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POST-NKRUMAH GHANA: THE LEGAL PROFILE OF A COUP†

WILLIAM B. HARVEY*

I. INTRODUCTION

The *coup d'état* in Ghana on February 24, 1966, carried out by the army with police support, ended the fifteen year old government of Dr. Kwame Nkrumah. Of that period, almost nine years had elapsed since the British colonial power withdrew and granted sovereign independence to the former Gold Coast on March 6, 1957. Ghana was the first of the colonial territories of black Africa to achieve independence, and Dr. Nkrumah's government carried the hopes and aspirations not only of the Ghanaian people but of many others. Colonial apologists awaited the justification of a century's bearing of the white man's burden. Critics of imperialism welcomed the cutting of political bonds as a first step toward complete economic and cultural emancipation. More ominously, the cold war antagonists began to marshal their forces for encounters in a new theater.

The Nkrumah government achieved the remarkable feat of disappointing everyone. Ghana's economy was shattered by a disastrous drop in the international price of cocoa, by the waste of resources on nonproductive prestige projects, and by increasing corruption among governmental officials. The massive popular support Nkrumah had enjoyed at independence was eroded steadily by the economic disappointments of the people and by governmental mismanagement. Dr. Nkrumah's reaction to growing signs of political discontent was increasing authoritarianism. He alienated fellow African leaders by his compulsive drive for dominance and by his support of subversion in their territories. The Western powers endured his shrill denunciations without major retaliation but grew more reluctant to provide the aid that he sought for bolstering the limping economy. To the Eastern powers he was hardly more satisfactory. Though his government was officially committed to socialist development, economic plans usually were ignored at the implementation level, the private sector of the economy was harassed but not eliminated, and misconceived government enterprises dissipated public resources. Nkrumah's Ghana was clearly not an Eastern satellite; at best it was a sympathetic, but unpredictable, supporter.

In these circumstances, the coup of February 24 provided no surprises. Fighting was brief, and the few casualties incurred were

† This article is based upon developments through July 19, 1966, the date of National Liberation Council Decree No. 65.

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largely among the President's personal guard. The army's action was greeted by widespread rejoicing. Though the inadequacies and misdeeds of the Nkrumah regime were great, even the army's delay in intervening was predictable: it had maintained the strong non-political imprint of its British parentage.

It seems most improbable that Dr. Nkrumah will be able to re-impose his control on Ghana, despite his fulminations from Guinea, where President Sekou Toure has accorded him the ambiguous status of co-President. The new government is peacefully and firmly in control, and it is to the structure, powers, and policies of that government that we will now direct our attention. This article will sketch briefly the legal profile of a *coup d'état* and seek in its subsequent enactments clues to the future legal and governmental development of Ghana.

II. POST-NKRUMAH CHANGES

A. *The Executive*

Two days after the coup its leaders formally declared the structure and powers of the new government. A proclamation established the National Liberation Council with Lieutenant General J. A. Ankrah as chairman and Commissioner of Police J. W. K. Harlley as deputy chairman. As originally constituted, the Council consisted of four army officers and three police officials, but today the membership is balanced between them.¹

The Proclamation also suspended the Republican Constitution of 1960, dismissed Dr. Nkrumah from his offices of President and Commander-in-Chief of the armed forces, dissolved the National Assembly, dismissed all ministers, and abolished the Presidential Commission that had been set up to exercise the powers of the President during Dr. Nkrumah's absence from the country. Nkrumah's Convention Peoples' Party, the only lawful political organization since 1964,² was dissolved, and membership in it prohibited.

Into this governmental vacuum stepped the National Liberation Council. It reserved to itself plenary legislative power, to be exercised by decree,³ as well as the full competences granted by any preexisting law to the President, the cabinet, or a minister.⁴ Thus

¹ The Council's first decree added another member from the police. National Liberation Council Decree No. 1 (1966). [National Liberation Council Decree will hereinafter be cited as N.L.C.D.].

² Republican Constitution, 1960, art. 1A. This article was added by the Constitution (Amendment) Act, 1964, Pub. Act 224 (Ghana).

³ Proclamation For The Constitution of a National Liberation Council for the Administration of Ghana and for Other Matters Connected Therewith § 3. [The Proclamation For The Constitution of a National Liberation Council for the Administration of Ghana and for Other Matters Connected Therewith will hereinafter be cited as Proclamation].

⁴ Proclamation § 7; National Liberation Council (Proclamation) (Amendment) Decree (1966); N.L.C.D. No. 1, § 2 (1966).

the Council became the government of Ghana, merging in itself all legislative and executive powers. In practical operative effect, this consolidation of powers in the Council probably did not differ from that previously enjoyed by Dr. Nkrumah and his close advisors. Nevertheless, the "Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana and for Other Matters Connected Therewith" stripped away the legal facade of separation of the powers and functions of the President from those of the National Assembly and abandoned the theory of minimally limited government that the Republican Constitution had preserved by reserving to the people the power to amend the Constitution in certain respects.⁵

Though the Council assumed all ministerial powers, it showed a marked reluctance to distribute portfolios among its members. Apparently fearing that such a move would cast Council members in an unduly "political" role, it undertook to act only in its corporate capacity. Since this ideal was not fully practicable, the Council initially delegated to senior civil servants acting as the principal secretaries or heads of ministries the numerous ministerial functions laid down by statute. In the exercise of these functions, however, the civil servants were made subject to such directions as the Council might give.⁶ By a later decision, ministerial portfolios were assigned to the various members of the Council.

