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Chieftaincy is Dead: Long Live Chieftaincy: Renewed Relevance of Chieftaincy in Postcolonial Ghana[1]

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Abstract

In the 1950s and 60s when the modernization school was a popular paradigm, there was the general feeling across Africa that traditional institutions like chieftaincy would not be able to resist the forces of modernization as it swept across Africa. Many thus predicted the death of chieftaincy. However, chieftaincy survived into the post colonial era and found space within many postcolonial African states. One theoretical explanation that has become dominant in explaining the relations between chieftaincy and post-colonial African states is the theory of mixed government. In this article I draw examples from different countries on mixed government and then analyze the Ghanaian instance of mixed government. Data for this paper is based on extensive literature search, coupled with empirical data through observation and interviews. The conclusion of this paper is that the chieftaincy institution in post-colonial Africa, as shown in the case of Ghana, has a long life span.

Introduction

There were many who predicted the death of chieftaincy in the wake of representative democracy and increased bureaucratization of state institutions, and feared that the conflict between chiefs and the new elite at the dawn of independent Africa was too profound to be resolved to the satisfaction of both by any kind of constitutional engineering. In Zambia for instance, Kalenga Simwinga notes: "Chieftainship is obsolete and should be allowed to die out, as it has in Europe, where its remnants (monarchies) can only be seen in the most backward of countries" (Van Binsbergen, 1987:156). In South Africa, Van Kessel and Oomen (1997:561) also observe that "it was

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widely assumed that chieftaincy would not survive in the post apartheid era." Similarly, a leading intellectual of the African National Congress has argued: "Backward tribal and other relationships such as the role of the chiefs in such situations, will be replaced by democratic institutions founded on the organs of people's power" (Mzala, 1988:224, quoted in Van Kessel and Oomen, 1997:565).

Soon after his release from prison, Nelson Mandela accommodated chiefs and condemned the manner in which chiefs were being systematically undermined by the apartheid regime. He gave the assurance to chiefs that he would restore them to their rightful place in society. By early 1996, Mandela's position toward chieftaincy, then president, had changed. He advised the traditional leaders in South Africa to abandon "the illusion that there can ever emerge a constitutional settlement which grants them powers that would compromise the fundamental objective of a genuine democracy in which the legislature and the executive at all levels are made up essentially of elected representatives" (Van Kessel and Oomen, 1997:584). Writing about the Houses of Chiefs in Botswana, Proctor argues, "It seems unlikely that the Houses of Chiefs will remain now a permanent feature of the Botswana political system. Like chieftainship itself, it was doomed to ultimate extinction in the face of powerful and irreversible forces of modernization" (Proctor, 1968:97).

In Ghana, Rathbone (2000a:3) noted that for the last 50 years, at the very least, it had been frequently stated by Ghanaian and non-Ghanaian observers that chieftaincy in Ghana, and in the rest of Africa for that matter, would wither and eventually die out. According to Nyamnjoh, modernization theorists have expected such demise as the natural course of things, in tune with their evolutionary and homogenizing perspectives. In the 1950s and 1960s, modernization theorists predicted that chiefs and chieftaincy would soon become outmoded and be replaced by 'modern' democratic offices and institutions (Nyamnjoh, 2002). Chieftaincy has long "refused to die" contrary to the expectations of the modernization school.[2] Even in Botswana where, according to Nyamnjoh (2002:15), modernization is believed to have had its greatest impact in Africa, chieftaincy remains resilient. The attempt here is not to offer reasons explaining the resilience of chieftaincy and its continuous relevance in Africa. This has been explained extensively by scholars like Andriaan Van Nieuwaal (1996, 2003), Von Binsbergen (1987), Von Throta (1996), Skalnik, (1983, 1994), and Tonah (2005, 2006). Most scholars of chieftaincy agree that chieftaincy and democracy are no longer antithetical as

both are now coexisting in the face of modernization, democratization, and increased bureaucratization of state institutions. Rather than being phased out as relics of pre-modern times, chiefs continue to survive and their relevance continues to persist in several forms throughout Africa. In the rest of this article, I analyze conceptual issues such as chiefs and traditional authority holders. After, I present the conceptual framework of mixed government, how it is applied in selected African countries and I explain the various mixed actors as exemplified in the Houses of Chiefs in Ghana, and their mixed actions in the judicial process. I then conclude forcefully that as far as Ghana is concerned and many other African countries, the death of chieftaincy is far from near.

