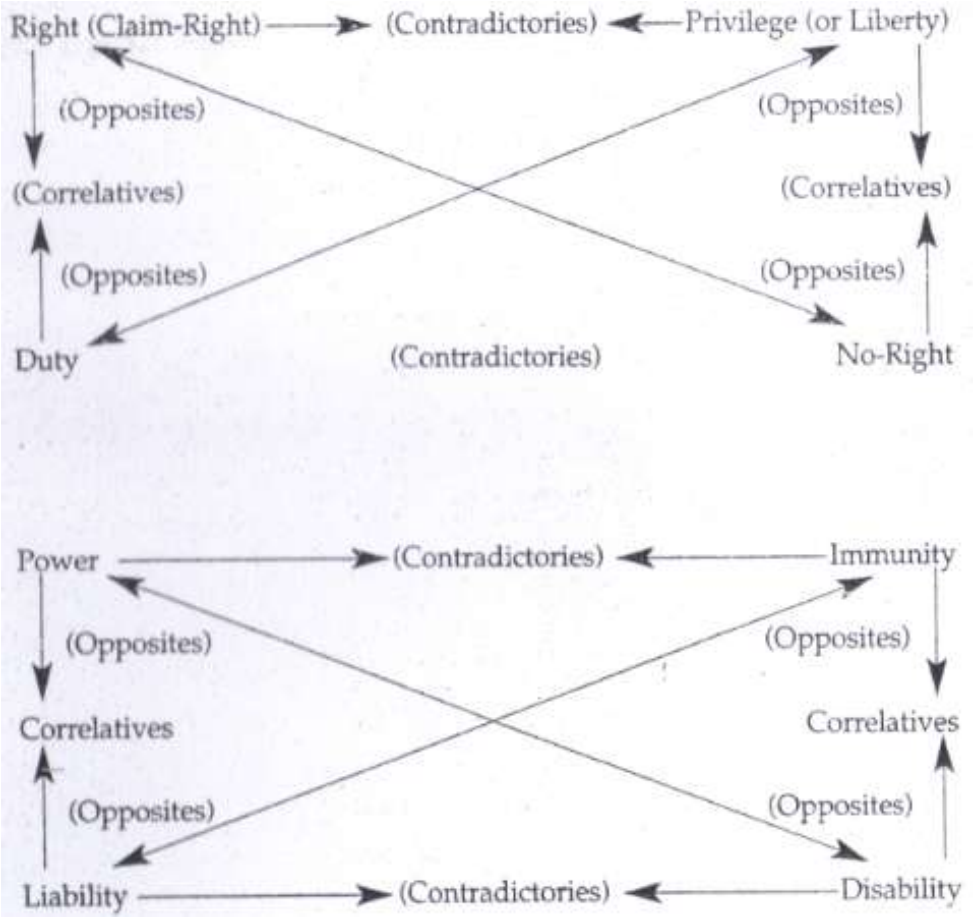
In the Jural Opposites (for example 'right' and 'no-right' or 'power' and 'disability'), no pair can exist in one person. If X has 'power', then he cannot have 'disability'; if X has a 'privilege', then he cannot have a 'duty'.

In Jural Correlatives (for example 'right' and 'duty' or 'power' and 'liability'), each pair must be a related 'unity'. If X has one of the pairs ('right'), then Y must have the other ('duty'); if X has 'power', then Y must have the other – 'liability'.

Jural Contradictories are later additions to Hohfeld's analysis. It analyses the pair of what 'right' Y loses when X acquires the 'right' to do R. For instance, if X has a claim-

right against Y, then Y cannot have the privilege to act as he chooses. If X has power to alter any legal relation of Y by X's voluntary act, then Y cannot possibly be said to have immunity under the circumstance and in relation to X.

Hohfeld's analysis of rights is diagrammatically presented as below.



Hohfeld's analysis undoubtedly assists greatly in understanding constitutional and legal issues of rights and its classification.

Chapter IV

The Jurisprudence of the US and UK Constitutions

III.1 The Jurisprudence of the Constitution of the United States of America

III.1.i The Natural Law School in America

The American Constitution is largely underlaid by the Natural Law school of jurisprudence.

John Locke (1632-1704) taught that men by nature are free and equal, governed by natural laws. No one ought to harm another in his life, health, liberty, or possessions. The end of law is not to restrain or abolish these liberties, but to preserve and enlarge them. Political authority therefore existed to retain the natural rights of life, liberty and property. The right to life, liberty and property does not get created by the community or state in a *social contract*. Such rights already exist in nature, pre-date any body politic which is rather created only to enforce the law of nature. For these reasons, Locke, as other natural law thinkers, considered as no law, any law that did not meet up to the standard of natural law. Citizens had the right, in fact, the duty to resist oppressive governments and laws.

Louis Montesquieu (1689 – 1755) furthered Locke's ideas on natural rights. He taught that the highest goal of any nation is human liberty as a natural right. He proceeded to propound the political structures needed to protect these natural rights. Strict separation of powers of government was needed to protect these rights because "every man invested with power is apt to abuse it".

"The combination of Locke's theory of natural law with Montesquieu's doctrine of separation of powers forms the philosophical basis of the American system of government."[129] The creation of America as a Republic is reminiscent of the natural law philosophy of Jean-Jacques Rousseau.

In the American Declaration of Independence in 1776, it is said that Thomas Jefferson only expressed the convictions in the minds and hearts of the American people. The political philosophy of the Declaration was not new; its ideals of individual liberty had already been expressed by John Locke and the Continental philosophers. What Jefferson did was to summarize this philosophy in "self-evident truths"130 thus:

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the first thirteen united states of USA,

"When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to

[129] Edgar Bodenheimer, *Jurisprudence, The Philosophy and Methods of the Law,* Revised Edition, p.49
[130] *The Charters of Freedom, online: <http://www.archives.gov/exhibits/charters/declaration.html> accessed April 1, 2011*

institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.--Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world…"[131]

"There can be little doubt that the Bill of Rights [first ten amendments of the US Constitution] was informed by a natural rights philosophy..."[132] The constitutional division of government into independent branches with its intricate system of checks and balances to forestall a decisive supremacy of any of these three owes its inspiration to Monstesquieu.

The philosophy of James Wilson (1742 – 1798), it is believed, is the most consistent expression of classical American philosophy of law and government. It is believed his philosophy was shared by most of the fathers of the United States' Constitution. John Adams, Thomas Paine and

[131] *The Charters of Freedom, online: <http://www.archives.gov/exhibits/charters/declaration_transcript.html> last visited April 1, 2011*

[132] George G. Christie, Patrick H. Martin, *Jurisprudence, Text and Reading on the Philosophy of Law*, 3ed (Thomson/West Publishing Co., 2008)

Thomas Jefferson were convinced that there existed natural rights which could not be restrained or repealed by human laws. And the view that it was the function of the courts to defend human rights, as recognized and sanctioned by the Constitution against any violations by the legislature[133]. James Wilson also proposed the idea of not only separating the legislature from the executive and judiciary, but also to split the legislative function into two for one chamber to serve as a check on the other. The jurisprudential ideas of James Wilson look inspired by the combined philosophies of John Locke and Louis Montesquieu.

The structure of the American government we see today, combined with certain seminal court decisions like *Savings and Loan Association v Topeka*[134] and *Marbury v Madison*[135] leave one in no doubt of the Natural Law jurisprudence of the American Constitution, 1787.

In *Savings and Loan Association v Topeka,* Justice Miller observed:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. **The theory of our governments, state and national**, is opposed to the deposit of unlimited power

[133] Op. cit., supra note 131 Edgar Bodenheimer, p.52
[134] *Savings and Loan Association v Topeka* 87 U.S. 20 Wall. 655 655 (1874)
[135] *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803)

> anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which **the social compact** could not exist and which are respected by all governments entitled to the name." (emphasis mine).

Chief Justice Marshall also stated in *Marbury v Madison* that:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten ... To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?"
>
> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

The above statements in *Savings and Loan Association v Topeka* and *Marbury v Madison* clearly reflect the Natural Law jurisprudential teachings of John Locke, Louis Montesquieu and James Wilson [among others] on law, justice and governance.

It has been observed that so far as judges, under the American Constitution, must determine what counts as deprivation of life, liberty or property, or what due process is required, or what actions of the state deny equal protection of the law, or what punishments are cruel, or what searches and seizures are unreasonably … "the act of constitutional interpretation in the US may require every

bit as much moral inspection as would be required by the most morally thick of natural law theories."[136]

It is to be noted that this power of the courts under the American Constitution alluded to above by Frederick Schauer[137] also underscores OLIVER WENDELL HOLMES' concept of American Realism. It is therefore to be noted that within the Natural Law jurisprudence of America is strong evidence of the philosophy of American Realism.

Several constitutional decisions in the US amply demonstrate the Natural Law leaning of the US Constitution.

On an issue of bakery workers choosing their interest, the US Supreme Court in striking down a law decreeing maximum hours for workers in a bakery in the case of *Lochner v New York*[138], Justice Peckham said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law."

[In another case exemplifying the Natural Law leaning of the US Constitution,] the state of Connecticut banned the use of contraceptives in 1958. In reversing an earlier decision and declaring the 1958 statute unconstitutional, Justice Douglas, in *Griswold v Connecticut*[139] said:

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[136] Frederick Schauer, *Constitutional Positivism,* (25 Conn. L. Rev. 797,802 (1993))
[137] Ibid.
[138] *Lochner v New York* 198 U.S. 45, 25s Ct. 539,49 L.Ed. 937 (1905)
[139] *Griswold v Connecticut* 381 U.S. 479,85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965)

> " 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'[140] … We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." (emphasis mine).

Justice Goldberg, in this same case, concurring with Justice Douglas said:

> "… In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] … as to be ranked as fundamental."

Justice Goldberg's comments exemplify the *volksgeist* concept and Historical School of jurisprudence espoused by von Savigny, but blended within Natural Law.

Another example of the use of Natural Law in US constitutional matters is the 1973 seminal case of *Roe v Wade*[141] which ruled as unconstitutional, an 1854 Texan law that criminalized abortion.

Roe claimed Texas' abortion law violated her First, Fourth, Fifth, Ninth and Fourteenth Amendment rights to seek safe abortion in Texas. (The pregnancy did not threaten her life as a single unmarried pregnant girl.) Justice Blackmun ruled that abortion was a "fundamental" right and a right of personal privacy.

[140] *NAACP v Alabama*, 377 U.S. 288
[141] *Roe v Wade* 410 U.S. 113,93 S. Ct. 705,35 L.Ed. 2d 147 (1973)

An obvious question is: "what is the source of a right that is not enumerated but that is nevertheless to be defined by the Supreme Court?" The US Supreme Court has on several such occasions resorted to deriving such rights from Natural Law.

III.1.ii The Customay Law School in America

Customary Law jurisprudence does not seem to enjoy much patronage in American courts.

American courts seem unwilling to call "law" a custom which lacks authority and sanction of the state in the modern sense. This was the jurisprudential leaning of a Michigan court when invited to determine the validity of a polygamous marriage under customary law of an Indian Tribe.[142]

According to Prof. Allen[143], the English tests used in the admission of Customary Law have been scarcely mentioned in American courts. The requirement that the custom must be "ancient, notorious, uniform" etc in order to be admitted was stated as dictum but never applied in *Port Investments Co v Oregon Mutual Fire Insurance Co.*[144] Customary Law was however admitted in the Massachusetts case of *Ghen v Rich*[145]. The plaintiff proved a custom of first harpooning a whale and hence entitled to it. The court agreed with plaintiff but for the following reasons:

1. Custom was necessary to the continuation of the fin-whaling industry, and,
2. Old Common law rule that he who first takes effective possession of a wild animal is entitled to it.

[142] *Kobogum v Jackson Iron Co.*76 Mich 498,43 N.W. 602 (1889) cited in infra note 145 Allen
[143] Allen, *Law in the Making*, 3d ed. (1939)
[144] *Port Investments Co v Oregon Mutual Fire Insurance Co* 163 Ore., 1,94 P.2d 734 (1939)
[145] *Ghen v Rich 8F. 159 (D.C. Mass. 1881)*

It is therefore to be observed that in this rare finding of a US Court admitting Customary Law, it is clearly done in pursuit of Sociological jurisprudence rather than the admission of Customary Law.

III.1.iii The Sociological School in America

"The Law Must Be Stable, But It Must Not Stand Still." — Roscoe Pound[146]

US jurisprudence is believed to have received a lot of influence through the work of Roscoe Pound for the end of social change to meet the needs of the people. "The United States … is known to have used law to shape her economy in the 19th and 20th centuries."[147]

Prof James Willard Hurst[148], a popular US legal historian, and Arthur Schlesinger[149] in their respective works have said Americans have used law to release the population's creative energies.