In a search for greater insight into the existing administrative machinery of government and for ways in which it might be improved, the Council has established an Administrative Committee.⁷ The duties of the Committee include advising the Council on all matters of central and local government administration and making recommendations on organization, staffing, and training. Prior to the establishment of this Committee, however, basic changes in the structure of local government had been decreed. Provision was made for the replacement of the elective councils at various local government levels by "management committees" to be appointed by the Council. These committees are to perform all functions previously exercisable by the elective councils, and they, like their predecessors, are governed by the Local Government Act of 1961. The membership structure provided for the management committees further reflects the reliance by the Council on technicians and its effort to depoliticize government at all levels.⁸

⁵ For a discussion of the Republican Constitution, 1960, see HARVEY, *LAW AND SOCIAL CHANGE IN GHANA passim* (1966).

⁶ Ministers' Functions (Delegation) Decree, N.L.C.D. No. 11 (1966).

⁷ National Liberation Council (Administrative Committee) (Appointment) Decree, N.L.C.D. No. 31 (1966).

⁸ Illustrative is the composition of a city or municipal committee: (a) the senior medical officer, (b) the regional education officer, (c) the assistant chief planning officer, (d) the regional engineer of the Ghana National Construction Corporation, and (e) a private person nominated by the senior police officer of the region.

B. *The Judiciary*

Of the basic governmental structures of Ghana, the judiciary was affected least by the coup. The Proclamation provided that, despite the suspension of the Constitution, the courts should continue to function with the same powers as before. Judges and all others holding posts in the judicial service were continued upon the pre-coup terms and conditions of service.⁹ The judges were required to take a new oath, however, swearing to act not only in accordance with the "laws and usage,"¹⁰ but also in accordance with the "decrees" of Ghana.¹¹

Nevertheless, the judiciary still bore the scars of the Nkrumah period. In 1961, legislation had been enacted to create special criminal courts to deal with offenses against the safety of the state.¹² In late 1963, the government's inability to procure from such a court the conviction of three defendants accused of treason brought the dismissal of Sir Arku Korsah as Chief Justice, the resignation of Sir Arku and Mr. Justice William B. Van Lare from the Supreme Court, and legislation authorizing the President to void the special court's judgment of acquittal.¹³ A more fundamental consequence of the acquittal, however, was a constitutional amendment granting the President summary power to dismiss any judge of the superior courts.¹⁴ Dr. Nkrumah promptly exercised this power in dismissing one High Court judge and three judges of the Supreme Court, including the sole survivor of the special criminal court.

After the coup, the National Liberation Council acted promptly to remove these impingements on the judiciary. A Judicial Service Commission of six members was established, consisting of the Chief Justice as chairman, the most senior judge of the Supreme Court, the Attorney General, the Chairman of the Civil Service Commission, and two nominees of the National Liberation Council, who must be retired judges of the superior courts.¹⁵ Important functions in the selection and discipline of judges and judicial officers are assigned to the Commission. The Chief Justice and other

⁹ Proclamation § 2(3).

¹⁰ Oaths Act, 1960, Constitutional Act 12, First Schedule.

¹¹ National Liberation Council (Oaths) Decree, N.L.C.D. No. 6, § 1 (1966).

¹² The Criminal Procedure (Amendment) Act, 1961, Pub. Act 91 (Ghana), later replaced by the Criminal Procedure (Amendment) Act, 1964, Pub. Act 238 (Ghana).

¹³ The Criminal Procedure (Amendment) (No. 2) Act, 1963, Pub. Act 223 (Ghana).

¹⁴ The Constitution (Amendment) Act, 1964, Pub. Act 224, § 6(c) (Ghana).

¹⁵ Judicial Service Act, 1960 (Amendment) Decree, N.L.C.D. No. 39, § 2 (1966), as amended by Judicial Service Act, 1960, (Amendment) (No. 2) Decree, N.L.C.D. No. 58 (1966). As originally constituted by N.L.C.D. No. 39 (1966), the Commission included two representatives of the bar and did not include the Chairman of the Civil Service Commission.

judges of the Supreme Court and High Court are to be appointed by the National Liberation Council acting on the advice of the Judicial Service Commission.¹⁶ The Council has similar appointive powers with respect to lower court judges, but it may delegate these powers to the Judicial Service Commission.¹⁷ Protection of judicial tenure has been reinstated. Judges of the Supreme Court and High Court may be removed only by the National Liberation Council, acting on the advice of the Judicial Service Commission, for either stated misbehavior or infirmity of body or mind. Their salaries cannot be diminished while they remain in office.¹⁸ Lower court judges still do not enjoy these usual safeguards of judicial independence, but the power to discipline them has been removed from the President or his designee¹⁹ and vested in the National Liberation Council. However, its action is subject to the binding advice of the Judicial Service Commission.²⁰