Conceptual Issues

Within the context of chieftaincy, the term "chief" means the head or leader of a tribe or clan in a town or village, and who is in charge of, and answerable to the people in the town or village (Brobbey, 2008:32). In colonial Ghana, the British made several attempts to define the position of a chief.[3] The current Ghana's 1992 Fourth Republican Constitution provides that unless the context otherwise requires, "chief" means a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage. Today, there is no need for state recognition for a person's selection and nomination as a chief to be valid. The terms 'chief' and 'chieftaincy' appear to have similar meaning across the literature in Africa. Literature, especially on chieftaincy in South Africa, Botswana, Zambia and Zimbabwe use the term 'chieftainship' instead of 'chieftaincy.' Nevertheless, in whichever context the two terms are used, both 'chieftaincy' and 'chieftainship' are synonymous. Rathbone (2000a) observes that much of the West African 19th century travel literature and that of early colonial administrators refer to African traditional rulers as kings. However, the twentieth century use of the titles 'chief' was clearly an intentional demotion not only connoting domination (Crowder and Ikime, as cited in Cheka, 2006:72), but also, "an attempt after 1901 to escape the confusion in official papers between the British king and subject monarchs" (Rathbone, 2000a:45).

Generally, chiefs hold authority based on tradition. Weber defined traditional authority as that type legitimated by sacred traditions (cited in Höhne, 2006:2). Etymologically, the word 'tradition' comes from the Latin word *tradere* which can be translated as "pass something [over]" or "hand

something [over]" (Höhne, 2006:3). The sociological importance of this idea of tradition is that, it is not always fixed. As it is being passed over from one generation to another, tradition changes and gets adapted to changing circumstances. Thus, when Cheka (2008:72) defines traditional authority as "an institution or power that is received and handed down or over from generation to generation, it does not mean that tradition always conveys a timeless, unchanging past (Spears, 2003). In making reference to Vansina (1990:257-8), Spears observes that tradition is a powerful and enduring endogenous process. Far from being timeless, traditions represent the fundamental continuities which shape the futures of those who hold them. They exist not just in the mind, but also out there in the forms of scriptures, institutions and concepts. Whilst the terms 'traditional institutions' and 'traditional rulers' are problematic Kraxberger (2009:451), traditional rulers are "key leaders of natives or ethnic groups who buttress their legitimacy and authority by claiming links to the ancestors and first settlers" Kraxberger (2009; also see Lentz and Kuba, 2006). However, the term "chief" has gained wider acceptance in colonial reports as well as early and contemporary anthropological writings.

Mixed Government as Applied in Contemporary African Political Systems

The application of the model of "mixed government" provides a fruitful perspective for the analysis of the effects of existing authoritative bodies on state legitimacy, system stability, state performance and capacities (Düsing, 2002:33). This was as a result of a "new wave of internalization of traditional political institutions which began during the 1970s and 1980s, with many African countries adopting traditional political institutions as part of their state apparatus, in order to engage their administrative capacities and widen their acceptance in rural local communities and to strengthen the legitimacy base of the respective government" (Düsing, 2000: 37-8). Richard Sklar characterizes existing dualistic systems of political authority within a single sovereign state as a form of mixed government in African states. The idea of mixed government or what Sklar calls mixed constitutions, is based on the concept of the combination, amalgamation, or "mixture" of different forms of government within the political system, and not on parallelism or duality especially in its application in the African context. In the history of political thought, it has always been referred to as a unified and sovereign political system. It is for this reason that Sklar suggests:

> That the concept of mixed government is appropriate for the present-day African condition of dualistic authority with a single, undisputed

> sovereign in each country. Just as in both ancient and modern epochs of mixed government, African politics today are governed by unified sovereign authorities (Sklar, 1993:86).