Prof Hurst shows how the United States, in a manifestation of a sociological jurisprudence, determined the purpose and object of law for specific generations. Over the first three-quarters of the 19th Century, law was used to determine priorities among competing uses of scarce working capital. Next, was the inflation of private capital over the public sector in the early 20th Century. Then there was a swing back towards the "promotional use of the public finance,"[150] strengthened but not initiated by the depression of the 1930s. Course of development was also

[146] *Online: <http://legal-dictionary.thefreedictionary.com/Roscoe+Pound> last visited April 4, 2011*
[147] *Tawia Modibo Ocran, Law In Aid of Development – Issues in Legal Theory, Institution Building and Economic Development in Africa (Ghana Publishing Corporation, Accra, 1978), p. 32*
[148] Willard Hurst, *Law and the Conditions of Freedom in the 19th Century United States*, (The University of Wisconsin Press, Madison, 1950) supra note 149 Tawia Modibo Ocran
[149] Arthur Schlesinger, *The Age of Roosevelt*, (Houghton Mifflin, Boston, 1957) supra 149 Tawia Modibo Ocran
[150] Op. cit. supra note 148 Willard Hurst

shaped through instruments such as the Homestead Act, which made available free land in the relatively non-settled Western regions[151].

There is therefore much evidence of the use of the Sociological School of jurisprudence for the purpose of social engineering in the United States.

Summary

In summary, it may be said that American jurisprudence is dominated by the Natural Law School along the lines of Locke-Montesquieu-Rousseau. Later developments see the fusing in of pragmatism through von Savigny's Historical School ("conscience of the people"[152]). Also fused in is Oliver Wendell Holmes' American Realism (with emphasis on empowering judges to tell what the law is and even make laws under some circumstances). Arguably in the pursuit of pragmatism, American jurisprudence in the 19th and 20th Centuries was greatly influenced by the Sociological School. This is evidenced by Roscoe Pound's philosophy of using law as a social engineering tool to shape and develop America. The role of the Customary Law school however seems to be minimized in American jurisprudence.

[151] Op. cit. supra note 147 Tawia Modibo Ocran
[152] per Justice Goldberg in *Griswold v Connecticut*. See supra note 141 *Griswold v Connecticut*.

III.2 The Jurisprudence of the Constitution of the United Kingdom

III.2.i The Natural Law School in the United Kingdom

It has been noted that the biggest elements of Thomas Hobbes' legal understanding corresponded with the conspicuous points of Lord Bacon's jurisprudence.[153] [154] In particular reference is the supremacy of the king as a judge. Hobbes' claim was that law is informed by reason and cannot be law if it conflicts with reason.[155] This may be aptly described as an Aristotelian-Cicero-Stoic-Hobbes-Thommist jurisprudence, a Natural Law school.

Development of law in the UK, according to Prof Lawson[156] did therefore follow this path [of natural law]. Law in the UK consists of national and local laws, the common feature being a central body of doctrine [derived from reason]. This body of doctrine is not contained in a code in line with the UK's dominant Natural Law jurisprudence. It is continually distilled from the decisions of an immense number of cases decided by the courts of law. The distillation was at first exclusively in England, but later also in other parts of the Commonwealth and the USA, said Prof Lawson. This judgment-made law is again divided into two parts, which bear the technical names of Common Law and Equity. They are both modified continuously by legislation, mainly of a fragmentary kind, passed by the national or local legislature.[157]

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[153] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Law of England,* (The University of Chicago Press, 1971)
[154] Thomas Hobbes, a legal philosopher, was of the Natural Law School; Lord Bacon was the 16th Century Attorney-General of King Charles II
[155] Op. cit. supra note 153 Thomas Hobbes.
[156] F.H. Lawson, *The Hamlyn Lecturers: Third Series. The Rational Strength of English Law*, (Stevens & Sons Limited, London, 1951)
[157] Ibid.

The Natural Law jurisprudence of British courts was clearly demonstrated in the celebrated case of *In re A (Children) (Conjoined Twins: Surgical Separation)*[158].

In *Re A (Children)* J and M were conjoined twin girls who were born to devout Roman Catholic parents. They were joined at the pelvis. J, the stronger twin, sustained the life of M, the weaker twin, by circulating oxygenated blood through a common artery. M's heart and lungs were too deficient to oxygenate and pump blood through her own body. If they were not separated J's heart would eventually fail and they would both die within a few months of their birth. However, if they were separated the doctors were convinced that J would have a life which was worthwhile although M would die within minutes. The parents refused to consent to the operation on religious grounds. Upon an application to the court, the judge authorized the hospital to proceed with the operation, ruling it as not a murder of M, and not unlawful. The parents appealed.[159]

The Court of Appeal held, granting the application but dismissing the appeal, inter alia, that, notwithstanding the conflict of duties the doctors owed to each twin in respect of her right to life and the impossibility of undertaking any relevant surgery on one without affecting the other, the proposed operation was an **act of necessity** to avoid inevitable and irreparable evil; that its purpose was to preserve the life of J and not to cause the death of M, and it was inappropriate in the unique circumstances to characterise foresight of M's accelerated death as amounting to criminal intent; that the protection of a person's right to life in article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms[160] did not import any prohibition,

[158] *In re A (Children) (Conjoined Twins: Surgical Separation) [2001] Fam 147; [2001] 2 WLR 480 per Brooke LJ*
[159] Online: http://www/justis.com accessed 28 December, 2010
[160] *Art 2 of The European Convention on Human Rights (1950) (ECHR) is as follows: "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court*

additional to that under English common law, to the proposed operation, and "intentionally" in its **ordinary and natural meaning** applied only to cases where the purpose of the prohibited action was to cause death; the operation could be lawfully carried out.[161] (emphasis mine).

Brooke LJ's appeal to the writings of Thomas Hobbes[162], John Locke[163] and Cicero[164] to formulate reasoning to address the legal question of "'destruction' of one human life to save another" in *Re A (Children)* underscored the Natural Law jurisprudence of the British courts and society.

However, in the dialectic between Thomas Hobbes, Lord Bacon and Lord Coke[165] it was noted that "… it is not wisdom, but Authority that makes a law … It is more important for civil life that subjects be governable than that they be excellently governed."[166] This Natural Law jurisprudence underlies what Professor Hanbury later points out as Montesquieu's fruitless search for his scheme for division and mutual balancing of governmental powers in the unwritten constitution of England.[167] (Professor Hanbury counsels Montesquieu to find his scheme of governmental balance of power rather in the United States). Developments in English jurisprudence have come to show that in reality the executive and judicial powers, in British constitutional jurisprudence, are inferior in strength to the legislative power, regarded as

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following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article where it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[161] Op. cit. supra note 161 www.justis.com

[162] Thomas Hobbes, *The Elements of Law: Natural and Politic (1650)*

[163] John Locke, *An Essay Concerning Human Understanding (1689)*

[164] *Marcus Tullius Cicero, de Officiis (44BC)*

[165] *Lord Coke was Chief Justice, Court of Common Pleas from 1606 and Chief Justice, King's Bench from 1613*

[166] Op. cit. supra note 153 Thomas Hobbes.

[167] H.G. Hanbury, *English Courts of Law,* 2ed (London, 1953) cited in infra note 168 Edgar Bodenheimer

omnipotent.[168] The jurisprudence that emphasizes "authority", rather than "wisdom" is thus made to make laws in the UK.

III.2.ii The Historical School in the United Kingdom

Two key components of the Historical School in operation in the United Kingdom have been identified by Prof Lawson.[169] These are **Continuity** and **Contract**.

Continuity

Key institutions that have contributed immensely to continuity in the UK are the Constitution and the Church of England, says Prof Lawson.[170]

The English, he argues, therefore enjoy the benefits which usually result from a traditional pattern of behavior. He therefore sees British jurisprudence as having partially developed along a von Savigny line of thought: 'law is the product of the popular sense of right'.

Contract

Sir Henry Maine, of the Historical School of Jurisprudence, identified one of the important characteristic features of modern societies as a movement from *status to contract*. Maitland has branded contract as the greediest of legal categories in English jurisprudence.[171]

Prof Lawson has identified as major in the jurisprudence of the United Kingdom, the central legal concept of **contract**. He points out contract as having occupied the center of all private law. Even public law was made to depend as far as possible on actual or hypothetical agreement.

[168] Edgar Bodenheimer, *Jurisprudence, The Philosophy and Methods of the Law,* Revised Edition
[169] Op. cit. supra note 156 F.H. Lawson
[170] Ibid.
[171] Ibid.

What may be termed as the 'jurisprudence of contract' has therefore helped the English society and ordered its systems of production, management of resources and governance in general.

III.2.iii The Customay Law School in the UK

The Customary Law school has not enjoyed much prominence in British jurisprudence. Prof. Allen observes that custom must be proved as a fact in British courts.[172] The test for custom in British courts comprise of proving the following:

1. Antiquity
2. Continuance
3. Peaceable Enjoyment
4. Obligatoriness
5. Certainty (as to its terms)
6. Reasonableness
7. Legality

In the case of *Wigglesworth v Dallison*[173] the court held that custom had been proved when a tenant sued a lessor (using custom) for taking crops he planted before his lease expired on May 1, 1776.

Contrary to *Wigglesworth v Dallison*, in the famous case of *The Tanistry*[174], the court rejected an Irish custom that the real property of a deceased should descend, not to the eldest son, but to the

[172] Allen, *Law in the Making*, 3ed. 1939, pp. 126-141
[173] *Wigglesworth v Dallison (1779) 1 Doug. 201; 99 E.R. 132*
[174] *Le Case de Tanistry (1792) Dav. 28; 80 E.R. 516*

"older and most worthy" of the blood and surname of the deceased. The grounds for rejection of this custom was Uncertainty and Legality. The Court held that it was contrary to the Common Law rule of primogeniture.[175]

Summary

In summary, it may be said that UK jurisprudence is dominated by the Natural Law School. This grew from Aristotelian-Cicero-Stoic-Hobbes-Thommist reasoning. It late fused in the use of "Authority" to make laws, as evidenced by the supremacy of Parliament. Further development incorporated the Historical School along von Savigny's 'popular sense of right' and Sir Maine's legal philosophy on **contract**. The Historical jurisprudence of contract seems to have dominated both private and public conduct of life to help order British society as a **society of contract**. Overall, it may be said that English jurisprudence has benefitted from a traditional pattern of behavior. This has stemmed from a continuity immensely contributed to by the Constitution and the Church of England.

[175] Rule of primogeniture - the common-law right of the firstborn son to inherit his ancestor's estate, usu. to the exclusion of younger siblings. Was abolished in Britain with the 1925 reforms – *Black's* Law *Dictionary,* 8ed (West 2004) p.1230

Chapter V

The Jurisprudence of Ghana's 4th Republican Constitution (1992)

Heavy reliance has been made on the actual motions, debates and discussions that preceded the creation of all components of the 1992 Constitution. These were obtained through the Official Report of the Proceedings of the Consultative Assembly (CA) which created the 1992 Constitution that got accepted in a national referendum. This is because constitutional case law which espouse the philosophical underpinnings of the various Articles of the Constitution are almost non-existent at this early stage of the nineteen-year life of the Constitution. To compensate for the lack of Constitutional law cases, interviews were conducted with two key persons who were involved in the constitution creation process. These were Professor Dankwa who was a member of the Committee of Experts which wrote the proposed Constitution, and Justice S.A. Brobbey (Supreme Court) who was the chairman of the Legal and Drafting Committee of the Consultative Assembly which wrote the final draft of the Constitution before it went to the referendum. Also interviewed was ex-President J.J. Rawlings, who as head of state, supervised the creation of the Constitution and who also became the first President under the Constitution for its initial period of eight years. Views from these interviews have been incorporated into this part. Summaries of the respective interviews have been provided in the Appendix.

IV.i The Natural Law School

Evidence from the Constitution

The Preamble of Ghana's 1992 Constitution is as follows:

IN THE NAME OF THE ALMIGHTY GOD
We the People of Ghana,
IN EXERCISE of our natural and inalienable right to establish a framework of government, which shall secure for ourselves, and posterity the blessings of liberty, equality of opportunity and prosperity;

…

DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.[176]

'Adopting', 'enacting' and 'giving' a Constitution, the primary law of the land, 'in the name of the Almighty God', undoubtedly casts Ghana's 1992 Constitution in the mold of Natural Law thinking. It is perfectly reminiscent of the medieval period's philosophy of law taught by St. Thomas Aquinas[177] which combined Aristotelian rationalism and Judo-Christian doctrines. In this doctrine, the role of God is acknowledged as the ultimate repository of divine reason and wisdom which directs all movements in the universe.

