Legitimacy and interpretation in Ghanaian law: The literal interpretation theory versus the value-based interpretation theory

KWADWO B MENSAH'

Barrister and Solicitor of the Supreme Court of Ghana and Member of the New York Bar

> Come now and let us reason together. (Isaiah 1:18)
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> And he shall wipe away the tears from their eyes; and there shall not be any more death, or sorrow, nor crying, neither there be any more pain, for the former things have passed away. (Revelations 21: 4)

1 INTRODUCTION: THE PROBLEM OF INTERPRETATION

What should the courts do when they are called upon to interpret important documents, such as statutes and constitutions? Should they interpret them literally – using the words of the document alone, even when a literal interpretation leads to unjust results or arbitrary consequences? Or should interpretation necessarily involve protecting and promoting certain background political and moral values – values that are cherished in Ghanaian or African society? We shall call the problem raised here the *problem of interpretation*.

Two dominant theories of interpretation in Ghanaian law will be discussed here. First, the *Literal Interpretation Theory* (LIT) argues that documents should be interpreted literally. The courts must not be concerned with the consequences of their interpretation because it is not the business of the courts to determine whether a law is just or unjust. As long as the law is enacted by the legislature, it must be obeyed. The second theory is *Value-Based Interpretation* (VBIT). It argues that moral and political considerations are central to the task of interpretation. This is because such values indicate the kind of society that we wish to live in and these are part of our aspirations as a society. A theory of interpretation that ignores these values is necessarily hollow and unacceptable.

How do we resolve *the problem of interpretation*? First, it will be argued here that *the problem of interpretation* can be resolved only by anchoring it on a *solid theory of legitimacy*. Three different accounts of legitimacy will

1 BA (Ghana) Mst (Oxon) BA (Oxon) LLM (Toronto) LLM (Northwestern).

be distinguished. These are *legal legitimacy, ethical legitimacy* and *historical legitimacy*. It will be shown that the *problem of interpretation* can be resolved by basing interpretation on *historical legitimacy* which is the only *solid theory of legitimacy*. It will also be argued that any theory of legitimacy which is not based on *historical legitimacy*, is a *thin theory of legitimacy*. It will be further demonstrated that LIT, which is based on *legal legitimacy* alone, is a *thin theory of legitimacy*. We shall argue further that *legal legitimacy* commits the *legalistic fallacy*.

Secondly, we shall argue that the LIT that is propounded in Ghanaian courts is strongly influenced by the doctrine of parliamentary sovereignty espoused in English constitutional theory. However, we shall show that, contrary to the Ghanaian position, the legitimacy of interpretation in English law is not based on *legal legitimacy* alone. Dicey – the classical exponent of English constitutional theory – argues that in spite of the doctrine of parliamentary sovereignty, the legitimacy of parliamentary enactments is based on *historical legitimacy* because invariably parliament will enact laws that conform to the values of English society.[2]

Thirdly, we shall argue that because of the nature of the typical African polity, attempts to introduce English constitutional doctrines into African politics invariably become a tyrant's charter – the legalisation of tyranny.

Finally, we shall try to show why interpretation ought to be based on VBIT. VBIT will be constructed on a *historical legitimacy* that is accepted in Ghanaian and African society. It will be argued that Ghanaians and Africans aspire to live in a society based on the rule of law within a liberal democratic system. *Historical legitimacy* requires that legal interpretation should protect and enhance values such as *liberty, fairness and integrity*. A political system based on these values is the only legitimate political system in which Ghanaians and Africans wish to live. It is also the only political system in which they can expect to advance economically and hold their own within the world community of persons.

1.2 What is legitimacy?

Beetham[3] argues that there are three different types of legitimacy. These are *legal legitimacy*, *ethical legitimacy* and *historical legitimacy*. However, Beetham argues that it is *historical legitimacy* that is useful to the social scientist. We also shall conclude that it is *historical legitimacy* that can help us to resolve *the problem of interpretation*.

But before we do that, we have to explain the different types of legitimacy. *Legal legitimacy* is legitimacy seen from the lawyer's point of view. *Legal legitimacy* is therefore legal validity. For a lawyer, an exercise of authority is legitimate if the power was legally acquired, if the actor had authority to act and if he has acted within the prescribed limits. Beetham, however, argues that *legal legitimacy* is deficient because sometimes

2 Dicey: 1960.
3 1991: 22-29.

questions about legitimacy are not about legal validity alone. Sometimes they are questions about whether the law can be justified according to moral or political principles.

Ethical legitimacy is the philosopher's account of legitimacy. For the philosopher, an exercise of power is legitimate if it conforms to universal moral or political principles. Beetham argues that this account of legitimacy, while useful, cannot help us to explain legitimacy in historical societies. This is because people in historical societies may not necessarily accept a philosopher's supposedly universal moral and political principles.[4]

It is *historical legitimacy* that can explain legitimacy in particular historical societies. *Historical legitimacy* combines *legal legitimacy* and *ethical legitimacy*, but contextualises these principles to a particular historical society. For an act to be historically legitimate, it must be valid in terms of the laws of that society, it must be justified in terms of the values of that society and there must be demonstrable consent by members of that society to the act under consideration

Why is legitimacy important in society? Beetham argues correctly that legitimacy is important because human beings are moral persons and what is illegitimate offends our moral senses. Legitimacy is the normative aspect of power relations and it provides the grounds for subordinates to obey their superiors.