One of the most typical expressions of authoritarianism is the creation of special courts to deal with criminal prosecutions in particular cases or series of cases, frequently those involving political opposition to the incumbent regime. The *Working Paper on The Rule of Law in a Free Society*, prepared for the International Commission of Jurists meeting in New Delhi in 1959, declared, with justification, that "the trial of accused persons must take place before an independent court. Special courts created *ad hoc* for a particular case or series of cases endanger fair trial or at least create pursuance [*sic*] of instructions given by the Executive."²¹ The special criminal court in Ghana amply illustrated these dangers. It operated under summary procedures and modes of proof established by the President and with a jury selected from a special list.²² Its judgment was final and unreviewable. When one such court resisted executive pressure and acquitted the accused, the judgment was voided and the defendants re-tried. On retrial, a conviction was predictably returned.

¹⁶ Judicial Service Act, 1960, (Amendment) Decree, N.L.C.D. No. 39, § 1(3) (1966).

¹⁷ Judicial Service Act, 1960, (Amendment) Decree, N.L.C.D. No. 39, § 3(a) (1966).

¹⁸ Judicial Service Act, 1960, (Amendment) Decree, N.L.C.D. No. 39, §§ 1(4), 7 (1966).

¹⁹ Judicial Service Act, 1960, Constitutional Act 10, § 18.

²⁰ Judicial Service Act, 1960, (Amendment) Decree, N.L.C.D. No. 39, § 3(c), (d) (1966).

²¹ INT'L COMM'N JURISTS, *THE RULE OF LAW IN A FREE SOCIETY* 318 (1959).

²² The original special courts legislation excluded jury trial. The Criminal Procedure (Amendment) Act, 1961, Pub. Act 91, § 3(3) (Ghana); Criminal Procedure Code, 1959, Pub. Act 30, §§ 242-45 (Ghana). After the acquittal of three defendants in late 1963 the constitution of a special criminal court was revised by substituting for the former three-judge court a judge of the superior courts sitting with a jury of twelve persons drawn from a special list of jurors. The Criminal Procedure (Amendment) Act, 1964, Pub. Act 238, § 1 (Ghana).

Treatment of the special criminal court by the National Liberation Council was prompt and decisive. The court was abolished, the legislation authorizing it was repealed, and the retrial conviction of the five defendants charged with treason was declared null and void.²³ However, three of the defendants, who long had been associated with Dr. Nkrumah's government, were retained in "protective custody."²⁴

C. Public Service

To assure the necessary continuity of government, the initial Proclamation of the National Liberation Council continued the public services of Ghana as they existed before the coup.²⁵ The Council in fact has been inclined to rely heavily on the senior civil servants for various quasi-political or policy-oriented roles. As has been noted, ministerial functions were delegated to the principal secretaries.²⁶ Public service technical personnel dominate the management committees that are to replace the local government councils.²⁷ The Economic Committee, the first appointed by the Council and surely the most important, is composed predominantly of senior civil servants. The committee is charged with responsibility for studying the present state of the economy and recommending ways of rehabilitating it.²⁸

D. Law of Ghana

Despite the revolutionary change effected by the *coup d'état*, the legal order of Ghana remained remarkably stable. The original Proclamation of the National Liberation Council continued in force all enactments and rules of law as they existed prior to the coup, subject, of course, to the plenary legislative power of the Council.²⁹ In this body of law, decrees of the National Liberation Council have effected a number of significant amendments. In addition to those discussed under other headings, several merit brief mention. The offense of unlawful exportation of cocoa has been reduced from a second degree felony to a misdemeanor, with a consequent reduction of penalty.³⁰ The Criminal Code was further amended to make punishable violent entry into any building or onto land,

²³ Criminal Procedure (Special Criminal Division) (Abolition) Decree, N.L.C.D. No. 43 (1966).

²⁴ National Liberation Council (Protective Custody) (Amendment) (No. 4) Decree, N.L.C.D. No. 44 (1966).

²⁵ Proclamation § 5.

²⁶ Ministers' Functions (Delegation) Decree, N.L.C.D. No. 11 (1966).

²⁷ See Local Government (Interim Administration) Decree, N.L.C.D. No. 26 (1966).

²⁸ National Liberation Council (Economic Committee) (Appointment) Decree, N.L.C.D. No. 4 (1966).

²⁹ Proclamation § 3(2), (3).