Evidence from the Consultative Assembly

During proceedings for the creation of the 1992 Constitution, the Speaker of the Consultative Assembly (CA), Hon. Pe Rowland Adiali Ayagitam II prayed for God to bestow on all members the wisdom necessary for the task of creating the 1992 Constitution[178]. And to open each day's sitting, prayers were made to God asking for, inter alia, wisdom for the job of creating the 1992 Constitution.

[176] Preamble, The Constitution of The Republic of Ghana, 1992
[177] Op. cit. supra note 45 Lloyd pp.109-110
[178] Proceedings of the Consultative Assembly, 1992 Constitution – Official Report

In contributing for the creation of the Preamble of the Constitution, a CA member, Mr. R. Atta-Kesson (PNDC Appointee) called for the

> "articulation of our faith in the Preamble." "We are very much aware of God, from whom all authority is derived, and to whom all actions both of men and states must be referred" he added.[179]

Dr. I.K. Chinebuah (Ghana Chamber of Mines) in his contribution said the Preamble must be "a summation, succinctly and clearly expressed, of the general principles and objectives underlying our constitutional proposals … and acknowledgement of Almighty God as the supreme power from whom all human authority is derived and to whom all actions both of men and governments must be referred."[180]

Again in the Preamble, the 'exercise' of the 'natural and inalienable right' of the people of Ghana to 'secure' 'liberty, equality' and 'prosperity' is reflective of the ideas of Natural Law philosophers like John Locke.[181]

In moving a motion for the adoption of the report on Supremacy of the Constitution Mr. Charles Stanley-Pierre (Ghana Employers' Association), Chairman, Committee on State Policy, said the 1992 Constitution is

> "… an embodiment of our aspirations and above all an enshrinement of our inalienable right for life, liberty and happiness".[182]

[179] Consultative Assembly Proceedings on Thursday, 3rd October, 1991, p.342
[180] Consultative Assembly Proceedings on Tuesday, 8th October, 1991, p.430
[181] Op. cit. supra note 55 *John Locke*
[182] Consultative Assembly Proceedings on Thursday, 5th December, 1991, p.1166

In seconding the above motion, Dr. R. S. Amegashie (Institute of Chartered Accountants) said

"No man is good enough to govern another without the other's consent",

a direct quotation of John Locke[183] in his Natural Law philosophy of the social contract.[184]

Combined views of Dankwa, Brobbey and Rawlings – Natural Law

Professor Dankwa, Justice Brobbey and ex-President Rawlings all expressed views that the 4th Republican Constitution was formed with a Natural Law school, among other schools.

Prof Dankwa, in the interview, talked about written/unwritten laws and natural fairness as sources of law. This view is similar to the normative standards of Natural Law.

Justice Brobbey talked about law finding the due of every person, or what everybody deserves. This view is similar to the views of Plato, Aristotle, Thomas Aquinas and John Locke in their expositions on Natural Law.

Ex-President Rawlings equated law and justice with moral and social justice which is similar to the normative standards of Natural Law.

Natural Law is therefore, in their combined view, one of the philosophical underpinnings of the 1992 Constitution.

[183] Op. cit. supra note 55 *John Locke*

[184] Consultative Assembly Proceedings on Thursday, 5th December, 1991, p.1169

IV.ii Legal Positivism

In spite of the Natural Law cladding that the Consultative Assembly (framers) gave to the Constitution, they made attempts at several locations to meet the Legal Positivism requirements of certainty, clarity and predictability for law. Article 11 (Chapter 4) of the Constitution unambiguously states the sources of the laws of Ghana. Although these sources include 'doctrines of equity and the rules of customary law'[185] which by nature include normative rules, attempts were made at legal positivism by making the Constitution the supreme law of Ghana. It declares as void 'any other law found to be inconsistent with any provision' of the Constitution.[186]

In seconding a motion for the adoption of the provision on the supremacy of the Constitution, Dr. R. S. Amegashie emphasized the legal positivism of Article 1(2) by saying:

> "Under the nature of the Constitution we have confirmed what the Constitution is, which is the supreme law of the land, the mother of laws. It is the embodiment of the rules by which the sovereign people by our own will and choice wish to be governed. Being so, we the people say that any other law which is inconsistent with our Constitution is void and of no effect."[187]

Fundamental Human Rights and Freedoms are posited in Chapter 5 of the Constitution and enshrined. In confirmation of the legal positivism of Chapter 5, Article 19, which deals mostly with criminal offence trials, follows the "*nulla poena sine lege*" principle by providing that:

[185] Clause 2, Article 11, 1992 Constitution
[186] Clause 2, Article 1, 1992 Constitution
[187] Consultative Assembly Proceedings on Thursday, 5th December, 1991 p.1168

> "No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law."[188]

The laws on Human Rights and Freedoms are thus laid down, hence separate from the law as it morally ought to be, obeying a key principle of Legal Positivism.

We are however unable to conclude that Chapter 5 obeys all the rules of legal positivism. It is to be observed that Article 33(5) which provides that:

> "The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man."

serves as a dent in the legal positivism character of Chapter 5.

The phrase *"... shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.*" leaves an interpretation opening for the possible entry of non-positivism into Chapter 5.

The clause admits that not all rights have been 'mentioned' by the Constitution. It therefore permits the importation of rights under this clause. The obvious question which then arises is "where would the Courts go to find a right which is not 'mentioned' in the Constitution?"

[188] Clause 11, Article 19, 1992 Constitution

This question came up in the case of *Ghana Lotto Operators Association & Ors v National Lottery Authority*[189]. In this case the plaintiff alleged that he had "Hohfeldian" claim rights which the Constitution did not mention and therefore sought remedy under Article 33(5). The Supreme Court, Brobbey, J.S.C., Presiding, gave a ruling delivered by Dr. Date-Bah, J.S.C. as follows:

> "The plaintiffs are not altogether explicit about how Act 722[190] violates Article 33(5). Clarity requires that the plaintiffs specify what rights of theirs have been infringed by Act 722 and which are not mentioned in Chapter 5 of the Constitution, but which should nevertheless be regarded as fundamental human rights or freedoms. Evidence of such rights can be obtained either from the provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states." (emphasis mine).

As noted above in *Griswold v Connecticut*[191], *Roe v Wade*[192] and *In re A (Children) (Conjoined Twins: Surgical Separation)*[193] the Supreme Courts in the US and UK when faced with this question did resort to Natural Law to find such 'unmentioned' rights. Evidence therefore exists in the 'practice of other states' that Natural Law has successfully been imported when faced with such situations. This implies that Article 33(5) does indeed open the door for a possible Natural Law 'spot' in the Legal Positivism 'garment' of Chapter 5. With the Natural Law cladding of the Constitution, the Court may import a natural law doctrine through the gaping hole of Article 33(5) without offending Clause 2 of Article 1.

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[189] Ghana Lotto Operators Association v National Lottery Authority [Unreported] REF. NO. J6/1/2008. 23/07/2008
[190] National Lotto Act, 2006 (Act 722)
[191] *Griswold v Connecticut* 381 U.S. 479,85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965)
[192] *Roe v Wade* 410 U.S. 113,93 S. Ct. 705,35 L.Ed. 2d 147 (1973)
[193] *In re A (Children) (Conjoined Twins: Surgical Separation) [2001] Fam 147; [2001] 2 WLR 480 per Brooke LJ*

Inquiring into the legal positivism of the 1992 Constitution would be incomplete without a search for John Austin's *Sovereign* and Hans Kelsen's *Grundnorm*.

The Search for Austin's *Sovereign*

The search for a sovereign is a search for *"... a determinate human superior not in the habit of obeying a like superior ... essential, indivisible and illimitable*" in the Constitution.

Article 1(1) resides sovereignty in the people of Ghana and makes the Constitution the supreme law of Ghana in Article 1(2). The key institutions of government: the Executive, Legislature and Judiciary are all made subject to the Constitution in Articles 58, 93 and 125 respectively.

The Constitution therefore makes no provision for the creation of an Austinian Sovereign.

The Search for the *Grundnorm*

According to Hans Kelsen all norms derive their validity from a higher norm in hierarchy. The *Grundorm* is at the highest level in hierarchy and exists only in 'juristic consciousness'. It is a non-juridical-norm; a premise (*Hypothese*)[194]. The *Grundorm* is presupposed, though not arbitrarily, by reference to whether the legal order as a whole is 'by and large' effective. It has no specific content as a legal construct.

The antecedents of the 4th Republican Constitution, 1992 were:

i. A revolutionary overthrow of the 1979 3rd Republican Constitution on 31st December, 1981.

[194] François Rigaux, *Hans Kelsen on International Law*, European Journal of International Law (Vol. 9 (1998) No. 2), Online: http://207.57.19.226/journal/Vol9/No2/art6-02.html Last accessed 24April2011

ii. A Proclamation (PNDCL 42) establishing the PNDC military government.

iii. A new *Grundnorm* was thus presupposed once the new legal system was 'by and large' effective after the Proclamation.

iv. PNDCL 253 established a Consultative Assembly to frame a draft constitution for Ghana.

v. The draft constitution was approved by the people of Ghana in a referendum held on 28th April, 1992.

vi. PNDCL 282 promulgated the 1992 Constitution and gave it the force of law (as a Schedule) which came into force on 7th January, 1993.

The 1992 Constitution having come into force and 'by and large' having been effective, a new *Grundnorm* was therefore presupposed.

So what is the G*rundnorm* of the 1992 Constitution?

Is it the PNDC Proclamation of December 31, 1981? This does not seem to be case.

The coming into force of the 1992 Constitution was a 'revolution' in the Kelsenian sense as the Proclamation of 1981 did not anticipate that kind of change. The Proclamation indeed reserved the power to 'amend, revoke or suspend' the Proclamation to its own lawgiver, the PNDC. However eventual revocation of the Proclamation was done by Section 36(1) of the Transitional Provisions of the 1992 Constitution, not in pursuance of any provision of the Proclamation.

Is it PNDCL 253 which established the Consultative Assembly or PNDCL 282 which claimed to give the Constitution the force of law? These do not also seem to be the case.

The *Grundnorm* is a non-juridical-norm with no specific content as a legal construct.

The 1992 Constitution derived its authorship and authority from the people of Ghana whose representatives assembled in the Consultative Assembly and followed by the approval obtained through a referendum. The *Grundnorm,* that 'juristic consciousness', therefore exists in the people of Ghana. The validity of the Constitution is therefore derived from the people of Ghana as a higher hierarchy of norm.

In conclusion, we may therefore say of the 1992 Constitution that Kelsen's *Grundnorm* may be traced, unlike Austin's *sovereign*. Although several norms are posited, especially as found in Chapter 5, the Constitution simultaneously makes room for the entry of Natural Law. So while certain clauses in the Constitution have legal positivism characteristics, the Constitution as a whole cannot be described as a document cast in Legal Positivism.

IV.iii Scandinavian Realism

Scandinavian Realism, typified by Olivecrona's ideas, sees the origin of law as a question of factual and historical origins, growth "out of customary, magico-religious rules found in ancient societies" with no metaphysical basis. It thus rejects natural law as illusory.

There seems to be no evidence in the 1992 Constitution to support this school of thought, the Constitution having been adopted 'in the name of the Almighty God', as contained in its Preamble.

Although several clauses in the Constitution have historical and customary origins, the Consultative Assembly, in their appeal to God at the start of each sitting, for wisdom to make good laws, endorsed the metaphysics of the origin of law, the *lex aeterna* espoused by Thomas Aquinas.

IV.iv American Realism

American Realism says law is what the judges do, not the rules that guide them. Oliver Wendell Holmes in his famous saying, "the prophecies of what the courts will do in fact, and nothing pretentious, are what I mean by the law", emphasized the view of the court's role in saying what the law is.

Clause 3 of Article 125 vests final judicial power solely and absolutely in the Judiciary, subject only to the Constitution. The question therefore of 'what is the law?' in Ghana, is only finally answered by the Judiciary.

In a Consultative Assembly debate on the supremacy of the constitution, Mr. Jacob Charles Amonoo-Monney (PNDC Appointee) explained the limits of the so-called 'omnipotent' Parliament in the terms below, and thus confirmed: it is only what law does, in fact, that we may call law.

> "Parliament is subordinate to the Constitution; Parliament is under the Constitution. So when one says that Parliament shall have no power, it is no institution talking to Parliament, it is the Constitution that is talking to Parliament. Parliament can only do what the Constitution would give it and no more. That is why the Supreme Court can make a declaration that an enactment passed by the so-called "sovereign" Parliament was made in excess of the powers conferred on it. That does not mean that the Judiciary is superior to Parliament. No! All that it means is that the Judiciary is saying that the Constitution is supreme; the Constitution says that you cannot pass such a law; therefore in interpreting the Constitution, we are saying that what Parliament has done is wrong. It is not that the Judiciary is superior to Parliament. The power of Parliament is not limitless; it is subject to the Constitution. Therefore when you say "Parliament shall have no power … " it is not derogatory of the so-called omnipotence of Parliament; it is only to establish a fact that Parliament is subordinate to the Constitution and if the Constitution does not give it power, it cannot do anything.""[195]

The above view upheld by the Consultative Assembly also underlies the spirit of judicial review in the 1992 Constitution, in direct contrast to earlier views of Parliamentary supremacy as expressed in *Lardan v Attorney-General (No 2)*[196], *Balogun v Edusei*[197] and the infamous *Re Akoto*[198] case.