Legitimate power is important to any political system because it allows the system to be orderly, stable and effective. The political system is orderly because subordinates obey their superiors. It is stable because there is a bedrock of support for the system and this allows it to withstand shocks. It is effective because superiors are able to achieve their purposes because of the quality of performance which they can secure from their subordinates.

1.3 The legalistic fallacy

Historical legitimacy, as we have argued, contains three elements that are necessary for any proper account of legitimacy. These are legal validity, ethical legitimacy and demonstrable consent of subordinates to the actions of superiors. We shall call an account of legitimacy that recognises these three elements as essential constituents of any account of legitimacy a *solid theory of legitimacy*. Any account of legitimacy that does not recognise any one of the elements of this trinity is a fallacious argument. Such a fallacious account of legitimacy will be characterised as a *thin theory of legitimacy*. More importantly, we shall label an account of legitimacy that relies exclusively on *legal legitimacy* as suffering from *legalistic fallacy*.

2 LEGITIMACY AND INTERPRETATION IN GHANAIAN LAW

How have Ghanaian courts handled the problem of interpretation? What accounts of legitimacy have they given to justify the peculiar power relations

4 *Ibid.*

that exist in the Ghanaian polity? Are they based on solid theories of legitimacy or are they based on thin theories of legitimacy? Is the *legalistic fallacy* a serious problem in Ghanaian law?

Three cases, *CFAO v Zacca*[5], *Assibey v Ayisi*[6] and *Armah v Naawu*[7] will be analysed here to explain the response of past Ghanaian courts to *the problem of interpretation*.

2.1 Historical background to these cases

Between 1966 and 1981, there were several overthrows of governments through military coups in Ghana. When the military took over, they restructured the superior courts. The restructuring process interfered with the handling of cases that were before the courts before an overthrow took place. These problems resulted in the interesting decisions that show the different responses of the courts to *the problem of interpretation*.

2.2 *CFAO v Zacca*

In 1966, the civilian government of the CPP was overthrown by a coup. As part of the restructuring of the superior court, the Supreme Court was abolished. What was left were the High Courts and the Court of Appeal. The Court of Appeal was divided into two parts, the Ordinary Bench of the Appeal Court and the Full Bench of the Appeal Court.

An appeal against a decision of the High Court went to the Ordinary Bench of the Appeal Court. There could be no appeal against a decision of the Appeal Court. A person aggrieved by a decision of the Ordinary Bench of the Appeal Court could, however, seek a *review* before the Full Bench of the Court of Appeal. In order to seek a review of a decision of the Ordinary Bench of the Appeal Court, one had to seek leave from the Ordinary Bench.

The plaintiff-applicant in *CFAO v Zacca* lost his case in the High Court. He appealed against the decision to the Appeal Court, which dismissed the appeal on 15 August 1969. Exactly one week after the Appeal Court's decision, and as part of the return to constitutional rule, a new constitution came into force that restructured the prevailing court system. The Superior Courts were restructured to include a Supreme Court. The applicant then applied to the new Appeal Court for review of the decision of the former Appeal Court. This was refused on 20 June 1970.

On 21 August 1971 the applicant brought a motion seeking an extension of time to appeal to the Supreme Court against the decision of 15 August 1969. He did this according to the rules of the Supreme Court. According to those rules, a person could apply for extension of time against a final decision of a court within three months of the decision. If after one month, the court had not taken a decision on his application, the appellant could move the Supreme Court to determine the application.

5 [1972]1 GLR 366–397.
6 [1974] 1 GLR 315–317.
7 [1975] 2 GLR 201–222.

Section 13(1) and (2) of the Transitional Provisions of the 1969 Constitution stated that:

(1) Subject to the provisions of this section, legal proceedings pending immediately before any Court, including civil proceeding by or against the Government, shall not be affected by the coming into force of this Constitution and may be continued accordingly.

(2) Where at the commencement of this Constitution there is any matter for review before a Full bench of the Court of Appeal in being immediately before any such commencement, that matter for review shall be deemed to be an appeal before the Supreme Court as established under the provisions of this Constitution.

But for the abolition of the former structure, the applicant would have had the right to seek leave of the Ordinary Court for review of its decision before the Full Bench of the Court of Appeal. With the abolishing of the old structure, the question before the courts in *CFAO v Zacca* was whether there was a "matter pending" before the Full Court of Appeal, which could be converted into an appeal before the Supreme Court.

The applicant argued that since he had the right to seek leave for a review of the decision before Full Bench of the Court of Appeal, there was a "matter pending" before the Full Bench of the Court of Appeal, which could be converted into an appeal before the Supreme Court. This was in spite of the fact that he had not physically filed the application seeking leave to review the decision before the Full Bench was abolished.