In his *The Premise of Mixed Government in African Political Studies*, Sklar (2003) took political identity as his starting point of analysis of mixed government. His argument is that, many people first identify themselves as citizens of sovereign states. "To be sure, however, citizenship is but one among many types of personal political identity" (Sklar, 2003:4). People all over the world identify themselves with ethno-linguistic groups known as nationalities. In several countries, religious identity is a major component of ethno-linguistic identity as in the case of Northern Ireland, Bosnia, and Sudan (Ibid). He reiterated that, the history of mixed government is found in the works of Plato, Aristotle and Polybius where it implies the mixture of institutions designed to protect the interest of the rich with other institutions that were created to assist the poor (Ibid). Sklar traces the historical development and trajectories of mixed government in "early modern Europe when the so-called Estates of society, specifically the nobility, the clergy and the common people, were represented in the organs of government" (Ibid: 6). Similarly, "The Estates-General in France during the sixteenth and seventeenth centuries and the contemporaneous system of King, Lords and Commons, known as mixed monarchy, in England define the early modern meaning of mixed government" (Ibid:6-7).

Subsequently, the principles of mixed government were incorporated into the Republican Constitution of the United States of America. The difference between mixed government in European and American political thought and that of medieval Europe was that whilst in the former, mixed government never implied dualistic, as opposed to unified systems of political authority" in the latter, "dualistic forms of political authority were common place" where political theorists "adopted the concept of "dual majesty" introduced by the German theorist, Otto von Gierke, to represent this reality" (Sklar 2003). Between these positions, Sklar's position is that in modern Africa, mixed government:

> does not appear to have been used in connection with dualistic forms of political authority. It has always been conceived as a type of representative government in unified states. In our day, sovereign states in Africa are governed by unified, central or national authorities,

> usually in the form of a republic with executive, legislative and judicial branches of government (Ibid).

Sklar clarifies the term further by stating thus; "What I term the second, or traditional, dimension almost always consists of several, or many, separate and distinct traditional polities" (Ibid). In Africa, these distinct traditional polities are ruled by traditional authority holders who assume different titles in relation to their areas of jurisdictions. Increasingly, this traditional authority is reckoned in Africa to be a political resource of potentially great value. A separate source of authority which is embedded in tradition, and could be used to reinforce social stability without the abandonment of social or democratic reforms (Ibid: 7-8). Distinct traditional authorities or political fragmentation in Africa predates colonial domination of the continent and survived the colonial administration. In postcolonial Africa, political fragmentation is a common phenomenon. Whilst in Africa "[P]olitical fragmentation is a widely lamented legacy of colonial rule…"the implications of political fragmentation are not entirely negative" (Ibid: 4-5). On the positive side, these "domains of authority are readily identifiable as the realm of state sovereignty and the realm of traditional government; both systems effectively govern the same communities of citizens-subjects reinforcing each other most times, and other times overlapping each other but not parallel or in opposition to each other (Sklar, 1993:86-7). A key word in Sklar's explanation of the relationship between the sovereign state and traditional authority holders is the concept of "incorporation" which he used in the following sense: "The idea of dual authority implies a systematic relationship between two coexistent dimensions of government. I use the term 'incorporation' to connote the inclusion of elements of one dimension within structures of the other" (Sklar, 2003:9).

Then he adds: "My discussion of incorporation … is limited to the assimilation of traditional institutions by the organs of sovereign governments" (Ibid) or sovereign states. Sovereign states and traditional authority holders, govern both citizens and subjects. In Ghana, traditional authority holders, as in many African countries, are popularly called chiefs. Their rule over indigenous political structures is more dominant than the presence of the state.[4] As the state governs the citizens, the chiefs rule over their subjects, leading to divided sovereignty, legitimacy and authority. Though sovereignty, legitimacy and authority could be divided within the contending domains of political authority-modern and traditional authorities,[5] "Sklar posits that contending domains of political authority are