³⁰ Criminal Code, 1960, (Amendment) Decree, N.L.C.D. No. 28 (1966).

even by a person entitled to possession.³¹ The 1959 enactment that provided for suspending any pension or allowance upon the detention of the entitled person under the Preventive Detention Act was repealed retroactively, thus entitling the pensioner to all payments withheld.³²

The prospect of a broad review and revision of the body of law appeared when the Council appointed a Legal Committee composed of certain judges of the Supreme Court, the principal government lawyers, four leading practitioners, and a representative of the law faculty of the University of Ghana.³³ The Committee has been given responsibility for examining the existing law, recommending revisions, and making other suggestions on legal matters, "including matters preparatory to the setting up of a commission to consider a new constitution for the country."³⁴ The activity of the Legal Committee thus far has been disappointing. It appears doubtful that it will become a significant force for either law reform or the development of new legal institutions.

The inadequacies of the Legal Committee are illustrated by a decree that it recommended to the Council. The proposed decree, which the Council promulgated,³⁵ repealed rent stabilization legislation enacted in 1962 and 1963.³⁶ Regulations issued under this legislation had imposed a nominal rental of one shilling per year on cocoa land held by a member of the owning stool and five shillings per acre if the landholder was not a member of the owning stool.³⁷ Repeal of the 1962 legislation restored the effect of customary law rules applicable to such tenancies, which, in the main, provided for substantially higher rentals. My criticism of the repealing decree is not now directed at its substantive effects. Rather, it is directed toward the Legal Committee for recommending and the Council for legislating on such a vital subject without adequate study of the effects of the controls and the consequences of their removal. Illustratively, what were the economic and political implications of the rent control measures? Who are the principal beneficiaries of their removal, chiefly landowners or the public treasury? How does the repeal affect the politically sensitive status of the chiefs and other traditional rulers? My personal inquiries reveal no evidence that the Legal Committee considered these questions or advised the Council on them before recommending the

³¹ Criminal Code, 1960, (Amendment) Decree, N.L.C.D. No. 47 (1966).

³² Pensions (Special Provisions) Act, 1959, (Amendment) Decree, N.L.C.D. No. 55 (1966).

³³ National Liberation Council (Legal Committee) (Appointment) Decree, N.L.C.D. No. 38 (1966), as amended by N.L.C.D. No. 56 (1966).

³⁴ National Liberation Council (Legal Committee) (Appointment) Decree, N.L.C.D. No. 38, § 3 (1966).

³⁵ Rents Stabilization Acts (Repeal) Decree, N.L.C.D. No. 49 (1966).

³⁶ The Rents (Stabilization) Act, 1962, Pub. Act 109 (Ghana); The Rents (Stabilization) Act, 1963, Pub. Act 168 (Ghana).

³⁷ The Rents (Cocoa Farms) Regulations, 1962, L.I. 186.

repeal of the rent stabilization acts. Rather, the only professed basis for the recommendation was the unpopularity of the controls in the affected areas.

E. Political Controls

The enactments discussed under this heading reflect the efforts of the National Liberation Council to move against the ousted Nkrumah regime as well as to provide curbs against political activity generally. The former may be divided into provisions to neutralize politically individuals and associations that supported Dr. Nkrumah and measures to publicize and punish various corrupt practices of the former government and its members and supporters.

The initial Proclamation of the National Liberation Council not only dismissed Dr. Nkrumah, his ministers, and the National Assembly; it also dissolved the Convention Peoples' Party and prohibited membership in it.³⁸ Later decrees began the process of removing the imprint of the Party and of Dr. Nkrumah from various features of national life. No longer is the Party flag the national emblem; the original design was readopted for the national flag.³⁹ The title of Kwame Nkrumah University of Science and Technology lost its reference to the former President.⁴⁰ More significantly, certain wing organizations of the Convention Peoples' Party were dissolved and organizational acts with respect to them prohibited under criminal penalties.⁴¹

The most extreme sanction applied to members and supporters of the ousted government has been detention. The Preventive Detention Act, probably the most hated and feared enactment under Nkrumah, originally was kept in force,⁴² but soon was repealed.⁴³ Even before repeal, however, the Council had laid the legal foundation for its own detention powers under the euphemism of "protective custody."⁴⁴ The protective custody net has been sweeping. Many persons have been held as part of a class, e.g., all members of the dissolved Parliament or all district commissioners.⁴⁵ Subsequent decrees have authorized protective custody

³⁸ Proclamation § 2(2)(e).

³⁹ National Liberation Council (Proclamation) (Amendment) Decree, N.L.C.D. No. 1, § 3 (1966).

⁴⁰ National Liberation Council (Kwame Nkrumah University of Science and Technology) (Amendment) Decree, N.L.C.D. No. 33 (1966).

⁴¹ National Liberation Council (Dissolution of Ghana Moslem Council and National Council of Ghana Women) Decree, N.L.C.D. No. 15 (1966).

⁴² Proclamation § 3(2).

⁴³ Preventive Detention Act, 1964, (Repeal) Decree, N.L.C.D. No. 30 (1966).

⁴⁴ National Liberation Council (Protective Custody) Decree, N.L.C.D. No. 2 (1966).