The respondent argued that there was no "matter pending" before the Full Bench because the plaintiff had not filed the application for review at the time the Constitution came into force. According to the respondent, the interpretation to be given to section 13(1) and (2) of the Transitional Provisions of the Constitution was that it was only when a person had already filed his application in court that the right to seek review could be converted into an appeal to the Supreme Court.

It is important to understand the full force of the applicant's argument. A rigid application of the respondent's argument could lead to great hardship and injustice for the applicant. It could also result in serious incoherence for the legal system. Let us suppose that two cases, X and Y, were heard on 1 August 1969. X's judgment was given on 15 August 1969, while Y's judgment was read a day before the new Constitution came into force. The parties in X would have the time to file an application for review before the Full Bench of the Court of Appeal before the new Constitution came into effect, whilst the parties in Y would have no such opportunity. The effect will be that the application for review in X could be converted into an appeal before the Supreme Court. However, the application in Y will not be heard by the Supreme Court, because, through no fault of Y, there could not have been the opportunity to file an application for review before the Full Bench of the Court of Appeal.

In dealing with these questions, Azu Crabbe JSC provides insights into one attitude towards interpretation in Ghanaian law. Azu Crabbe JSC argues that whilst he has sympathy for a person in Y's situation, there is nothing the courts can do to assist him. Where the meaning of a statute is clear, the courts have the responsibility to interpret the statute *literally*. If

a literal interpretation leads to injustice, the aggrieved party cannot look to the courts for redress. He states that:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it'. If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case is declaring the intention of the legislature. The object of all interpretation of statute is to determine what intention is to be conveyed, either expressly or impliedly by the language used, so far as is necessary for determining whether the particular case or facts presented to the interpreter falls with in it.' If there is one construction for statutes and other documents, it is that you must not imply anything in them that is inconsistent with words expressingly used.[8]
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> It is said that the application of the maxim in this case will work injustice or hardship. But an answer to that argument is that if the precise language of an enactment is clear and unambiguous it is the duty of the courts to enforce it, though the results may be unjust, arbitrary or inconvenient. It is not the duty of the courts to make the law reasonable but to expound it as it stands.[9]

Since Azu Crabbe JSC argues that statutes must be interpreted literally, it is clear that he is committed to LIT.

Sowah JA, however, takes a different position. Stating his position on the case he argues that:

> As already observed, the judgment of which extension of time is being sought was delivered a week before the coming into force of the Constitution There is no room for argument that the applicant-company would have had a right of appeal if that judgment had been delivered on or after 22 August 1969, . . . and the only question which would have arisen would be whether this court would be disposed to exercise its discretion in extending time.[10]

Before embarking upon a detailed discussion, it is necessary to preface it by saying that it is the manifest intention of the Constitution to provide within defined limits a further forum of appeal.[11] In considering these articles pertaining to appeal and right of appeal to the Supreme Court, this court ought to lean towards such interpretation as will convey the intention into effect, unless of course there are express provisions to the contrary. Judicial notice ought to be taken that shortly before the coming into force of the Constitution several cases were heard by the Court of Appeal created under the Courts Decree,[12] judgments in some were delivered before 22 August 1969, while others were heard after the effective dates. The order of the delivery did not depend upon the dates or order upon which they were heard, but on the fortiutous circumstances leading to some being delivered by 22 August 1969 while the remaining ones were only delivered after this date:[13]

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8 [1972]1 GLR 374.
9 [1972]1 GLR 375.
10 *Ibid.*
11 See arts 105 and 106 of the Constitution.
12 1966 (NLCD 84).
13 [1972]1GLR 389-390 (emphasis added).

> The respondent draws a date-line and maintains that there is no right of appeal from judgment delivered by the Court of Appeal immediately before the date-line except where the applicant had filed a notice of review. Thus, if two appeals were heard on the same date, say 1 August 1969, and one had judgment delivered on 21 August, 1969 while the second judgment was read on 22 August the later judgment could be appealed against while the losing party in the earlier case lost his right of appeal. It seems justice demands parity of treatment. Though, perhaps not very apt one cannot but help recall the ancient maxim 'Equality is Equity'; it seems desirable to place such construction on the relevant articles which would meet the test of equality of treatment or at least of opportunity.[14]

Note that Sowah JA would decide the case on the "integrity" of the constitution, equality and justice. These concepts can be either formal or substantive moral and political values. His position is thus very different from that of Azu Crabbe JSC. Since he argues that interpretation should conform to either formal or substantive moral and political values, we shall call his position the value based interpretation theory (VBIT). *LIT* and *VBIT* can be found in the other two cases we shall discuss in this paper.

2.3 *Assibey III v Ayisi*

In January 1972, the constitutional government was again overthrown. The new military government again re-organised the courts and this resulted in the same kinds of problems that came up in *CFAO v Zacca*.