[195] Consultative Assembly Proceedings on Wednesday, 19th February, 1992, pp.2591-2
[196] *Lardan v Attorney-General & Ors* 1957 2 G & G 1 (2d) 323; (1957) 3 WALR 114
[197] *Balogun & Ors v Edusei & Anor* 1958 2 G & G 1 (2d) 396; (1958) 3 WALR 547
[198] *Re Akoto & 7 Ors* 1961 2 G&G 1 (2d) 579; [1961] 2 GLR 523, SC

This spirit of the so-called Parliamentary sovereignty was exorcised from Ghana's constitutions through provisions such as Articles 125(3) and 296[199], 1992 Constitution, expressed in cases such as *NPP v GBC*[200] and *NPP v IGP*[201]. Justice Amua-Sekyi succinctly captured it in *NPP v IGP* as follows:

> "It is an axiom of British parliamentary democracy that Parliament is supreme. This means that Parliament may pass any laws that it considers ought to be made. If it takes a mistaken view of the public interest and passes laws that are inimical to the welfare of the community, or a section thereof, its error must be corrected by itself, and not by any outside body such as the courts. In this system of government, much faith is placed in the good sense of those who, for the time being, wield power. It works best in a society where tolerance of divergent views is regarded as necessary for the well-being of the community. But where those who hold differing views are looked upon as subversive, it breaks down completely and becomes tyrannical."[202]

The spirit of the 1992 Constitution is thus to ensure that the Courts have the final say on 'what the law is' as stated in the jurisprudence school of American Realism.

[199] Article 296, 1992 Constitution, defines limits on use of discretionary powers when vested in a person
[200] *NPP v GBC* 1993 2 G&G 1825 (2d) 2065; [1993-94] 2 GLR 354
[201] *NPP v IGP (Public Order Case)* 1993 2 G&G 1825 (2d) 2097; [1993-94] 2 GLR 459
[202] Loc. sit. supra note 201 *NPP v IGP* @467

IV.v Sociological Jurisprudence

The essence of the Sociological School is that law is a social phenomenon reflecting human needs. Roscoe Pound[203] wrote of the sociological movement in jurisprudence as 'a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern.' The central theme of Jhering's doctrine was to define the very purpose of law as *social.* He asserted that legal rules owed their origins to some purpose, some practical motive.

The motions, debates and discussions in the Consultative Assembly (CA) during the framing of the 1992 Constitution are replete with 'purposes and practical motives' behind almost every legal rule. Interestingly, the CA conducted its affairs with practically no direct and explicit jurisprudential theory references. It stayed focused on the 'adjustment of principles and doctrines' to the contemporaneous needs of Ghana and its peoples. The jurisprudence of the deliberations focused on the needs of Ghana without any reference to sociological school theories such as that of von Jhering, Ehrlich, Durkheim, Weber nor Pound.

The approach adopted for the making of the Constitution explains the complete absence of direct and explicit references to jurisprudential theories. The typical approach was summarized by Mr. Joe L. Allan (Mfantsiman District Assembly) as follows:

> Members of the CA made copies of the draft constitution for the constituencies they represented. Sub-committees were formed within the constituency on various parts of the proposed constitution. Meetings were then held to discuss opinions, which when agreed

[203] *Roscoe Pound*, Mechanical Jurisprudence (1908), referenced in Supra note 48

on, were carried to the CA meetings in Accra as representing the views of the constituency.[204]

The 260 constituencies ranged from district assemblies through professional bodies to trade associations.[205] Participation was by ordinary citizens with no legal training. In fact, the Ghana Bar Association did not participate in the CA.[206] (See II.2 The Making of the 4th Republican (1992) Constitution above for the composition of the CA).

The sociological jurisprudence of the constitution was aptly captured as follows:

Dr. Tony Aidoo (CDR) said:

> "Mr. Speaker, I think the time has come for us to sit down and carefully look at how we are going to develop our country, both politically and economically, not with reference to ideals and sentiments which have been operating elsewhere, but with an objective examination of our concrete social conditions and development systems which are applicable and which are workable."[207]

Also, Mr. Justice G. L. Lamptey (Judiciary), Chairman, Committee on Public Services said:

> " … [w]e are called upon to lay down the fundamental laws of the land, laws which will guarantee good government, peace and stability and which by and large would ensure the greatest happiness for the greatest number of Ghanaians. Law in the formal form in which we have it developed with the Greek thinkers through the Roman Empire,

[204] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.252
[205] PNDC Law 253
[206] Op.cit. supra note 33, Kwadwo Afari-Gyan. p.27
[207] Consultative Assembly Proceedings on Wednesday, Tuesday, 8th October, 1991, p.429

> Renaissance Reformation, 19th Century, more particularly in the 20th Century, attempts have been made to define law, the content of law, the purpose of law, the concept of law, but fortunately for us in this Assembly, we are not called upon to engage in that exercise. We are called upon to consider various documents which will form the foundation for the laws which we hope in its corpus will represent the fundamental laws of this country…
>
> … I [have] tried very carefully to avoid getting into the field of jurisprudence [theories] … it is our turn now to find and make for ourselves laws by which we will govern ourselves."[208]

Direct and explicit references to legal philosophies and theories were indeed absent. Consultative Assembly debates and discussions considered to write this chapter spanned over 3,800 pages. No evidence was found in these pages of any explicit reference to any legal theory by a participant while proposing a rule or amending one. Instead, behind every rule were the clearly stated key purposes and goals of **development**, **constitutional longevity**, **rights and freedoms**.

Development

i. National Development Planning Commission

The jurisprudence of development in the Constitution is typified by Articles 86 and 87[209] which created the National Development Planning Commission. It was established by Act 479, 1994, with the long title of "AN ACT to establish the National Development Planning Commission

[208] Consultative Assembly Proceedings on Wednesday, 20th November, 1991, pp.1295, 1304-5
[209] Articles 86, 87, 1992 Constitution - National Development Planning Commission

under the Constitution, provide for its composition and functions relating to development planning policy and strategy and for connected purposes."[210]

Contributing to the debate on these clauses, Dr. C. P. Imoru, Nandom Naa (PNDC Appointee) said it is "the co-ordinating institution within the development decision-making system."[211] This is acknowledged as the result of advocacy for a "development constitution" which have influenced constitution-making since the 1970s.[212]

Commenting on the economic intentions of the constitution, Dr. Joseph L.S. Abbey (PNDC Appointee) said:

> "[T]he most secure democracy is one that assures the basic necessities of life for all its people as a fundamental duty."[213]

Also, Mr. Edward Ameyibor (Ghana Journalists Association) had this to say:

> "The main problem facing this country is one of underdevelopment, ignorance and disease. It is a problem of ensuring that there is a good Government that will continuously be responsive to the people and draw up programmes for overcoming their needs."[214]

[210] National Development Planning Commission Act, 1994 (Act 479)
[211] Consultative Assembly Proceedings on Thursday, 30th January, 1992, p.1766
[212] Kumado, K., *The Constitution and Conflict Resolution in Africa*, in Mike Ocquaye, *Democracy and Conflict Resolution in Ghana*, pp.313-314
[213] Consultative Assembly Proceedings on Tuesday, 1st October, 1991, p.178
[214] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.262

Continuing with the economic intentions of the Constitution, Mr. Joseph Kwesi Odzeyem (Eastern Region Farmers Association) also said:

> "… a Constitution is an instrument of development."[215]

Mr. K. Adjei-Seffah (Institute of Marketing, Ghana) also had this to say:

> "We must state that the society is aiming at Market Economy, and this economy, should be enshrined in the Constitution so that no group of people would come later on and say they are going back to the Foreign Exchange regime which does not augur well for the economy."[216]

ii. Directive Principles of State Policy

Contained in Chapter 6 of the Constitution are the Directive Principles of State Policy (DPSP). These are the most pronounced rules with the jurisprudence of development. It contains most of the economic, social and cultural rights, which the framers designed as the vehicle to convey their intentions of the constitution being an 'instrument of development.'

An important question however is whether the DPSP are justiciable?

The debates and discussions with respect to these principles in Chapter 6 and the economic aspects of the constitution leave one in no doubt that the 'spirit' behind these clauses, the philosophy, or the intention of Chapter 6 was that of justiciability. When the issue was directly raised during proceedings it was answered as follows:

[215] Consultative Assembly Proceedings on Thursday, 10th October, 1991, p.685
[216] Consultative Assembly Proceedings on Tuesday, 1st October, 1991, p.204

Mr. John Jay Baiden-Amissah (Ghana Institute of Planners) said:

> "On the issue of Directive Principles of State Policy … Mr. Speaker, if this is not enforceable by law then what are we doing here?"[217]

Mr. Justice S.A. Brobbey (PNDC Appointee), Chairman, Legal and Drafting Committee however seemed to think otherwise. He said:

> "Directive Principles of State Policy … these State objectives for every Government to follow ... are not enforceable or justiciable but in other clauses they are referable to specific situations and they are justiciable."[218]

The view of Justice Brobbey was reflective of the view already expressed by the Committee of Experts which drafted the proposed constitution. This view, known as the traditional view, commonly held in other nations, is that Directive Principles of State Policy are non-justiciable.[219]

However, the Supreme Court decision in *Ghana Lotto Operators Association & Ors v National Lottery Authority*[220] has settled the issue in favour of Chapter 6 being, prima facie, justiciable. The Supreme Court ruling was arrived at partly through ascertaining the spirit of Chapter 6 from deliberations at the Consultative Assembly.

Presenting the ruling of the Supreme Court, Dr. Date-Bah, J.S.C., said:

[217] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.270
[218] Consultative Assembly Proceedings on Tuesday 17th March, 1992, p.3320
[219] Paragraphs 95-97, Committee of Experts' Report on Proposed Constitution, 1992
[220] Ghana Lotto Operators Association v National Lottery Authority [Unreported] REF. NO. J6/1/2008. 23/07/2008

> "As far as this present Court is concerned, we are of the view that, because there is a conflict between two previous Supreme Court decisions, we are free either to choose between the two decisions or to formulate a different rule that is right in our view, since there is currently no binding precedent. We would humbly submit that that right rule is a presumption of justiciability in relation to the provisions of Chapter 6 of the Constitution, 1992."

It is worthy of note that Brobbey, J.S.C. who seemed to have a contrary view during the Consultative Assembly deliberations, was the Presiding Judge of the Court in this case which unanimously ruled Chapter 6 as being justiciable.

The decision in this case confirmed an earlier Supreme Court decision per Adade J.S.C., as he then was, in *New Patriotic Party v Attorney-General (the 31st December case)*[221], and overturned another Supreme Court decision per Bamford-Addo J.S.C. in *New Patriotic Party v Attorney-General (the CIBA case).*[222]

Constitutional Longevity

i. Longevity Demand of the People

Constitutional longevity is another key societal purpose and motive underlying several provisions in the Constitution. The subject of longevity arguably enjoyed the longest debates, discussions and contributions during the CA proceedings; possibly only challenged by the debates on press freedom.

[221] *New Patriotic Party v Attorney-General (the 31st December case)* [1993-94] 2GLR 35
[222] *New Patriotic Party v Attorney-General (the CIBA case)* [1997-98] 1GLR 378

The National Commission for Democracy (NCD) which toured the country to collate views of the public for the formulation of the principles of the 1992 Constitution, captured this need as one of the key demands of the people of Ghana for the new Constitution.[223]

Mr. Ato Ampiah (Ghana National Chamber of Commerce) in his contribution stated:
"Mr. Speaker, our objective today is to draft a Constitution for our Nation, a process which has been carried out in 1960, 1969 and 1979. We are here because all the mentioned constitutions were abrogated through overthrows. This means that for our work to be meaningful and of value to the nation, we should be able to identify the problems of the past and resolve them. We cannot achieve stability for our country without systematically reducing all identified negative forces which militate against constitutions in this country."[224]

In his contribution Mr. J. Ainoo-Ansah (Gomoa District Assembly), noted that the concept and philosophy [of the Consultative Assembly process] is to give Ghana a very democratic and lasting Constitution.[225]

Underlying Article 3(4) of the 1992 Constitution is this "jurisprudence of constitutional longevity", a real sociological need of Ghana, having suffered constitutional overthrows in 1966, 1972 and 1981. The approach of the 1992 Constitution is to "render unconstitutional takeover of the powers of government unattractive."[226] Article 3(4) confers on all citizens the right and duty at all times to defend the Constitution and possibly to restore it after any overthrow. Promises of

[223] NCD Report, *Evolving a True Democracy,* p.88
[224] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.278
[225] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.243
[226] Prof. Kofi Quashigah, *The Evolution of the Constitution of Ghana: the Jurisprudence of the Courts*

absolving any person who acts in pursuit of Article 3(4) of any offence and liabilities are provisioned in Clauses 5,6,7 of Article 3.