⁴⁵ National Liberation Council (Protective Custody) Decree, N.L.C.D. No. 2, Schedule (1966).

for 446 named individuals.⁴⁶ Descriptions of the detained persons rarely suggest the basis for their detention; they range from "Financial Advisor to the Presidency" to "Lorry Driver" and "C.P.P. Activist." There are some familiar names: Tawia Adamafio, Ako Adjei and Coffie Crabbe, first imprisoned by Dr. Nkrumah under the Preventive Detention Act, were later convicted of treason on retrial in the special criminal court. After the voiding of this judgment by the National Liberation Council and the repeal of the Preventive Detention Act, they continue their confinement in protective custody.

Dr. Nkrumah's government was not only oppressive; it was appallingly corrupt. A major part of the post-coup activity has been directed toward ferreting out official wrongdoing, laying the basis for criminal prosecutions, and tracing assets that can be returned to the public coffers. The Ollennu Commission has been inquiring into official misconduct connected with the issuance of import licenses; another commission under Mr. Justice Apaloo has been investigating the former President's property. Pending the reports of these commissions, legal tools have been devised for immobilizing assets and in some cases forfeiting them to the government.

By decree, the National Liberation Council has forbidden numerous persons and organizations to withdraw funds from bank accounts or remove valuables deposited with a bank as security or for safekeeping.⁴⁷ Bankers similarly are forbidden to pay out funds or return valuables and are obliged to provide information to the Council concerning accounts or other valuables. Persons with accounts affected include Dr. Nkrumah and his wife, all members of Parliament and ministers, all regional commissioners, and many persons named as individuals. The organizations include the Convention Peoples' Party and wing organizations such as the Young Pioneers' Movement and the National Council of Ghana Women. When an individual account is blocked, the decree always includes the named person and his wife. As to whether a woman is the wife of a person named in a decree, whether a particular account belongs to a named person, and other critical factual issues, a certificate signed by the Chairman or Deputy Chairman of the National Liberation Council is made conclusive. There is no provision for hearing interested parties before the certificate is issued. The prohibitions of the decrees are enforced by substantial criminal sanctions.

⁴⁶ N.L.C.D. No. 37 (1966); N.L.C.D. No. 41 (1966); N.L.C.D. No. 42 (1966); N.L.C.D. No. 44 (1966); N.L.C.D. No. 45 (1966); N.L.C.D. No. 53 (1966).

⁴⁷ National Liberation Council (Bank Accounts) Decree, N.L.C.D. No. 7 (1966), as amended by N.L.C.D. No. 9 (1966); N.L.C.D. No. 13 (1966); N.L.C.D. No. 21 (1966); N.L.C.D. No. 24 (1966); N.L.C.D. No. 32 (1966); N.L.C.D. No. 35 (1966); N.L.C.D. No. 57 (1966); and N.L.C.D. No. 60 (1966).

By another series of decrees,⁴⁸ the Council has authorized the Auditor General to investigate the accounts of a number of organizations and to report to it his findings, as well as "such comments and recommendations as appear to the Auditor General to be in the public interest to make." For these purposes, the Auditor General has been given extensive investigatory powers. Affirmative obligations to provide him information on the nature and extent of property belonging to the scheduled organizations have been imposed on persons in possession or control of it. These obligations, as well as the prohibition of disposition of property without the Auditor General's direction, are enforced by criminal sanctions. Fifteen organizations have been scheduled for investigation, including the Convention Peoples' Party and its wing organizations, the Cocoa Marketing Board, and both the African Affairs Centre and the Bureau of African Affairs.

The earlier decrees freezing the assets of persons or organizations associated with Dr. Nkrumah applied only to bank accounts and deposits of valuables with banks, for security or safekeeping. Later the net was cast more widely. A subsequent decree prohibited the transfer of other assets such as land, buildings, bonds, shares of stock, motor vehicles, and jewelry.⁴⁹ All post-coup transfers by the scheduled organizations or persons were voided unless approved by the Council, except those transfers made pursuant to a court order or authorized by an enactment. Again the affected owners included Dr. Nkrumah and his wife, a number of categories of individuals, forty-eight other named persons, and three organizations.

The decrees thus far considered have frozen assets pending the auditing of accounts and other investigations. For a number of organizations, however, summary forfeiture of all assets has been decreed.⁵⁰ Ownership of the forfeited assets was vested in the Council subject to disposition "in such manner as the National Liberation Council may direct."⁵¹ The organizations whose assets were scheduled for such forfeiture are the Convention Peoples' Party, the Ghana Farmers' Co-operative Council, the Young Pioneers Movement, the Ideological Institute at Winneba, the African Affairs Centre, the Bureau of African Affairs, the Moslem Council, and the National Council of Ghana Women. A later decree similarly forfeited all assets of two other organizations, the Market

⁴⁸ National Liberation Council (Auditor-General's Functions) Decree, N.L.C.D. No. 12 (1966), as amended by N.L.C.D. No. 22 (1966); N.L.C.D. No. 46 (1966); and N.L.C.D. No. 48 (1966).