According to article 105(1)(c) of the 1969 Constitution (the Constitution that was overthrown by the military) an appeal from a decision of the Court of Appeal to the Supreme Court required leave of the Court of Appeal. Leave was granted only when the Court of Appeal felt that a substantial issue of law or a question of public importance was to be decided.

In *Assibey III v Ayisi* the applicant had previously had his appeal before the Appeal Court dismissed. On 28 July 1972, the applicant filed a motion with the Court of Appeal seeking leave to appeal against their decision before the Supreme Court. On 13 September 1972, and before that appeal could be heard, the Supreme Court was abolished. Its appellate jurisdiction was taken over by the Full Bench of the Court of Appeal by the Courts (Amendment) Decree 1972 NRCD 101. By section 1 of NRCD (1972), the Full Bench of the Court of Appeal had jurisdiction to deal with only cases that had been duly filed at the Supreme Court before the decree came into force. Due to the fact that the applicant had not had the requisite time, his case was not before the Supreme Court before it was abolished. At that time, he was seeking leave of the Court of Appeal to appeal to the Supreme Court.

14 [1972] 1 GLR 390.

It could be argued that on a literal reading of the decree, NRCD (1972) dealt with only cases where an appeal had been filed before the Supreme Court before it was abolished. It made no provision for cases where the applicant was seeking leave to appeal to the Supreme Court. Like the application in *CFAO v Zacca*, the applicant argued that injustice would be done to him if he were not given a chance to appeal to the Full Bench of the Court of Appeal. To achieve a just result, he argued that his case ought to be considered as a case filed before the Supreme Court before the coming into force of the Decree.

Azu Crabbe JA gave judgment in the case. He again rejected the argument of the plaintiff. Basing his decision on a full-blown LIT, he stated that:

> It is plain that at the commencement of this Decree there was no appeal in this case pending before the Supreme Court, and therefore the full Bench is not clothed with jurisdiction to entertain any such appeal coming before it by leave. The Decree did not provide for cases falling under article 105 clause (1)(c) of the Constitution or section 3 (1)(d) of the Courts Act, 1971 . . . and unprovided for they must remain. The court cannot take upon itself to supply omissions in an enactment, for this would be 'a naked usurpation of the legislative function under the thin disguise of interpretation': *Magor and St Mellons R D C v Newport Corporation [1952] SV 189*, per Lord Simmonds at p 191 HL . . . Consequently, we hold that the application is misconceived and it is accordingly refused.[15]

Note again that Azu Crabbe JA claimed to be looking only to the words of the statute. As long as the statute did not provide for the situation that the plaintiff faced, the courts could not intervene to assist him, even though their non-intervention would lead to injustice. It was not the duty of the courts to enact statutes and they should not use interpretation as a back-door route to changing the law.

2.4 *Armah and others v Naawu*

The courts faced a similar situation in *Armah v Naawu*. Again the different attitudes to interpretation are evident in the two important judgments of the case. Amissah JA's judgment was based on VBIT, while Archer JA rejected the applicant's argument, basing his decision on LIT.

According to Amissah JA the facts of the case were as follows:

> The application before us is one 'for leave to appeal to the Supreme Court against the decision of the Appeal Court.' It is common knowledge that the Supreme Court referred to has been abolished and that its demise took effect as long ago as 13 September 1972. The application now comes for consideration on the basis that it is an application for leave to apply for review by the full bench of this court of a decision of its ordinary bench. And the question is: is this conversion permissible?[16]

Explaining the inherent incoherence of LIT from a moral point of view, Amissah JA argues that:

> In sum, the whole matter boils down to this question: procedural rules apart, would a person who had an adverse judgment given by the ordinary bench of

15 [1974] 1 GLR 316-317.
16 [1975] 2 GLR 203.

> the Court of Appeal against him immediately before the abolition of the Supreme Court . . . be entitled to apply to the ordinary bench for leave to invoke the jurisdiction of the full bench? To that question my answer is firmly in the affirmative . . . If as I view it a person who had filed no application before the substitution of the one tribunal by the other could, acting within the time allowed by the procedural rules, apply for leave, I see no reason why his brother in the same position should be prejudiced merely because he happened to have filed his application for leave to be granted by this court to proceed to the higher tribunal before it was replaced. The solution in that case lies not in a dismissal of the application but in an amendment.[17]

Amissah JA's arguments are based on the integrity of the legal system and the need to ensure fairness within it. Archer JA, on the other hand, based his dissenting judgment on LIT. His position is particularly interesting because it is based on an extremely hard LIT. Archer JA states the constitutional position of the courts as follows: "firstly, it is not the role of a court of law to legislate". According to Archer JA, the interpretation of the statute is clear and consequently it has to be interpreted literally. "The language of paragraph 3(2)(d) is so clear and unambiguous that no aids to statutory interpretation or construction are called for".[18]

Archer JA concludes by looking at the consequences of LIT in the light of his theory about the constitutional position of the courts and moral evils such as hardship and injustice.