In the case of *Ekwam v Pianim (No.2)*[227], the defendant failed to take protection under a similar clause in the 1979 Constitution. Pianim sought this protection because he had been convicted under the Public Tribunal Law, 1982 (PNDCL 24) for preparing to overthrow the PNDC government, and therefore disqualified to put himself up as a Presidential candidate. The court denied him protection because the 1979 Constitution had been abrogated at the time of his offence, and the clause he was seeking refuge under could not survive on its own.

Ekwam v Pianim has led to queries raised about the practicality of the promises of Clauses 5,6,7 of Article 3. It has however been shown in *Mitchell v DPP*[228] that Granada's constitution was successfully restored after an overthrow and the coup makers tried under the same constitution.

Clauses 4,5,6,7 of Article 3 seem to be far reaching enough to preserve this "jurisprudence of longevity" underlying the 1992 Constitution. Moreover, the Supreme Court in *NPP v Attorney-General (31st December Case)*, referenced above, in its ruling that it would be against the spirit of the Constitution to glorify an event like the 31st December 1981 coup, has signaled the Courts' abhorrence of coups d'état. The Supreme Court has thus cast the "jurisprudence of longevity" under the 1992 Constitution in the stone of *stare decisis*. The call for constitutional longevity by the Ghanaian society, tired of coups d'état, from the NCD Report through Consultative

[227] *Ekwam v Pianim & Ors (No. 2)* 1996 2 G & G 1825 (2d) 2140; [1996-97] SCGLR 120
[228] *Mitchell v DPP* [1986] LRC (Const.) 35

Assembly debates, have therefore been met by the 1992 Constitution and confirmed by the Supreme Court.

ii. Longevity from Workers' Right to Demonstrate

The most interesting Sociological Jurisprudence discovery of this research was probably the discovery of the jurisprudence of Article 21(1)(d)(e) which enshrines that:

> 21 (1) All persons shall have the right to -
>
> (d) freedom of assembly including freedom to take part in processions and demonstrations;
>
> (e) freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest;

On the face of it, Article 21(1)(d)(e) seems to stand for the protection of rights of workers to form and join Trade Unions and to assemble and take part in processions and demonstrations. These provisions, on face value, seem to do the obvious thing of granting workers such rights that will enable them to press their employers for their work-floor related needs and remunerations.

While this obvious purpose of the provision is true, the Trades Union Congress representative, Mr. Foli Amekor, in calling for the Article 21(1)(d)(e) right for workers, had the primary goal of workers using this right to fight against coup makers to ensure the longevity of the 1992 Constitution.[229]

[229] Consultative Assembly Proceedings on Wednesday, 2nd October, 1991, p.259

The right of workers to demonstrate, as it stands in the 1992 Constitution, therefore has a jurisprudence of constitutional longevity as a social need, in addition to work-floor demands of workers.

iii. Longevity from the Indemnity Clauses

The 1992 Constitution contains indemnity provisions[230] similar to those in 1960[231], 1969[232] and 1979[233] Constitutions. It is however to be noted that these four indemnity provisions are similar but not the same. While the pre-1992 Constitutions indemnified <u>any official act</u>, the 1992 Constitution indemnified <u>any act</u>.

The key difference is that the indemnity provisions of the pre-1992 Constitutions sought to protect only the acts of the overthrow of the respective governments, abrogation of the Constitutions, the establishment of the military governments and the establishment of the civilian constitutions on the exit of the military government. Indemnity provisions of the 1992 Constitution however go a step further to permanently cover all actions of the PNDC (the military government) and its appointees, throughout the period of its administration. (In fact, the Transitional Provisions of the 1979 Constitution explicitly excluded acts or omissions of any persons found "inconsistent with, or is in contravention of, any provision of the existing law."[234]) The indemnity coverage provided for the PNDC and its appointees under the 1992 Constitution therefore seem absolute and permanent in intent.

[230] Sections 34-37, Part IV, Transitional Provisions and Article 299 of the 1992 Constitution
[231] The Constitution Consequential Provisions Act, 1960 (C.A. 8) – containing Transitional Provisions
[232] Section 12(3), Part IV, Transitional Provisions, Constitution, 1969
[233] Section 9(3), Part V, Transitional Provisions, Constitution, 1979
[234] Section 9(4), Part V, Transitional Provisions, Constitution, 1979

The PNDC era has been described as an era of "noticeable lack of political liberalization and a relatively chilly political setting. [T]he PNDC refused to repeal repressive decrees such as Laws 4 (allowing indefinite detention without trial), 91 (limiting the application of habeas corpus) and 78 (permitting the execution of political offenders), which ma[d]e opposition to the regime so hazardous."[235]

The PNDC era is again not seen favorably, viewed from the "level of violence or the scale of intimidation to which the citizenry at large were subjected or the extent to which the regime sought to destabilize established authority and settled procedures and institutions."[236]

With such a view of the PNDC era, absolute and permanent indemnity has been viewed as an attempt to throw an impenetrable legal cloak around the PNDC years, only akin to impunity in international law. It is also seen as threatening to the much sought-after constitutional longevity because the protection is one-sided: victims of the PNDC era are left by the Constitution to carry their burdens alone, while it attempts to give absolute and permanent protection to those who they perceive as inflicting their pain under the dictatorship.[237]

Were the indemnity clauses smuggled into the 1992 Constitution?

There is a feeling that the indemnity provisions were "inserted" into the 1992 Constitution through "surrogates" of the PNDC[238]. This feeling found official expression in the National Reconciliation Commission Report of October 2004. It stated that the indemnity clauses were not permitted to be debated by the Consultative Assembly before their insertion into the

[235] E. Gyimah-Boadi, *Notes On Ghana's Current Transition to Constitutional Rule,* Africa Today, Vol. 38, No. 4, 4th Quarter, 1991

[236] C.E.K. Kumado, *Forgive us our trespasses: an examination of the indemnity clauses in the 1992 Constitution (Inter Faculty Lecture) (1993-1995) 19 UGLJ 83*

[237] Ibid. supra note 236 C.E.K. Kumado

[238] Ibid. supra note 236 C.E.K. Kumado p.84

Constitution[239]. Although this feeling is justifiable [as explained below], it is not wholly supported by the record of proceedings of the Consultative Assembly for 9th October and 5th December, 1991[240 242 243].

Two members of the Consultative Assembly were interviewed as part of this research, specifically on this question of whether the indemnity clauses were "smuggled" into the Constitution. These persons were Messrs Anthony Forson, Jr. and Charles Stanley-Pierre. Both interviewees confirmed that the Transitional Provisions (including the indemnity clauses) were deliberated upon by the Committee on State Policy and presented on the floor of the Assembly for debate. Mr. Stanley-Pierre, who was the chairman of the Committee on State Policy, confirmed that his committee drafted the entire Transitional Provisions, as part of the committee's work on the Supremacy of the Constitution, its Enforcement and Defence. He moved the report on the floor of the house for debate during the sitting of 5th December, 1991. This is confirmed by the recording of the 45th Sitting of the Consultative Assembly on 5th December, 1991[240].

Mr. Stanley-Pierre, during the interview, however said that, to his recollection, what his committee moved on the floor of the house for debate, with regards to the indemnity clauses, was to indemnify "any official act" of the PNDC. However, the version of the 1992 Constitution that went for the referendum had the word "official" deleted. This deletion was not the work of his committee, and neither did that portion of their work come back to the floor of the house for debate. It may therefore be inferred that the deletion could be the source of the feeling that the

[239] National Reconciliation Report, October 2004, Vol. 1 Chpt. 8, s.8.2.8 p.184; Vol. 3 Chpt. 1, s.3.2.9.2 p.6
[240] Consultative Assembly Proceedings on Thursday, 5th December, 1991, pp.1165-1168

Transitional Provisions were smuggled into the 1992 Constitution. The fact however remains that the Consultative Assembly did intend to have the indemnity clauses in the Constitution, generally in its present form, though the deletion of the word "official" [by whoever], has accorded the PNDC an unintended absolute protection.

It is to be noted that the proceedings of 5th December, 1991, did not see much debate on the Indemnity Clauses, besides comments by Dr. R. S. Amegashie[242]. The possible reasons for this may include:

- The Assembly focused most of its attention on other parts of the committee's work which related to the prevention of future coups (and probably more interesting)[241].
- The Indemnity Clauses presented by the Stanley-Pierre's committee were no different from those contained in the 1960, 1969 and 1979 Constitutions.

The feeling of the Indemnity Clauses being smuggled into the 1992 Constitution therefore seems to stem mainly from the obvious surreptitious deletion of the word "official" from "any official act" after the report had been accepted by the Consultative Assembly. Therefore while this feeling is justifiable, it is not wholly true that the Indemnity Clauses were smuggled into the constitution. The Consultative Assembly intended to grant indemnity to the PNDC, though not in its present form of absolute indemnity.

Jurisprudence of the Indemnity Clauses

Having thus established that the framers did intend to have indemnity clauses, the question therefore remains as to the thinking behind these provisions? What is the spirit or the jurisprudence of the indemnity clauses [as intended]?

[241] Consultative Assembly Proceedings on Thursday, 5th December, 1991, pp.1165-1257

Commenting on the indemnity clauses, Mr. David Nii Ayi Hammond (PNDC Appointee) said:

> "… Ghana is going through a change; thank God, we have been spared the fate that befell some of our neighbours like Liberia and Togo, and we should keep the current tempo and a good dose of level-headedness. We should ensure peaceful transition. That is not, in the least, to say that we should condone crime, but we should avoid vindictiveness, vengeance, and cultivate a spirit of tolerance and reconciliation, in the supreme interest of the nation."[242]

Dr. R. S. Amegashie (Institute of Chartered Accountants) in seconding Charles Stanley-Pierre's motion for the adoption of the report of the Committee on State Policy [which included the Transitional Provisions] also said the following regarding the indemnity clauses:

> "… [The people of Ghana] are saying we forgive and try to forget all the wrongs that have been done to date. They are saying we want to wipe the slate clean. We have seen enough damage done to this dear country of ours. They are saying we are granting all the indemnities now and amnesty to all political question marks now. We want to turn over a new leaf and move forward in peace and stability to the haven of rich development and well-being." [243]

The foregone show that the intention of the Consultative Assembly behind the indemnity clauses was not that of impunity, nor the condoning of crime, but that of a response to "forgive us of our trespasses" as aptly reiterated by C.E.K.Kumado.[244] The intention of the framers was to 'forgive

[242] Consultative Assembly Proceedings on Wednesday, 9th October, 1991, pp.507-8
[243] Consultative Assembly Proceedings on Thursday, 5th December, 1991, p.1170
[244] Ibid. supra note 236 C.E.K. Kumado

past sins' for the sake of stability of the nation. Constitutional longevity was therefore the spirit behind the indemnity clauses.

Future Survival of the Indemnity Clauses

The totality of the indemnity provisions in the 1992 Constitution protect the PNDC and its appointees from being questioned in court or order or remedy issued against them for:

i. acts or omissions during its administration (s.34(1))

ii. any act to assist or bring about the change in government (s.34(2)(c))

iii. any act for the establishment of the 1992 Constitution (s.34(2)(d))

iv. any action taken or purported to have been taken by the PNDC (s.34(3)(4))

v. any act alleged to be in contravention of any law (s.34(5))

vi. any confiscation of any property and any other penalties imposed (s.35(1)(2))

vii. any enactment or rule not inconsistent with the constitution (s.36(2))

Additionally:

i. Parliament has no power to amend the indemnity clauses (s.37), and,

ii. It is enshrined that the transitional provisions shall have effect notwithstanding anything to the contrary in the Constitution (Article 299).

Therefore the jurisdiction of the Courts seems to have been ousted and Parliament's legislative powers disabled with respect to any act or omission of the PNDC and its appointees, supposedly absolutely and permanently. However, it seems that the Transitional Provisions did not go far enough to protect the Indemnity Clauses as a separate entity from the PNDC and its appointees. It is therefore submitted that the constitutionality of the Indemnity Clauses may be challenged, without offending the Transitional Provisions. It is implied here that if a legal attack is launched

which aims NOT at the PNDC and its appointees, but rather at the constitutionality of the Indemnity Clauses, admissibility may lie with the Supreme Court. It therefore seems that the indemnity clauses of the 1992 Constitution may "only be maintained by power not by law."[245]

It is therefore submitted here that the jurisprudence of the indemnity clauses is sociological. They are non-juridical, as they do not seem to enjoy enough legal security. They were included in the Constitution to meet the contemporaneous needs of peace and stability. So when society considers this sociological need met at some point in time, it is predicted that the indemnity clauses may be expunged from the 1992 Constitution with a Supreme Court order, without needing a national referendum.