⁴⁹ National Liberation Council (Prohibition of Transfers of Assets) Decree, N.L.C.D. No. 40 (1966).

⁵⁰ National Liberation Council (Forfeiture of Assets) Decree, N.L.C.D. No. 23 (1966).

⁵¹ National Liberation Council (Forfeiture of Assets) Decree, N.L.C.D. No. 23, § 3 (1966).

Women's Union and Nkrumah Kurye Kaw, and, in addition, dissolved the organizations.⁵²

The foregoing measures were directed at persons and groups closely identified with the ousted regime. The National Liberation Council has made clear, however, that it seeks a general moratorium on political activity. In his radio address at the end of the first one hundred days, General Ankrah, Chairman of the National Liberation Council, declared that "we cannot at this stage afford to indulge in Party political wrangles when we are confronted with the spectre of economic bankruptcy Until the preparatory work [for eventual return to civilian administration] has been satisfactorily completed, the Council will not tolerate any form of Party political activities and will take drastic steps against persons trying to defy its decrees."⁵³ Within a week of the coup, this posture had been given legal effect.

By a decree for the "preservation of public peace," the Council prohibited the formation or operation of *any* political party.⁵⁴ It also prohibited, under criminal penalties, "all activities whatsoever likely to assist in the formation or operation of a political party."⁵⁵ Under such a broad prohibition with such lack of definiteness, virtually any group activity could be in jeopardy. As a potential political force, the Ex-Political Detainees Organization has been dissolved and organizational activities connected with it prohibited under severe penalties.⁵⁶

The present effort to depoliticize the country does not, in General Ankrah's words, "imply that the Council intends to remain in power indefinitely. At the opportune time, the country will revert to civilian rule, and the Council is taking appropriate steps to prepare the grounds for that."⁵⁷ The first of these steps is the appointment of a Political Committee.⁵⁸ Under the chairmanship of Mr. Edward Akufo-Addo, a distinguished lawyer who was dismissed from the Supreme Court by Dr. Nkrumah, the Committee covers a wide political spectrum. Not surprisingly, supporters of the dissolved Convention Peoples' Party have been excluded. Functions of the Committee include making proposals to the Council on

⁵² National Liberation Council (Dissolution and Forfeiture of Assets) Decree, N.L.C.D. No. 3 (1966).

⁵³ "First 100 Days," broadcast speech by Lt. General J. A. Ankrah, June 3, 1966.

⁵⁴ National Liberation Council (Preservation of Public Peace) Decree, N.L.C.D. No. 3 (1966).

⁵⁵ National Liberation Council (Preservation of Public Peace) Decree, N.L.C.D. No. 3, § 2 (1966).

⁵⁶ National Liberation Council (Dissolution of the Ex-Political Detainees Organization) Decree, N.L.C.D. No. 34 (1966).

⁵⁷ "First 100 Days," broadcast speech by Lt. General J. A. Ankrah, June 3, 1966.

⁵⁸ National Liberation Council (Political Committee) (Appointment) Decree, N.L.C.D. No. 59 (1966).

changes in laws or policies to serve better the public interest and the interests of the people of Ghana and advising the Council on matters referred by it to the Committee. All doubt as to the nature of the Committee is removed, however: It "shall act solely as an advisory body to the National Liberation Council and . . . the Council is not obliged to accept any proposal, suggestion or advice submitted."⁵⁹

F. Economic Reform

No concern of the National Liberation Council has been more pronounced than that relating to Ghana's economy. With the ravaging effects of an unfavorable international market for its primary export compounded by official waste, mismanagement, and corruption, the economy urgently demands reform. Yet thus far this pressing concern has been reflected relatively little in the formal enactments of the Council. An Economic Committee has been appointed to study and recommend,⁶⁰ certain taxes have been reduced,⁶¹ the penalties for certain currency offenses have been revised,⁶² and customs and excise tariffs amended.⁶³ The enactments discussed in the preceding section may be viewed appropriately not only as political weapons against the Convention Peoples' Party but as a concerted attack against the pervasive official corruption that has drained off public funds. The Council also has announced plans to turn over a number of unprofitable state enterprises to the private sector of the economy and to invite private participation in several others.

While the Council pledged its immediate preoccupation with the economy, its actions have not been precipitate. Thus far it has decreed only minor adjustments. Presumably studies currently proceeding will suggest more fundamental reform. There is little evidence as yet, however, to indicate the new routes on fundamental policy that the Council proposes to follow.

III. ASSESSMENT AND CONCLUSION

It is premature to assess the accomplishments or failures of the National Liberation Council. Having ousted a corrupt, oppressive, and ineffective government, the Council understandably is preoccupied with moving against the malfeasants, removing the most blatant expressions of political oppression, and rationalizing basic governmental administration. The Council has pledged itself to

⁵⁹ National Liberation Council (Political Committee) (Appointment) Decree, N.L.C.D. No. 59, § 4 (1966).