> It has been argued that injustice and hardship would be caused. I agree but when the legislature through an enactment has clearly conferred jurisdiction (with express limitations) on a court of law, I do not think it is open to the court to enhance and expand its jurisdiction in order to avoid injustice and hardship. When the first Republican Constitution came into force in 1960, all appeals pending before the Privy Council abated. No doubt, the appellants in these cases were tremendously aggrieved. It was the wish and intention of the legislature that these appeals should abate. In the present case, NRCD 101 is completely silent on applications for leave to appeal to the former Supreme Court. Is it opens to us for reasons for injustices and hardship advocated by an applicant, that the court should drive a coach and horses into NRCD 101 and confer upon itself jurisdiction to hear the application? With the deference to my learned brothers, I am inclined to think that the course they have chosen in granting the application smacks of judicial subversion of the Proclamation of 1972 and I must categorically disassociate myself from this 'voyage of discovery'. It seems to me that when certain matters have not been taken care of in enactment, the defects or omission should be brought to the notice of the body with the appropriate legislative power.[19]

2.5 LIT, legitimacy and the legalistic fallacy

How do we resolve the problem of interpretation? What is legitimate public action? From the accounts given by Azu Crabbe JSC in *CFAO v Zacca* and *Assibey III v Ayisi*, and Archer JA in *Armah v Naawu*, it is obvious that for them legal validity alone is the basis of legitimate public action. To

17 [1975] 2 GLR 213.
18 [1975] 2 GLR 215.
19 [1975] 2 GLR 220.

them, as long as the law has been enacted by the legislature, it is legitimate and citizens have to obey it. There is no role for moral and political values in the determination of legitimate public action.

It is obvious that this account of legitimacy is based on a *thin theory of legitimacy* and it suffers from the *legalistic fallacy*. It ignores the values of the Ghanaian society and citizens' views about the laws that have been enacted.

2.6 Parliamentary sovereignty and LIT

As a consequence of the issues discussed above, a number of important questions come to the fore: why should anyone propound LIT as a theory of interpretation? What is the basis of LIT? What is the basis of Azu Crabbe JSC and Archer JA's literal interpretation theory? It is not difficult to notice that LIT is based on that very English constitutional doctrine called "parliamentary sovereignty". Azu Crabbe JSC and Archer JA quote liberally from English texts on statutory interpretation, English legal theorists and from English constitutional theory. Therefore it is clear that parliamentary sovereignty provides the key to understanding LIT.

What is parliamentary sovereignty and how is it related to LIT? What account of legitimacy is the doctrine of parliamentary sovereignty based on? Is it based on a *thin theory of legitimacy* and does it suffer from *the legalistic fallacy*? For answers to these questions, we must examine the views of the classical exponent of English constitutional theory – Dicey.

3 DICEY'S THEORY OF LEGITIMACY

How does Dicey answer questions about interpretation? What is his account of legitimacy? Is he committed to LIT and the *legalistic fallacy*?

I shall argue here that Dicey provides a *solid theory of legitimacy* in which all the elements of historical legitimacy are present. Dicey argues that the English constitutional system is legitimate because it is based on a liberal democracy in which the electorate is the ultimate sovereign. The electorate chooses the legislature, which is ultimately accountable to the electorate. Although the legislature is sovereign and can enact any laws that it wishes and the courts are duty bound to enforce all laws passed by the legislature, the legislature will not enact laws that are contrary to the values of English people. If they do so, they risk being dismissed in the next elections. They also risk a rebellion from the electorate. Consequently, the legitimacy of the courts' role in interpretation is not due solely to the legal validity of the laws passed. Interpretation rests on *historical legitimacy* because parliament will not act contrary to the values of English society. Interpretation is therefore not based on the *legalistic fallacy*. English subjects must obey the law enacted by the legislature because the law ultimately reflects values of English society.

3.1 The laws of the Constitution

Lets us now present Dicey's view in detail. According to Dicey, the English Constitution is made up of two elements. These are the laws of the Constitution which the courts enforce and the conventions of the Constitution

which are not enforced by the courts. The laws of the Constitution are based on the doctrines of parliamentary sovereignty, the rule of law and dependence of the conventions of the Constitution on the laws of the Constitution. Parliamentary sovereignty has a positive and negative side. On the positive side, it means that the courts will enforce any laws enacted by parliament. On the negative side, it requires that the courts should ignore any rules that are contrary to laws enacted by parliament.[20]

Dicey, however, distinguishes two sovereigns within the English constitutional arrangement. These are the legal sovereign, which is parliament, and the political sovereign, which is the electorate. Although from the legal point of view parliament is the most important institution, from the perspective of politics the electorate is the ultimate sovereign. From the position of the laws of the Constitution, the courts know nothing about the "will" of the electorate and will ignore that "will" unless it is expressed in an Act of parliament. The political reality is that, ultimately, the courts will enforce the will of the people because a legislature that enacts laws contrary to the wishes of the people will be dismissed in the next election. This is because, although parliament is sovereign in the English constitutional system, parliamentary sovereignty operates within a representative democratic arrangement.