The National Reconciliation Commission in its final report seems to recommend the removal of the indemnity clauses[246]. It argues for a submission of the indemnity clauses to a referendum because it sees the clauses as unjust. The report asserts that a stable constitutional order cannot be founded on injustice and impunity on the part of wrong-doers. It has however been argued in this research that expunging the indemnity clauses may only require a Supreme Court order, without requiring a referendum, if the matter is viewed from the constitutionality of the clauses.

IV.vi Historical Jurisprudence

i. Evidence from the Consultative Assembly

The historical school in jurisprudence teaches that a legal system can only be understood through its historical roots and patterns of development. von Savigny saw law as reflecting the historical

[245] Ibid. supra note 236, C.E.K. Kumado
[246] Op cit. supra note 239

experience, culture and 'spirit' of the people, the *volksgeist*. Evidence of historical jurisprudence abounds in the 1992 Constitution.

Mr. Charles Stanley-Pierre, (Ghana Employers' Association), Chairman, Committee on State Policy noted that "… [the constitution] is a reflection of our history, an embodiment of our aspirations …"[247]

The constitutional history of Ghana dates back to 1844 with each subsequent constitution showing signs of having learnt from the previous constitutions.

Mr. Justice G. L. Lamptey (Judiciary) Chairman, Committee on Public Services noted that

> " … before the Bond of 1844 our societies were governed not by written laws but by Customary Law … And from then on, the law has developed until it is our turn now to find and make for ourselves laws by which we will govern ourselves."[248]

ii. Prohibition of One-Party State

The 1992 Constitution provides in Articles 3, 55 and 56 respectively as follows:

- "Parliament shall have no power to enact a law establishing a one-party state."[249]
- "The right to form political parties is hereby guaranteed."[250]
- "Parliament shall have no power to enact a law to establish or authorise the establishment of a body or movement with the right or power to impose on the people of Ghana a common programme or a set of objectives of a religious or political nature."[251]

[247] Consultative Assembly Proceedings on Thursday, 5th December, 1991, p.1166
[248] Consultative Assembly Proceedings on Wednesday, 20th November, 1991, p.1305
[249] Article 3(1), 1992 Constitution
[250] Article 55(1), 1992 Constitution

The three provisions above regarding political parties are enshrined in the 1992 Constitution for historic reasons, as noted below by Mr. David Y. Mensah (Atebubu District Assembly):

> "Ghana up to 1964 (from independence) became a one-party State and sections of the people lost their freedom of association … a new chapter is unfolding before us, and the chiefs and people of this country would be the wiser men and women if they do not forget the painful experiences of the past."[252]

iii. Compliance with Supreme Court Order

The Constitution provides for the removal of the President from office if he fails to obey or carry out a Supreme Court order with regard to an enactment, act or omission made in contravention to the Constitution.[253]

This clause is rooted in the history of *Sallah v Attorney-General*.[254] In this case Mr. E.K. Sallah, a public official, alleged wrongful dismissal from office when government did not reappoint him to his office in accordance with the transitional provisions of the 1969 Constitution. The Supreme Court declared the government's refusal to reappoint him as unlawful. The Prime Minister, Dr. Busia, responded to the Supreme Court decision with a radio broadcast and declared that "[n]o court can enforce any decision that seeks to compel the government to employ or re-employ anyone."[255]

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[251] Article 56, 1992 Constitution
[252] Consultative Assembly Proceedings on Thursday, 10th October, 1991, pp.631-2
[253] Clauses 1- 4, Article 2, 1992 Constitution
[254] *Sallah v. Attorney-General*, 2G&G 739(2d) 1319
[255] Dr. Busia's Radio Broadcast (20/04/1970) on the judgment in the *Sallah* case.

iv. 48 Hour Detention

The Constitution provides that a person arrested, restricted or detained shall be brought before a court within 48 hours.[256] Being a human right issue, previous Constitutions have kept this period of detention at 24 hours.

The 1992 Constitution however extended this period to 48 hours at the risk of abusing the rights of citizens. The representative of the Ghana Police Service at the Consultative Assembly, Mr. George Abavelin, provided the historical perspective and justification for this extension as follows:

> The 1969 and 1979 Constitutions provided for 24hours. But:
>
> - The State machinery that deals with the issues is always inadequate.
> - It takes investigators considerable time to get suspects.
> - It takes time to examine the issues before taking a decision to go to court.[257]
>
> Therefore 48hours' detention before bail was preferred to 24hours.

v. Parliament Altering Court Judgment

The 1992 Constitution provides in Article 107 that:

> Parliament shall have no power to pass any law -
>
> (a) to alter the decision or judgment of any court as between the parties subject to that decision or judgment;[258]

Article 107 is in pursuit of the principle of separation of powers to ensure good governance. This rule traces its roots in the history of the nation, to the lesson learnt in the case of *Balogun v*

[256] Clause 3, Article 14, 1992 Constitution
[257] Consultative Assembly Proceedings on Tuesday, 1st October, 1991, pp.173-4
[258] Article 107(a), Constitution, 1992

Edusei[259]. In this case a court held the Minister of the Interior and the Commissioner of Police in contempt for deporting Balogun and 3 Others from the country while applications for writs of *habeas corpus* were still *sub judice*. Smith J. stayed execution of committal to prison, expecting the contemnors to purge by expressing regret. During the pendency of the contempt, Parliament passed an Act[260] which "indemnified the contemnors from all penalties and exonerated them from all other liabilities."[261]

Smith J. expressed his frustration of such interference in a court's judgment as follows:

> "I cannot over-emphasise the undesirability of interference by the Executive with the functions of the court. Persistent indulgence in such a practice could not have any other than the most serious ill-effect on the well-being of the country. Decisions of a court are as binding upon the Executive as the laws which Parliament passes are binding upon the ordinary citizen, and it is the court that enforces upon the people obedience to these laws, thereby aiding Parliament in the ordering of the country."[262]

Not only does *Balogun v Edusei*[263] demonstrate an unwanted interference in decisions of Courts, it shows abuse of human rights as well. In a later judgment in *Balogun v Minister of Interior*[264], Ollennu J. ruled the action of government wrongful upon finding that Balogun and the 3 Others

[259] *Balogun & Ors v Edusei & Anor* 1958 2 G & G 1 (2d) 396; (1958) 3 WALR 547
[260] Deportation (Indemnity) Act (No. 47 of 1958) passed 24th December, 1958; received Royal Assent same day.
[261] Loc. sit. supra note 261, Deportation (Indemnity) Act (No. 47 of 1958)
[262] Op. cit., supra note 260, *Balogun & Ors v Edusei & Anor p.402; p.553*
[263] Ibid., supra note 260, *Balogun & Ors v Edusei & Anor*
[264] *Balogun & Ors v Minister of Interior* 1959 2 G&G 1 (2d) 403; [1959] GLR 452

were indeed Ghanaians whose deportation was therefore in contravention to the Deportation Act.[265]

It is therefore to avoid the "ill-effect on the well-being of the country" and for human right protection, among others, that such interference has been outlawed in Article 107, benefiting from the history of the nation.

Combined views of Dankwa, Brobbey and Rawlings - Sociological/Historical School

Professor Dankwa, Justice Brobbey and ex-President Rawlings again expressed views [when interviewed as part of this work], which suggest that the 4th Republican Constitution is underpinned by sociological and historical jurisprudence (in addition to natural law).

Dankwa: talked about law being an expression of the total experience of society (Historical School), which cannot be divorced from what goes on within and without society. He talked about law meeting the goals and aspirations of a people, meeting their welfare, capturing how society operates and addressing the needs of society.

Brobbey: talked about law representing the interest of the people and goes through a natural process of growth and development needing the patience of the people. Law is reflective of the unique environment of a people (Historical School) he opined.

Rawlings: Sees law as a mechanism for the achievement of societal goals. Sees law as evolving through continual re-examination of rules by society (Historical School). He emphasizes social justice. He sees just laws as the implementation and enforcement of the sentiments of society (especially the vulnerable) for the

[265] S.3(1), Deportation Act (No. 14), 1957

benefit of society. He requires the participation of all of society to create law and to achieve justice.

The combined views of these three gentlemen therefore underscore, inter alia, the sociological and historical schools of jurisprudence as being the spirit of the 1992 Constitution.

IV.vii The Customary Law School

The key jurisprudential question on customary law is whether it has the necessary content to influence a Constitution.

Customary Law as a source of Law

The 1992 Constitution both acknowledges customary law and admits its influence on the constitution through Article 11:

(1) The laws of Ghana shall comprise-

(a) this Constitution …; and

(e) the common law.

(2) The common law of Ghana shall comprise … rules of customary law …

(3) For the purposes of this article, "customary law" means the rules of law, which by custom are applicable to particular communities in Ghana.[266]

Codification of Customary Law

As a confirmation of customary law as a source of law, the Constitution under Article 272 tasks the National House of Chiefs, a customary law institution, to codify customary law:

'The National House of Chiefs shall -

[266] Clauses 1-3, Article 11, Constitution, 1992

(b) undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin;'[267]

Chieftaincy Guaranteed

In doing respect to the content of customary law, the Constitution guarantees chieftaincy and enshrines it under Article 270:

(1) The institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed.[268]

Role of Chiefs in Legislation

Article 106 respects the content of customary law by including custom in the process of legislation that affect chieftaincy:

'(3) A bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of Chiefs.'[269]

The principle in this rule governed the case in *Ware v Ofori-Atta & Ors*[270] where an Act of Parliament[271] and an order under it were declared invalid. The Act did not follow the constitutional procedure[272] of reference to the House of Chiefs, similar to Act 106(3), Constitution, 1992.

[267] Article 272(b), Constitution, 1992
[268] Clause 1, Article 270, Constitution, 1992
[269] Clause 3, Article 106, Constitution, 1992
[270] *Ware v Ofori-Atta & Ors* 1959 2 G&G 1 (2d) 425
[271] Statute Law (Amendment) (No. 2) Act, 1957
[272] Section 35, Ghana (Constitution) Order in Council, 1957

Definition of Chief

The Committee of Experts which proposed the first draft constitution attempted to modernize the definition of chief as it had been in previous constitutions. The ill they tried to cure was situations when, due to the definition of chief in the constitution, some chiefs could be "designated from a distant community without reference to the consent of the people concerned". They therefore included in the definition "election by his or her people"[273].

This modernization was rejected by Osagyefo Kuntunkununku II (Eastern Region House of Chiefs) to preserve "custom and history"[274]. His rejection was accepted by the Consultative Assembly. This again shows the influence of customary law on the 1992 Constitution.

Citizenship by Marriage

Another influence of custom on the 1992 Constitution was the rejection of the Consultative Assembly of a provision in the 1979 Constitution on citizenship[275]. In this provision a monogamous marriage was a requirement for a man who sought to acquire citizenship through marriage. In asking for a modification of this rule prior to admitting it into the 1992 Constitution, Mr. C.A. Avoka (PNDC Appointee), argued that Custom does not restrict marriage to monogamy.[276]

[273] Paragraphs 345-348 of Committee of Expert's Proposed Constitution
[274] Consultative Assembly Proceedings on Wednesday, 9th October, 1991, p.560
[275] Clause 5, Article 15 Constitution, 1979
[276] Consultative Assembly Proceedings on Wednesday, 13th November, 1991, p.1000

IV.viii Some Hohfeldian Rights Under the 1992 Constitution

Some jurists have contended that the essence of law is about the enunciation, interpretation and protection of rights[48]. Using this narrow definition of law's essence, the 1992 Constitution may be described as law indeed, with the numerous rights it seeks to grant and protect.