nurtured as legitimate mediums of governance and administration" (Vaughan, 2003:xviii), and does not lead to marked dual and competing authorities. Indeed, nowhere in Africa, with the probable exception of Uganda does mixed government lead to marked and dual competing authorities. The Ghanaian state does this nurturing of political authority by allocating the power of judicial functions to the chiefs (to adjudicate on their own disputes). By doing so, the state has provided all the necessary support to the chiefs. This support is manifested in constitutional and statutory provisions, infrastructure and facilities, administrative regalia and support personnel in the Houses of Chiefs. This legitimizes chiefs' authority and creates the bases upon which chiefs are engaged in judicial administration in Ghana. The courts in the Houses of Chiefs are not a parallel institution to the Ghanaian traditional court system. It is a system of hierarchically arranged institutionalized chieftaincy, which, through time, has been incorporated into the Ghanaian court structure. This incorporation makes it compulsory for contending parties in chieftaincy disputes who wants to settle their differences in court, to start the judicial process in the Houses of Chiefs, and to gradually appeal to the Supreme Court. From this light, we can apply the theory of mixed government to explain the existence of two separate and distinct political realms. These political realms interact in many ways with each rooted in an independent source of authority, and consequently, has its separate jurisdiction and govern in its own way. The creation of the Houses of Chiefs by constitution and statute is already a manifestation of mixed government. More importantly, the interaction of the actors in the judicial process in these Houses of Chiefs is indicative of the operation of mixed government in the form of mixed actors.

Mixed Government in Africa: Long Live Chieftaincy

The incorporation of traditional institutions into sovereign African states such as the Houses of Chiefs system in Ghana is not a uniquely Ghanaian socio-political institution, even though in some other countries, they are not necessarily called House of Chiefs. From southern Africa especially in Botswana, Lesotho, South Africa, Zambia, and Zimbabwe, to Ghana, Nigeria, Togo, Sierra Leone and Gambia, mixed governments exist where chiefs are still playing out several roles in the postcolonial African state. The following section considers some of the instances of mixed governments in African states so as to understand the uniqueness of the Ghanaian case of mixed government.

One of the scholarly works which gives insight into the Botswana House of Chiefs is Proctor's (1968). He traces the inception of the Botswana House of Chiefs to the early 1960s. According to him, in 1960 before the coming into force of the Botswana Constitution, the chiefs had demanded for a second chamber to be called House of Lords. After much negotiation and consultation with the British, a compromise was reached resulting in the establishment of the House of Chiefs (also see Jones, 1983: especially pages 133-139). The 1966 Constitution of Botswana established a House of Chiefs to serve as a consultative body in respect to 'tribal matters.[6] Article 77 (2) of the constitution outlined the composition of the House of Chiefs to consist of 15 members. These 15 members comprised eight ex-officio members, four elected members, and three specially elected members. Its role was and has been purely advisory as against the legislative authority the chiefs had demanded in the 1960s (Proctor, 1968:61). In 1965, the House of Chiefs, still dissatisfied with this advisory (and not legislative) role, passed a vote of no confidence in itself, dissolving the House and asking for its reconstitution, and that Parliament be reconstituted with two Houses; House of Chiefs and House of Assembly (Ibid. 66). Though, this demand was not met, yet the new constitution that came into force the following year mandated that bills from the Legislative Assembly were to be referred to the House of Chiefs for suggestions where necessary. Even though no detailed comments were made perhaps due to the technical nature of the bills, yet the Government respected the few comments that the House made on some of the bills that came before it. A glance at the 1966 Botswana Constitution reveals that since its establishment in the mid-1960s, the House of Chiefs has largely remained an advisory body to parliament and government. However, it was required that bills such as those on tribal organization, tribal property, powers or administration of customary courts, customary law, and the ascertainment or recording of customary law come before the house for discussion. It is also important to note that the position of the chief in Botswana is dependent on the government. The 1966 Chieftainship Act for instance, subjected the chiefs in Botswana to the authority of the state. The President had the authority to recognize the installation of a chief by the tribe and to suspend or depose him following a judicial commission of enquiry. Four years later, the state did not have to suspend a chief based on a judicial enquiry. The Chieftainship (Amendment) Act of 1970 removed the right of a chief to a judicial enquiry before his suspension or deposition by the President, and stipulated that the final sanction in appointment of sub-chiefs and representatives of chiefs was to rest with the Minister of Local Government and Lands. Under the Chieftainships (Amendment) Act of 1973, the