> Speaking roughly, the permanent wishes of the representative portion of parliament can hardly run differ from the wishes of the English people, or at any rate of the electors; what the majority of the House of Commons command, the majority of the English people usually desire.[21]

3.2 The values of the Constitution

Due to the representative nature of English politics, Dicey argues that, in spite of parliamentary sovereignty, the legislature will not enact laws contrary to the values of the English society. What are these values? These are the love of *liberty and justice*, the *democratic spirit* and the love of *the rule of law over the rule of men*. Generally these values prevent the development of tyranny and the use of arbitrary power. The English Constitution expresses English society values because it has grown out of the history of the English people and is a reflection of their culture. Any attempt to interfere with an English person's constitutional right to liberty will require a wholesale change in English culture. It is in this context that he states his views on LIT.

> A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench has always refused, in principal at least, *to interpret an Act of Parliament otherwise than by reference to the words of the enactment*. An English judge will take no more notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognizance), even of the changes which a Bill may undergone between the moment of its introduction to Parliament and of its receiving the Royal assent.[22]

20 Dicey: 1960: 39–40.
21 Dicey: 1960: 83.
22 Dicey: 1960: 407–408.

Clearly, the LIT that Dicey expresses here is not supposed to give the courts a blank cheque to the legislature to enact any laws it wishes. It is meant to assist the courts to prevent parliament from interfering with the liberties of English people.

3.3 The values of English politics

How are the values of English society captured in the everyday politics of Britain? Dicey argues that the values of English society can be found in the workings of the conventions of the Constitution.[23] The objectives of the conventions are that, ultimately, parliament and the Cabinet give effect to the values and aspirations of the true political sovereign of the English constitutional system – the electorate. According to him, the conventions are obeyed because the laws support the conventions of the Constitution, and a breach of an important convention will almost inevitably lead to a breach of the law.

4 LEGITIMACY, ACCOUNTABILITY AND THE POST-COLONIAL AFRICAN STATE

Will a theory of legitimacy that is based on legal validity alone be suitable for the Ghanaian polity? Does the Ghanaian polity exhibit the love of liberty and justice, the democratic spirit and legality that Dicey considered central to the working of a political system based on legislative supremacy?

To be able to answer these questions it is important for us to examine the African state historically. There has been a mistaken impression, especially among lawyers, that the African state can be understood ahistorically. This explains why lawyers are quick to apply legal doctrines developed in societies very different from our own, without recognising that these doctrines make sense only within the peculiar historical circumstances of those societies. It is therefore central to understand as Chabal has argued that the post-colonial African state developed from specific historical circumstances. Consequently, any attempt to comprehend it, explain it, and chart a direction for it requires a deep appreciation of this history.[24]

To understand the African state, we must recognise that it was a forcible coming together of different political communities whose politics and culture exhibited different accounts of legitimacy and accountability. The system that kept these communities together was colonial rule. However, for most Africans, the colonial state was illegitimate and unacceptable.

The African state therefore developed out of the colonial state and inherited many of its characteristic weaknesses. The colonial state derived from conquest and was thus essentially based on force. Colonial rule, however, was not old or deep enough for its methods and values to

23 Dicey 1960: 418-419.
24 Chabal 1992: 68-81.

change and for it to become legitimate to most Africans. Legitimacy to the colonial state was at best superficial. A challenge to any aspect of colonial rule was invariably taken as a challenge to the colonial state and the colonist responded with force or the threat of force. The colonial state defined the rules of politics within its territory and the rules could be changed arbitrarily to suit the circumstances of the colonists.

The colonial state was also centralised. This was because its survival depended on its ability to control politics and dissent within the state. Until the last days of colonialism, representation within the colonial state was rare. The colonial state was also coercive because it was essentially a relationship between the conqueror and the conquered. It was thus difficult for the colonists to depend on the co-operation of Africans for the survival of their power. The principles and programmes of the colonial state were sanctioned by a political power that was external to the African communities that made up the colonial state.

In comparison, the modern African state has developed many of the characteristics of the colonial state. Its size, structure and organisation have been determined by the operational requirements of colonialism. After independence, however, the new states had aspirations that could not be realised through the structures of the colonial state. There was thus a dissonance between the nature of the post-colonial state and its resources and aspirations.

Unfortunately the post-colonial African state did not inherit one of the strengths of the colonial state – its structure of political accountability. Within the internal arrangement of the colonial state, the state was the most important factor. But the colonial government was limited by the fact that it was accountable to the external imperial government, which had the capacity to control its excesses. The post-colonial African state does not have this limitation. It has the power to control the resources of the state, unhindered. There is no recognisable body politic that defines the obligations of the state within the modern African political system and there are no operational principles of accountability. Until such principles are developed, the African state remains unrestrained.

Colonial rule was short and its principles of accountability and legitimacy were unacceptable to Africans. Consequently, the colonial state did not develop organically from African civil society. It was thus not anchored solidly to African communities. The post-colonial African state has also inherited this major weakness. It is not rooted deeply in many African communities and it lacks legitimacy in the eyes of many people. As a result, it is weak in its foundations and it is structurally deficient to carry on the duties of a modern state.