The issue of rights in the Constitution could be treated under natural law, historical or the sociological school. This is because they are fundamental, have historical character and also seek to meet the contemporaneous sociological needs of the people. It has however been separated here because of the focus on finding only Hohfeldian Rights under the constitution. The search under this section is for some of the rights recognized in the constitution whose correlative duties may easily be found in the constitution.

i. Right [and duty] to Defend the Constitution

Article 3 grants all citizens the right [and duty] to defend the Constitution and seek its restoration in the event of any unlawful overthrow[277]. The correlative duty [and right] to the state to reverse any consequences suffered by any citizen and to pay compensation to such, in the course of exercising this right granted under Article 3 is granted by the same Article[278].

ii. Right of Citizenship

(a) Chapter 3 of the Constitution[279] [280] grants the right of citizenship to qualified persons. The correlative duty of this right may be found in the forbearance of the state from arbitrarily revoking this citizenship or deporting any person vested with this right as was

[277] Article 3(4), Constitution, 1992
[278] Article 3(6),(7), Constitution, 1992
[279] Articles 6,7, 9, 10, Constitution, 1992
[280] Act 527(1),(2) (1996) which amended Articles 8 and 9 of the 1992 Constitution

seen in the cases of *Shalabi v Attorney-General*[281] and *Olympio v Ministry for the Interior*[282]. In the *Shalabi* case, the plaintiff claimed the right to operate a transport business as a citizen notwithstanding provisions of a law[283] which said otherwise. The Attorney-General argued that the plaintiff's citizenship right had been revoked retrospectively by a new law[284] passed. The Court rejected this arbitrary and retrospective revocation of the plaintiff's citizenship right acquired under the constitution[285] and law[286]. Similarly in the *Olympio* case, the plaintiff, having acquired a citizenship right under law[287] [288] [289], succeeded in getting the Court to stop an attempt by the State to withdraw his permit to stay in Ghana and to deport him within 48 hours.

(b) Secondly, the Constitution creates correlative duties in Article 41 for every citizen, which it describes as inseparable from the rights and freedoms enjoyed. These duties include the promotion of the prestige and good name of Ghana and respect of national symbols; uphold and defend the Constitution; foster national unity; respect rights of others; protect public property; honestly satisfy all tax obligations; etc[290].

iii. Right of Inviolability

The general rights of all persons against inviolability of dignity, against torture and inhuman treatment, and against slavery and servitude are acknowledged in Articles 15, 16[291]. The

[281] *Shalabi and Anor. v The Attorney-General*, 2G&G 739(2d) 1489 (1971); [1972] 1 GLR 259-270
[282] *Olympio v Ministry for the Interior*, 2G&G 739(2d) 1157 (HC Accra 1969)
[283] Ghanaian Business (Promotion) Act, 1970 (Act 334)
[284] Ghana Nationality (Amendment) Decree, 1969 (N.L.C.D. 333)
[285] Articles 5, 6 of Constitution, 1969
[286] Ghana Nationality Decree, 1967 (N.L.C.D. 191)
[287] British Nationality Act, 1948
[288] Ghana Nationality and Citizenship Act, 1957
[289] Op cit. supra note 286
[290] Article 41(a)-(k), Constitution, 1992
[291] Articles 15(1),(2), 16(1),(2), Constitution, 1992

correlative duty may be said to be the duty of forbearance of all persons in perpetuating such acts of inviolability against any person.

iv. Right to Fair Hearing

The Constitution, in creating the right to fair hearing in Article 19, in the same Article creates the various correlative duties to ensure the preservation of this right. These duties include trial by jury in the case of criminal offences; presumption of innocence until proved guilty; information to the accused in a language he understands; adequacy of time and facilities to prepare defence; no retroactive laws; no common law criminal offence[292]; etc.

v. Right to Vote

Every qualified citizen is granted the right to vote in Article 42. Correlative duties to this right are created in Articles 43, 45 where an Electoral Commission is created with specific duties and functions to ensure that citizens can exercise this right. This Hohfelding claim-right was exemplified in the case of *Tehn-Addy v Attorney-General & Electoral Commission*[293]. In this case the Electoral Commission had failed to register the plaintiff to vote in the 1996 general elections due to a pending injunction restraining them from conducting a supplementary registration exercise. The Supreme Court upheld the plaintiff's plea and ordered the Electoral Commission to register him. It ruled that "[A]rticle 45 of the Constitution, 1992 entrusted a heavy responsibility to the Electoral Commission to ensure the exercise of the constitutional right to vote to any qualified Ghanaian such as the plaintiff"[294].

[292] Article 19(1),(2),(5),(11) Constitution, 1992
[293] *Tehn-Addy v Attorney-General & Electoral Commission* [1997-98] 1 GLR 47 Supreme Court, Accra.
[294] Ibid.

Chapter VI

CONCLUSION

The creation of Ghana's 4th Republican Constitution lasted a period of two years. It started with the collation of public views on the future "constitutional order" in July, 1990, and ended with a referendum which approved the draft Constitution in April, 1992. The Constitution came into effect on 7th January, 1993.

A proposed Constitution was first created by the Committee of Experts using the report of the National Commission on Democracy (NCD) which collated the public views. A Consultative Assembly, with country-wide representation, then created the final draft which got approved at the referendum of April 1992, using the following input documents:

1. Report of NCD: "Evolving a true Democracy".
2. The Proposed Constitution created by the Committee of Experts.
3. The Abrogated Ghana Constitutions of 1957, 1960, 1969 and 1979.
4. The Report of the Business Committee of the Consultative Assembly.
5. The Report of the Standing Orders Committee of the Consultative Assembly.
6. The Report of the House Committee of the Consultative Assembly.

The Consultative Assembly which authored the final draft document was composed of ordinary citizens of Ghana, the majority of whom had little or no knowledge about the various theories of law and philosophies that underlie a Constitution. The Constitution was therefore created with no direct and explicit reference to any theory of law. A study of the resultant Constitution however shows the following theories of law underlying various provisions in the Constitution:

Natural Law, Legal Positivism, American Realism, Sociological School, Historical School and Customary Law School. Some Hohfeldian rights were also identified in the Constitution. Can we then name any single theory of law or legal philosophy and label Ghana's Constitution as being of that jurisprudence? This research has discovered that just like the US and UK Constitutions, we are unable to give an emphatic answer to this question.

Members of the Consultative Assembly had a clear understanding of their task "… to facilitate the arrival of the day when there will be plenty for our people, when ignorance and disease will disappear and when good government will ensure the fundamental rights of all our people..."[295]

With this understanding of their goal and the needs of the people they represented, the Consultative Assembly wrote a Constitution which may be described as largely underlaid with the Sociological School of jurisprudence.

However, 'adopting, enacting and giving to ourselves' a Constitution in the Name of the Almighty God and ascribing to God the wisdom for all laws throughout the Consultative Assembly process does cast the Constitution into a Natural Law mold. Within this Natural Law clothing or cladding several other jurisprudential bases are found, as mentioned below.

Within this clothing Legal Positivism is found for rules which need exactitude and predictability, the needed basis for any criminal law and human right jurisprudence, as found in Chapter 5.

[295] Mr. Edward Ameyibor (Gh. Journalists Association), Consultative Assembly Proceedings on Wed, 2nd Oct, 1991, p.262,

The specific and definite role given to the Judiciary in Article 125 to determine finally what the law is speaks to the American Realism School found within the Natural Law walls of the Constitution.

The clearly defined agenda of Articles 86, 87 and Chapter 6, to meet the goals of development and the aspirations of society; the constitutional longevity aim of Article 3 and the "forgiveness of past trespasses'" spirit of the Indemnity Clauses all speak to the Sociological Jurisprudence of the Constitution.

Also within the natural law walls are clear signs of Historical Jurisprudence. Marks of national history are found in Articles 3, 55 and 56 in the prohibition of one-party state; freedom to form political parties; and the prescribed punishment for a President who defies a Supreme Court order on the unconstitutionality of his actions. Article 107 which outlaws any interference in a court ruling using Parliamentary powers of a government is yet another of the remains of history.

The acceptance of Customary Law as a source of law in Article 11, and empowering codification in Article 272 show the Customary Law influence on the Constitution. Further evidence is seen in its guaranteeing of the chieftaincy institution and protecting it against Parliament making laws that concern it without consulting it, in Article 106.

Finally, some Hohfeldian Rights were also identified in the Constitution. These include the right [and duty] to defend the constitution, right to citizenship, right to inviolability of human dignity and against slavery, right to fair hearing and the right to vote. These are rights with clearly defined correlative duties in the Constitution.

The 1992 Constitution may therefore be described, just like the US and UK Constitutions, as being Natural Law in its jurisprudential outlook, but pragmatically embodying other schools of jurisprudence which have evolved from the needs and aspirations of the nation and its people.

In summary, the 1992 Constitution may be said to have a Natural Law cladding, but embodies:

- Legal Positivism
- American Realism
- Sociological School
- Historical School,
- Customary Law School, and some
- Hohfeldian Rights

as the underlying jurisprudence, designed to achieve the goals of meeting the aspirations of:

- constitutional longevity, and, to
- secure the blessings of liberty, equality of opportunity and prosperity;
- in a spirit of friendship and peace with all peoples of the world;
- acknowledging that all powers of government spring from the sovereign will of the people of Ghana.

Chapter VII

Recommendations

Is there a need to Change the Jurisprudence of the Constitution

Evidence has been presented in the preceding chapters to show the presence of the following theories of law underlying Ghana's 1992 Constitution:

- Natural Law
- Legal Positivism
- American Realism
- Sociological School
- Historical School
- Customary Law School, and
- Hohfeldian Rights

Does Ghana have any need to change the jurisprudence of its Constitution?

When this question was put to the three interviewees (Dankwa, Brobbey, Rawlings), they each answered NO, a position this research has come to agree with. Some of the reasons are:

i. The Constitution is too young in operation, more time must be allowed for growth,

ii. The Constitution evolves sociologically, and with such a growth there is not much one can change, the process of evolution must be allowed to continue,

iii. The Constitution is meant to reflect the needs and aspirations of the people so one cannot conjure a need for any change,

iv. The key objectives of meeting the development needs of the people have already been captured in the Constitution, so there is no need to change to anything else,

v. The possible alternative jurisprudence we may change to like civil law or a fully traditional system already do not look attractive to Ghana's social setting,

vi. Key institutions required for the operation of the Constitution are already in place and seem to be working well, only requiring patience, further definitions and delimitations of functions for more improvements in performance,

vii. Compared with its neighbours, Ghana already seems to be enjoying a reasonable level of stability and prosperity under the Constitution, hence prompting no need to change.

For the above reasons, it is the conclusion of this research that Ghana seems to have no need to re-examine the jurisprudence of its Constitution or to contemplate a change.

Recommendations for achieving Constitutional Goals

Although this research has concluded that there is no need to change Ghana's Constitutional Jurisprudence, additional steps still need to be taken to accelerate the achievement of the goals of the Constitution. The following recommendations are made to improve the speed of achieving the three main goals of constitutional longevity, development and promotion of rights and freedoms. These include improvements in allegiance to the Constitution, increasing codification of Customary Law, improved use of contract relations and the creation of a central national theme for unification.

Constitutional Longevity

The Consultative Assembly having devoted so much of its attention to the longevity of the Constitution showed how important this subject is. Indeed, it was also one of the key issues raised in the NCD Report, a collation of public views on the goals of the Constitution.

The single source of destabilization of the Constitutional order in Ghana has been the military. The military however never act alone; they always rely on public sentiments and ride on it for a successful entry and tenure in office. The public, in a military takeover, either openly support the takeover, or stand unconcerned and by the indifference, encourage the destabilization.

In our traditional chieftaincy system, why is it that it does not matter how poor and disillusioned people may get, the idea of overthrow of the traditional constitutional order is never contemplated?

One can for instance never contemplate the overthrow of the Asantehene! Why do these same people stand unconcerned or even rejoice when the nation's constitutional order is overthrown? The answer to this question could possibly help in finding the answer to our question of constitutional longevity.

One answer which has been attempted is that our traditional systems have never had written constitutions and standing armies.[296] A standing army and a written constitution have therefore remained foreign to the Ghanaian. Hence if the national standing army overthrows the government and the written constitution the Ghanaian is not bothered much, while it remains inconceivable that that will happen in his traditional community. In similar vein, the Ghanaian who enters the military remains allegiant to the chief in his hometown and will never overthrow him with his guns, but will easily help overthrow the nation's government and constitution.

- In view of the above reasoning, a suggested approach to ensuring constitutional longevity is civic education to remove the "foreign" mentality of the Ghanaian about his political government and constitution. Clear analogies should be drawn in this education between the traditional constitutional government and the national constitutional government.

[296] L.B. Akainyah (Natl Catholic Secretariat.), Consultative Assembly Proceedings on Wed, 2nd Oct., 1991, pp.246-7

- It is also suggested that deeper allegiance should be formed through oath, between every military personnel, and the Commander-in-Chief, being the President.
- It is also recommended that local government structures be evolved to enable Parliamentarians have clear linkages with the local government system so they will together reach each community. This would let citizenry at all levels see the presence of government, feel its usefulness and presence and so take interest in the sustenance of the national constitutional government.

Customary Law

It has been observed in Chapter III that there is an ever dwindling reliance on Customary Law in the legal systems of the United States of America and the United Kingdom. The decreasing reliance on Customary Law is obviously to minimize its disadvantages described by Jeremy Bentham as ”nothing but so many autocratic acts or orders ...”[297] and Prof Llewellyn as “too blunt and confused to serve in careful analysis”.[298]

It is therefore in the right direction that the Constitution has requested a progressive codification of Customary Law in Article 272(b).