⁶⁰ National Liberation Council (Economic Committee) (Appointment) Decree, N.L.C.D. No. 4 (1966).

⁶¹ Ghana (Reduction of Taxation) Decree, N.L.C.D. No. 5 (1966).

⁶² Currency Act, 1964, (Amendment) Decree, N.L.C.D. No. 8 (1966).

⁶³ Customs and Excise Tariff Regulations, 1966, (L.I. 504) (Amendment) Decree, N.L.C.D. No. 63 (1966).

humane, honest, and effective government; to "a strong and progressive welfare society in which no one will have any anxiety about the basic needs of life . . . a society in which the individual Ghanaian will be able to enjoy a modern standard of living based on gainful employment"; to "the suppression, repeal or amendment of those obnoxious laws, Nkrumah's instruments of tyranny and oppression with which he reduced the people of Ghana to virtual slavery and abject misery"; and to restoration of "the rule of law and basic human rights to the people of Ghana." These measures are to be taken, however, without "resort to indiscriminate acts of vengeance against those who were associated with the discredited party."⁶⁴ There is no reason to doubt the dedication of the Council to these objectives, and it deserves the patience and understanding of its own people and the world as it pursues them.

Forbearance from condemnation, however, should not foreclose an expression of concern when remedial measures adopted by the Council follow discredited patterns employed by the ousted regime. The euphemism of "protective custody" does not conceal the fact that without charge or trial large numbers of persons have been deprived of their liberty. Some have been released, but many remain in prison. Serious infringements of property interests have been decreed without affording affected parties an opportunity for a fair hearing. Ex parte official determinations of factual issues crucial to the application of sanctions have been made conclusive. Total legislative and executive power has been consolidated in the eight members of the Council, and steps for the validation of that power by the consent of the governed lie in the unforeseeable future. Certain modifications have been made in the law without the careful antecedent study that could assure a rational relation of enactment to social needs and governmental purposes.

As a result of the *coup d'état* Ghana now has a new opportunity, unencumbered by the euphoria of newly gained independence, to restructure public power and reshape legal institutions. Difficult, indeed tragic, though the last decade has been, it can provide the new constitutional and legal order with useful insights into the nation's needs. This essay will conclude with a few suggestions of the most important of these needs.

A. *Executive Domination*

The cardinal feature of the Nkrumah government was the progressive consolidation of power in the executive. Initially by his great political skills and popularity, and later by legal and extra-legal measures, Dr. Nkrumah decimated his political opposition and reduced the National Assembly to complete inconsequence and irrelevance. The constitutional amendments of 1964 gave him ul-

⁶⁴. "First 100 Days," broadcast speech by Lt. General J. A. Ankrah, June 3, 1966.

timate power over the judiciary. This one-party, indeed one-man, domination of all fundamental organs and powers of government predictably produced a corrupt tyranny. Arguments for the concentration of governmental powers and against a system of checks and balances rely primarily upon the undoubted shortage of qualified manpower and upon the widely perceived need for a vigorous, effective response to demands for economic and social development. The Ghanaian experience of the past decade seriously compromises the persuasiveness of these arguments for the consolidation of unlimited governmental power in the hands of a small revolutionary elite. No better example than Dr. Nkrumah need be offered of the corroding and corrupting effect of total power. Whatever the price in speed and efficiency of governmental action exacted by dispersion of power among governmental organs that check and control each other, that price is justified if it provides safeguards against the authoritarianism, the pervasive fear, the insecurity of the Nkrumah regime.

Ghana's experience does not suggest that a system of checks and balances must be based in any major way upon the recognition and use of divisive, sub-national power centers with their attendant loyalties, such as chiefs or other traditional rulers. A prominent Western diplomat suggested to me after the coup that the chiefs should play an important role in the new constitutional order of Ghana. I would regard any such development as serious retrogression. Vital though some of the stools may be as religious and cultural forces, they are ill-fitted to play significant roles in modern government. Adequate safeguards against a dangerous concentration of power can be achieved by the allocation of limiting and balancing roles to legislative and judicial organs under constitutional and legislative norms. The objective is not to fragment fragile national entities nor to immobilize government. It is rather to provide sufficient assurance against that monopolization of all government powers in the same hands that invites tyranny.

B. Creation of the New Institutions

The easiest task of the National Liberation Council will be the elimination of these offensive aspects of the constitutional and legal order associated with the Nkrumah regime. The equally important but far more difficult task will be the creation of new institutions to avoid dangers and meet needs starkly revealed by recent experience. Three kinds of institutions may be mentioned briefly for illustration.