Due to its deficiencies, there has been a struggle by those who control the state to assert its authority in the politics of Africa. Without any principles of political accountability, the controllers of the state have tried to use any methods – moral or immoral – to survive. This has led to a bitter and incessant struggle in which the state has sought to control all the important sectors of the polity. And in this struggle all methods, especially brutal ones, have been used to win and maintain political power.

4.1 Dicey's theory of legislative sovereignty and the African state

We have discussed the nature of the African state and some of its negative characteristics. For a society that aspires to democracy and development the important question is: would Dicey have recommended legislative sovereignty for the typical post-colonial African state?

The obvious answer is no. It is very unlikely that Dicey would have recommended the English political system for the typical African state. As has been argued, Dicey believed that English people were inherently democratic and in the long run the legislature would only enact laws that conform to the values of the majority of English people. The typical African state is extremely authoritarian. Wide discretion and arbitrariness have characterised the use of power in the modern African state and these have been at the expense of the development of legality. A constitutional system based on legislative sovereignty without democratic values would be very different from Dicey's ideal constitutional arrangement.

4.2 LIT, the tyrant's charter and political development

The doctrine of legitimacy and LIT that is propounded by Azu Crabbe JSC in *CFAO v Zacca* and *Assibey III v Ayisi* and by Archer JA in *Armah v Naawu* is really a doctrine of legislative supremacy without the necessary democratic values to control legislative supremacy. What will be the consequences, if we adopt such a theory for our political system? It will be a tyrant's charter. A political system that legitimises any laws enacted by the legislature will provide solace to tyrants. They will find comfort in a legal system that is prepared to enforce any laws that they pass, irrespective of their moral content.

Citizens of African states are, however, not likely to accept laws just because a legislature has enacted them. They will resist tyrannical laws because such laws are inimical to Africa's development. Such resistance will increase political instability and affect the development of African societies.

4.3 Law, legitimacy and the African state

What should be the law's contribution to the political system of the Ghanaian state in particular and the African state in general? The law should provide the formal and substantive rules of political accountability that would ensure legitimacy for our political system. It is my view that the law in Ghana already has the resources upon which we can develop the appropriate principles of political accountability and make our politics more legitimate. These principles can be found in the value-based theory of interpretation.

5 A LIBERAL'S STORY

What are the substantive political values that can provide legitimacy to the Ghanaian state? It is my view that liberalism provides the basis upon

which the principles of political accountability can be constructed for the Ghanaian political system, and indeed for all African states. It provides the only account of legitimacy that is appropriate to the people of Africa.

Liberalism as a political theory is a protest against restrictions on the self-determined actions of the individual. African liberalism therefore has two primary objectives. It aims to remove the arbitrary state and to replace it with one based on rules embedded in liberal democratic values. Liberalism also calls for substantive democracy in which all people, irrespective of their ethnic, cultural or religious backgrounds, participate in politics through fair elections and take part in debates about the policies that affect their lives. Liberalism therefore calls for reasonable and rational governance. Governance must be reasonable because government must have a moral basis. Rational government is also necessary because there must be an efficient and effective relationship between the ends of government and the means that government uses to attain those ends. We argue that the basic liberties of the citizen cannot be interfered with except to expand liberty. Thus the right to free speech, freedom of conscience, and the right to participate in government, freedom of association and freedom from arbitrary arrest are individual rights that cannot be interfered with by the state. The right to own property that has been legally acquired is also a basic right. Any attempt to interfere with those rights provides the basis for a justified rebellion.

5.1 Liberalism and interpretation

A liberal political arrangement is obviously incompatible with legislative sovereignty. Consequently, in a liberal society, LIT has to be rejected if a literal interpretation of a statute or the constitution has the consequence of unjustifiably interfering with the basic liberties of citizens.

5.2 Liberalism: The formal dimension

It has been pointed out that Sowah JA in *CFAO v Zacca* and Amissah JA in *Armah v Naawu* decided those cases on the basis of values such as equality, justice, fairness and integrity. These values have a formal dimension. For example, fairness as a formal concept will require that all like cases should be treated alike. Stated this way, the concept of fairness does not go far enough to protect substantive liberal values. For it is possible for a law to be enacted which states that "all blue-eyed children should be murdered". As long as all blue-eyed children are murdered the law has satisfied the condition of formal fairness.

However, even formal political values can radically reduce the power of the arbitrary state. These values will control the unrestricted discretion available to the African state, which allows it to engage in discriminatory treatment of its citizens. For example, a tyrant forced to adhere to formal fairness will have to ensure that none of his relations or his supporters is blue-eyed before he can go ahead with the murder of all blue-eyed children. Thus his ability to act arbitrarily will be severely constrained.

5.3 Legitimacy and development

One of the major aspirations of a developing country like Ghana is to develop its political and economic systems so that there is prosperity for its citizens. Our analysis of legitimacy should, therefore, indicate the contribution that legitimacy can bring to the development process.