It is recommended that specific steps are taken by government to speed up this codification process to systematically bring Customary Law into the main stream legal system.

Codifying Customary Law will ensure its applicability on a national setting and eliminate any unwanted and unpredictable parts.

[297] Op. cit. sura note 89, *The Collected Works of Jeremy Bentham*
[298] Op. cit. supra note 90 Edwin Patterson, *Jurisprudence*

The Jurisprudence of Contract

It was noted in Chapter III that one of the key theories of law that have aided the development of law and order in the UK is the jurisprudence of Contract. The concept of Contract got very well development in the UK in both private and public law.

This is a jurisprudence that needs to be advocated and advanced in Ghana. Letting contract law play central role in all dealings in any nation is very crucial. It is needed for the development of business and for the growth of trustworthiness, an essential ingredient for development and longevity.

Central National Theme

Another icon that helped the development of law in both the USA and UK was the identification of a central national theme around which all citizens "gathered", derived nationhood and common destiny. For the USA it was a common history; for the UK it was the Church of England.

Ghana has no such common history nor church: being disparate communities put together only recently by the British. Neither do we have a common, national religious identification like the UK. But as a people, we have a common enemy of poverty, deprivation, illiteracy and underdevelopment. We could exploit this as a common rallying point and a unifying factor that will merit the attention of all nationals to form a great bond of unity which our laws will then depend on to develop.

Summary of Recommendations

While this work has identified no need for Ghana to change the jurisprudence of its Constitution, the following suggestions have been made to improve the change of the achievement of identified goals:

- constitutional longevity
    - just like a soldier will never go to his hometown to overthrow his chief because of his allegiance to him, so both soldiers and civilians should be educated to cultivate allegiance to our government and constitution, drawing on the parallel of our allegiance to our traditional systems.
- Customary law
    - Codification should be accelerated to increase its national appeal and minimize its unpredictability.
- Jurisprudence of Contract
    - Just like the US and UK used the law of contract to achieve respectability for law and honouring of promises, Ghana should make Contract law the center of all private and public life. Let fulfillment of promises become our way of life.
- Central National Theme
    - Since Ghana lacks the central national theme such as the Church of England which brought the English together, Ghana may adopt the concept of the common enemy of poverty, deprivation, illiteracy and underdevelopment to unite all citizens behind a common goal.

Appendix

Jurisprudence in Operation in Ghana

The main sources of information in this work to discover the jurisprudence of Ghana's 1992 Constitution were:

- The NCD Report – "Evolving a True Democracy",
- Report of the Committee of Experts which produced the Proposed Constitution. Commissioned by the PNDC and based on the NCD Report,
- Official Record of motions, debates and discussions of the Consultative Assembly, which produced the draft Constitution,
- 1992 Constitution document itself, and
- Some constitutional law cases,

To obtain the actual jurisprudence "feel" of some real persons involved in the creation of the Constitution, some key persons were selected and interviewed on the subject.

These persons were:

Professor E.V.O. Dankwa – member of the Committee of Experts.

Justice S. A. Brobbey – Member of the Consultative Assembly representing the Judiciary and Chairman of the Legal and Drafting Committee of the Assembly. Currently a Justice of the Supreme Court.

Ex-President J. J. Rawlings – Chairman of the PNDC, the military government that initiated and supervised the creation of the Constitution; also the first head of state to govern with the Constitution for its first 8 years.

Summary of Interviews

Interview with Professor E.V.O. Dankwa

(i) What role did you play in the creation of the 4th Republican Constitution?

Member of the committee of experts which drafted the constitution for the consideration of the Constituent Assembly to create the 1992 Constitution of Ghana.

(ii) What do you consider as the 4th Republican Constitution's definitions and ideas of law and justice?

It's not easy to settle on a provision in the Constitution which you call a definition of law or justice.

(iii) What are your personal definitions and ideas of law and justice – what do you consider as the ends of law and justice in Ghana?

a. Law is what we get when we put together the constitution, customary practices of the people reduced into writing by the judges through cases, statutes, regulations, international practices, conventions and opinions and something higher than all that - natural fairness and conscience.

   Hart said those who write about these theories of law have shown the light so bright on a spot of law that it blinds them to the totality of law; and when you try to pigeon hole people into natural law, into Marxist, into positivist, into historical, sociological and so on you are missing some aspect of law.

   Law is not a thing apart from society and so it is not divorced from what goes on and we should always keep in mind life in society and see how we really interpret,

understand and implement provisions of law. It is part and parcel of our experience.

b. Justice entails equality before the law, it entails impartiality in adjudication of disputes, it encompasses ideas of independence of those who decide the disputes before our courts and tribunals. Justice will require a certain way of selecting those who decide disputes. The selection, the removal must be fair, must be impartial, must be transparent.

(iv) What in your opinion is the end of law? What in your opinion is the end of justice?

The end of law, the end of justice is to bring some satisfaction to the people, must bring some fairness to the people and must make for the welfare of the people.

(v) Do you think the governance structures created under the Constitution are adequate to meet the envisaged ends of law and justice?

Yes. It's the personnel, the atmosphere, the internalization of the law by people especially those in power and authority which make it appear as if there are deficiencies.

(vi) To what extent, in your opinion, is the nation achieving the ends of law and justice as envisaged by the 4th Republican Constitution?

The provision which allows for Parliament filling in gaps is not being utilized, hence we have certain complaints about the Constitution which could be avoided.

(vii) Do you think the nation has any need to re-examine its concepts and ideas of law and justice?

The concepts of law were not formulated in abstract; they were results of observing society and seeing that this is how society really operates. It is not a revision of the concept; it's a look at society to see how the concerns of society can be addressed.

(viii) **General Comments**

People who write constitutions are not experts in theories of law. Constitutions are written from the experience of the people, their goals and aspirations.

Interview with Justice S. A. Brobbey

(i) What role did your Lordship play in the creation of the 4th Republican Constitution?

I was a member of the Consultative Assembly which drew the Constitution up. I was Chairman of the Legal and Drafting Committee of the Assembly which drew up the entire Constitution and put the final touches to everything that was decided by the Assembly.

(ii) What do you consider as the 4th Republican Constitution's definitions and ideas of law and justice?

Sources of law in article 11 tell us what the law is in Ghana.

Justice emanates from the people and it shall be administered by the judiciary which shall be independent and subject only to the constitution (article 125 clause 1). That is why, when we give judgments in the supreme court, we have at the back of our minds what in general, is the best interest of the people in this country, you don't just go by the strict letter of the law and stop there.

(iii) What are your personal definitions and ideas of law and justice – what do you consider as the ends of law and justice in Ghana?

Law and justice presuppose that every man should get what is his due.

Justice dictates that people should get what they deserve, that's my definition of justice.

Law may therefore be defined as the arrangements in society that allow people to get what they deserve.

(iv) Do you think the governance structures created under the Constitution are adequate to meet the envisaged ends of law and justice?

I think they are, they are all adequate, the only difficulty we are having is the definition of terms. For instance C.H.R.A.J. is an investigating body; many people believe that it is an adjudicating body, it isn't. It doesn't decide rights; that is the function of the court; it cannot prosecute because that is the function of the police. Rent control, by statute, is an investigative and adjudicating body as well. Chieftaincy is another one, the chief has a limit.

I believe all the structures are in order, the only problem is defining the functions of the institutions in the constitution. But the Constitution is just a broad based instrument. It's up to us to define and give the flesh to the bones that the broad base provides. That is what the courts are for. As people become aware of their rights, the constitution will begin to have more teeth but for now we are struggling with the bones, because we don't seem to be patient enough to allow it to develop. But it's natural, it will take time, it's a new development, 18 years is not long enough, considering the Americans have been there 200 years longer.

I think our best bet now is to allow the constitution to work for some time and help the structures to develop. Let people study the constitution and know the limits of the various structures that are in place.

(v) To what extent, in your opinion, is the nation achieving the ends of law and justice as envisaged by the 4th Republican Constitution?

I don't think we are doing badly. The structures are being effectively utilized. In so far that the courts are being used, C.H.R.A.J is being used, the police are being used and the institutions are being used for the purpose for which they have been set up. Many people are impatient, they want to see things too fast, but that is human nature, there is nothing you can do about people's reactions, but I think, so far, so good, we are on the right track. The fact that we are not resorting to arms, chaos, anarchy, because we don't get what we want shows things are working because of the structures in place.

(vi) Do you think the nation has any need to re-examine its concepts and ideas of law and justice?

I don't believe so, I think what we have in the constitution is adequate. We just have to develop them. We need time to be patient to develop them. If you have any need or you're not sure of anything, go to court.

Constitution review may be a good idea to provide some basis for operation. But to say you are reviewing your concept of law and justice, I don't agree with that. What else do you want apart from what is in the constitution? Traditional concept of justice? That was dictatorship! The head of family talks, you don't talk; the chief talks you don't talk. Even if that is what we want, we still have that in our chieftaincy

institution. They use arbitration to settle disputes. They listen to the parties and impose a decision. It's not mediation where you help people to come to conclusion on their own. One traditional concept of justice which is gradually entering our legal system is the ADR (Alternative Dispute Resolution). You will not find ADR referred to in the Constitution because at that time it was not popular. Not that it didn't exist, it wasn't popular in 1992 and the concept did not occur to us at all. But then the concepts of conciliation and compromise, which are part of ADR, are not new to our Constitution.

The law that we have is adequate, it should only be allowed to grow and develop.

(vii) General Comments

Having worked in Zimbabwe as a judge for 5 years, I had some experience with civil law concepts and I don't think they will do us any good by introducing them into this system because the systems are totally different. I have seen Zimbabwe, Gambia and Ghana; the customary law practice where when one dies, his successor is entitled to marry the widow. But now it's gone down in Ghana because of education and civilization.

I've also realized that the atmospheric and geographical conditions even dictate the types of laws the people have. You don't transport laws from one place to another just because you find it working somewhere.

From many of the ideas I picked from Zimbabwe and elsewhere, I originated the Jacket system for record keeping in our court system - replacing record books with dockets. I also started the automation of our court system and called it the Fast Track Court because I wanted the name to reflect what I was introducing.

So we learn as we go from place to place and we pick the best. There are ideas we can introduce to our system to improve but not everything.

Interview with ex-President J.J. Rawlings

Q1. What do you consider as the 4th Republican Constitution's definitions and ideas of law and justice?

Q2. What are your personal definitions and ideas of law and justice - what do you consider as the ends of law and justice in Ghana?

Law is the mechanism in a society by which the society's ideas of goals of social justice are given effect to achieve those goals.

Justice must be taken as social justice or moral justice.

Social or moral justice is achieved when the sentiments of society (especially the vulnerable) have been given effect to, implemented and enforced for the benefit of the society.

Q3. Do you think the governance structures under the 1992 Constitution are adequate to meet the envisaged ends of law and justice?

Q4. To what extent, in your opinion, is the nation achieving the ends of law and justice?

Even if you have the best structures, you need the will and commitment of leadership plus the vigilance, commitment and participation of the citizenry to achieve the ends of law and justice.

e.g. Intestate Succession Law and Head of Family Accountability Law.

These laws exist but education or financial independence of a woman could deny her justice.

Local Government Law of 1988. These laws and structures are adequate, what is left is implementation.

Q5. General Comments

A constitution, though important, is a mere planning document which requires continual re-examination of its concepts and ideas through teamwork and mutual trust of governors and the governed to achieve social justice.

The Combined views of Dankwa, Brobbey and Rawlings

The common strings in all three views are that of Natural Law, Sociological and Historical Schools of Jurisprudence.

Natural Law

Dankwa: talks about the written, unwritten and natural fairness as sources of law. (Similar to the normative standards of Natural Law).

Brobbey: talks about law finding the due of every person, or what everybody deserves. (Similar to the views of Plato, Aristotle, Thomas Aquinas and John Locke in their expositions on Natural Law.)

Rawlings: equates law and justice with moral and social justice. (Similar to the normative standards of Natural Law).

Sociological/Historical School

Dankwa: talks about law being an expression of the total experience of society (Historical School), which cannot be divorced from what goes on within and without society. He talks about law meeting the goals and aspirations of a people, meeting their

welfare, capturing how society operates and addressing the needs of society.

Brobbey: talks about law representing the interest of the people and goes through a natural process of growth and development needing the patience of the people. Law is reflective of the unique environment of a people (Historical School).

Rawlings: Sees law as a mechanism for the achievement of societal goals. Sees law as evolving through continual re-examination of rules by society (Historical School). Emphasizes social justice. Sees just laws as the implementation and enforcement of the sentiments of society (especially the vulnerable) for the benefit of society. He requires the participation of all of society to create law and to achieve justice.