1. LEGISLATIVE

If legislative innovation emerges full-blown from the brow of a Jovian executive, it has enormous potential for both social disruption and ineffectiveness in attaining its stated or assumed objectives. Even the laudable eclecticism of African leaders may create grave

problems. Foreign legislative models, highly successful on their native soil, may be entirely inappropriate to African circumstances. Legislative initiatives should be based on a careful study of the social, economic, and political facts obtaining in the country and a careful choice of techniques to serve clearly conceived goals. One of many illustrations of Nkrumah's failure in this connection was the abortive Marriage, Divorce and Inheritance Bill of 1963. A similar failure of the National Liberation Council may be found in the decree restoring customary law rules to tenancies of cocoa lands.⁶⁵

Procedures should be devised and institutionally assured to reduce the frequency of such failures in the future legislative program of Ghana. Among the possibilities deserving consideration are the establishment of substantive standing committees of a restored Parliament to study legislative proposals, more frequent use of specialized *ad hoc* commissions to investigate problems and recommend legislative solutions, the establishment of an adequately staffed and financed Law Revision Commission, and the support of more active and more relevant social research in the universities. The procedures adopted should include both resort to competent social, economic, and legal research by specialists and regularized opportunities for those affected by legislative proposals to urge their views in open hearing.

2. ADMINISTRATIVE

Professor Hayek's contention that any official discretion is incompatible with those decencies of government commonly subsumed by the "rule of law" cannot be sustained.⁶⁶ It reflects a yearning for governmental passivity that current conditions, particularly in the underdeveloped parts of the world, render unthinkable. Official action under grants of discretionary power is inevitable and, in fact, desirable. It is equally desirable, however, that the discretion of officials be circumscribed by standards that permit a review of their actions and a determination whether they have acted within the proper scope of their authority. A common phenomenon under Dr. Nkrumah was a grant of broad discretion to an official to take action, and to take it at such times as he believed the public interest required. This should be replaced by norms that articulate the policy goals, specify the official with authority to act, and indicate the standards that are to control his discretion.

The establishment of such a pattern in granting official powers is an indispensable first step toward responsible and decent government. The true villain is not discretionary power; it is official action unauthorized by any legal norm, or authorization to act within an uncontrolled discretion. It is also the absence of an ef-

⁶⁵ See text accompanying notes 36-38 *supra*.

⁶⁶ HAYEK, *THE ROAD TO SERFDOM passim* (1944).

fective system of administrative review that can be invoked by the citizen who is adversely affected by the acts of officials. Therefore, the architects of the new constitutional and legal order of Ghana should give careful attention to the development of a body of administrative law permitting the citizen to demand effectively that the officials justify their action in a legal norm, and curbing actions that a competent tribunal cannot find to be related rationally to the standards guiding discretion.

3. ECONOMIC PLANNING

The action of the National Liberation Council in withdrawing the state entirely or in part from certain enterprises suggests that future governmental intervention in the economy may be less than in the past. More generally, many development economists today are questioning attempts to devise overall economic plans and are urging greater reliance on specific project planning and implementation. Whether such a trend will develop in Ghana is now unpredictable. It is predictable, however, that the continuing role of the government in the economy will be substantial and that some effort to plan development will be continued.

It is unnecessary now to assess Ghana's past efforts at general economic planning. Whatever the merits or defects of the plans themselves may have been, it is clear that at the level of implementation they were almost total failures. Even in the planning phase itself, the planners were unable to rely on the active cooperation of ministers and civil servants. Once the plan was prepared, it had no determinate legal status, and the guidelines it provided in allocating scarce resources and coordinating government actions were ignored frequently at the ministerial and presidential levels. The resulting pattern of *ad hoc* decisions, in league with international market conditions, accelerated the deterioration of the economy. It is difficult to believe that even the staunchest advocate of planning would contend that the Ghana variety under Dr. Nkrumah was better than the untrammled play of market forces.

If Ghana's economic development is to be planned, the lawmakers must devise legal institutions for the improvement of both plan formulation and implementation. Assured access of the planners to all governmental data is an indispensable minimum. Formal legal status for a planning commission, including not merely specialists but also representatives of the executive and legislative body as well, would be desirable. Granting it power to review and coordinate all ministerial budgetary requests also might be considered. Providing the planning commission with its own legal staff might help to assure continuing adaptation of the legal order to the needs of development.

C. Political Participation

In conclusion, a brief word on the most important aspect of the legal order—that which structures the citizen's participation in his government. Aside from the indeterminate potential role of the Political Committee, no such participation now exists in Ghana. The desire of the Council for a respite from politics until it sets the government's house in order is understandable. I believe, however, that the structuring of a wider participation by the people and their leaders is among the most urgent tasks before the new government. Basically democratic institutions characterized the indigenous order of Ghana. Even under Nkrumah the formal facade of a representative democracy was preserved, and the Party, with its wing organizations, provided minimal channels of communication between the people and those in power. The people greeted the ouster of the Nkrumah government with general approval. Within the populace there is now no evidence of deep cleavages, tensions, or hostilities that would make the return of a more open political society dangerous to the public peace. I doubt profoundly that any people has ever become adept in the art of democratic government solely through the tutelage of a self-appointed military junta. The constitutional and legal machinery for popular participation in solving the problems left by the Nkrumah regime and in building a secure and humane society in Ghana calls for early attention.