At this point, a recapitulation of Beetham's argument is in order. According to him legitimacy is important because man has a capacity for a moral sense, and power that is illegitimate offends our moral senses.[25] Legitimacy provides the moral grounds for co-operationbetween different sections of society. Legitimate power therefore has the right to expect obedience[26] and people obey legitimate authority because, as moral agents, they recognise the validity of such authority.[27]

Legitimacy is therefore of extreme importance in a political system. It is significant not only for the maintenance of order, but also for the degree of co-operation and the quality of performance that leaders can secure from their citizens.[28] A system which is legitimate is orderly, stable and effective; it is orderly because there is a solid level of support from the populace, which allows the system to withstand shock; it is effective because the leaders are able to achieve their purposes because of the quality of performance they can secure from subordinates. Legitimacy is not the only source of such values, but it provides a crucial contribution to these qualities through its effect on citizens as moral agents and not merely as self-interested actors.

Many people think erroneously that the fundamental problem facing African states is their weak economies. Nothing is further from the truth. The major predicament of many African states is the crises of legitimacy of African political systems, which encourages rebellions and political instability. Until this crisis is dealt with, Africa's economic problems can never be resolved. Many citizens consider their governments to be illegitimate because they are unjust, illegal and arbitrary. Consequently, the states are disorderly, unstable and ineffective. In such situations, African leaders cannot secure the co-operation of the majority of their citizens. Until governments become legitimate there can never be the bedrock of solid support from their citizenry that will allow governments to take the tough measures that need to be taken to propel African countries and societies forward.

5.3 Legitimacy and Ghana's 1992 Constitution

It is possible to criticise this paper by arguing that its whole thrust is misguided. After all, the 1992 Ghana Constitution of Ghana captures many of the liberal ideals that have been argued for here. Chapter 5 of the 1992

25 Beetham: 1991.
26 *Ibid* 26.
27 *Ibid* 29.
28 *Ibid* 33.

Constitution protects fundamental freedoms and it is unlikely that the courts will interpret statutes according to LIT or in ways that will weaken the protection given to fundamental freedoms in the Constitution.

There are two responses that can be made to this criticism. First, the criticism is based on unjustified optimism. It is important to remember Dicey's warning that constitutions and pious proclamations do not protect civil liberties. Taking Ghana's history into consideration, it will be unwise to believe that the 1992 Constitution alone can protect our liberties. Ghana's democratic experiment can be overthrown and history provides ample evidence of the return to the dark days of tyranny when this occurs. Thus a sustained inculcation of liberal values into Ghana's political system is the surest way of preventing the abuse of basic liberties that Ghana has witnessed in its years as an independent state. More ominously, there is evidence that suggests that even in this new democratic dispensation, it has been difficult to wean judges from LIT. Unfortunately some judges continue to commit the legalistic fallacy.

Second, the criticism is misconceived because it fails to recognise the proper relationship that exists between constitutions and what legitimises constitutions. It is not the 1992 Constitution that has legitimised liberalism within the Ghanaian political system. Rather, it is the liberal foundations of the 1992 Constitution that have given legitimacy to the Constitution. Liberal values are the fundamental values upon which the Constitution and all the other laws of Ghana have to be judged. Any system of government, constitutional or unconstitutional, must be judged by the extent to which it achieves the liberal ideal. The 1992 Constitution is an important document, but it is important only because it meets citizens' aspirations and protects their liberties. The moment the Constitution ceases to protect liberal values, it becomes illegitimate and must face the full resistance of the people.

5.4 The role of the courts in the administration of Ghana

The role that the courts should play in the administration of the country is a question that arises whenever there is an attempt to democratise politics in Ghana in particular and in Africa in general. Many people will argue that the role of the courts is to interpret and enforce the law according to the Constitution. It should be clear from this paper that the courts have a more fundamental role to pay in the administration of the country. First, the courts must support legitimate governments and these must be governments that subscribe to the liberal ideal. Second, the courts should interpret the law to protect and promote the basic values of liberalism rather than to give succour to the arbitrary state. They must ensure that laws are interpreted in ways that make government accountable to the people. When they interpret statutes and constitutions in these ways, they will be providing the legitimacy that our political systems so badly need. They will be assisting in creating the stability, orderliness and effectiveness of the state that is essential to the development process. The law will then be an essential part of the development process.

6 CONCLUSION

In this paper we have argued that liberal political theory provides the basis of legitimacy for Ghana and for African governments. We have also argued that the courts must engage in interpretation with the object of protecting and promoting liberal values. These are the lines along which value-based interpretation must develop. We have argued further that constitutions are not by themselves legitimate. It is the liberalism of the 1992 Constitution that has legitimised the 1992 Constitution.

The struggle for liberalism in Africa has a long history. The struggle is bound to intensify because the new African aspires towards political, economic and social progress. Some people have argued that with the defeat of communism we are at the end of history. It is obvious that in Africa the struggle against arbitrary government has just begun in earnest. In Africa, we are at the beginning of history.

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