President was to determine the nature of administrative enquiry preceding his judgment on the removal of a chief from office, and such an enquiry could be instigated without there being, as was previously the case, a complaint from the tribe about the conduct of the chief (Ibid: 133. Also see Nyamnjoh, 2002). Today in the Botswana Constitution, there is no explicit declaration of state recognition of chiefs. Section 3 (4) of the Chieftaincy Bill No. 13 of 2007, however, gives the Minister the power to hire and fire chiefs without consulting the tribe which the chief represents, and sub-section 6 of the same section three now demand that a Chief should have some qualification and must retire at age 80[7]. Nevertheless, as late as 2005, the Botswana House of Chiefs was still considered an influential body advising parliament, and with many tribal and other organizations fighting to have representation therein (Minority Rights Group International, State of the World's Minorities 2008-Botswana[8]. In 2005 the Botswana Parliament passed a constitutional amendment bill dealing with membership of the House of Chiefs. But as early as February 2007, of the 47 tribes in Botswana, 20 still remained unrepresented but are fighting for inclusion (Ibid).

It is not in every country that institutionalized chieftaincy is called House of Chiefs. In South Africa, Ineka Van Kessel and Barbara Oomen (1997) and Leslie Bank and Roger Southall (1996) examined the agitation of traditional leaders for inclusion in the post independent legislature of South Africa. The Congress of Traditional Leaders in South Africa (CONTRALESA) represents their House of Chiefs. CONTRALESA was launched in September 1987 in Johannesburg, South Africa, to represent the interest of chiefs. Towards the end of the 1980s, chiefs were re-orienteering themselves toward the African National Congress, perceived as the new ruling party in waiting (Van Kessel and Oomen, 1997:562). Like their counterparts in Botswana, the South African chiefs campaigned for the establishment of House of Traditional Leaders based on the model of the British House of Lords and demanded simultaneously that their representation in this House ought to be based on democratic principles of one man one vote (Ibid). The new (independent) constitution has provided constitutional safeguards for traditional rulers. There are constitutional provisions for the establishment of Houses of Traditional Leaders at the provincial level, and a 20-member Council of Chiefs at the national level (Ibid). Under Article 183 of the 1993 South African Constitution, a Provincial House of Traditional Leaders was be entitled to advise and make proposals to the provincial legislature or governments in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the province (Ibid).

The constitution also specifies that any provincial bill pertaining to traditional authorities, indigenous law, or such traditions and customs shall be referred to the provincial house of traditional leaders before the bill is passed by the provincial legislature (Ibid). At the national level, the Constitution (under Article 184) provides for a Council of Traditional Leaders, which is mandated to advise the government on indigenous law, traditions and customs and other issues that affect chieftaincy. In addition, the Council may at the request of the President of South Africa advice him or her on any matter of national interest (Ibid). However, as late as the 1990s, the South African Constitution did not have a single body responsible for deciding on chieftaincy issues. CONTRALESA has called for an independent commission of inquiry to sort out the issue once and for all. But the Constitutional Assembly, when dealing with calls to establish the authenticity of chiefs decided that this was the responsibility of the Department of Justice. The Department of Constitutional Affairs handles chieftaincy issues with the President having the final say over who is appointed a traditional leader. Similarly, the President can define the duties, powers, privileges, and conditions of service of traditional leaders, and can appoint and depose them when he deems it necessary (Ibid. 578). Throughout 1994 and 1995, CONTRALESA regularly rejected the terms of reference set out in the interim constitution, arguing; "chiefs are fit to rule not only to advise" (Ibid: 418).

The Malawian Constitution also provides specific roles for traditional rulers. It mandates the election of twenty-four chiefs to its eighty-member National Senate. Each of the twenty-four chiefs is elected by a caucus of all the chiefs of the district in a secret ballot within thirty days of each local government-election. Among other things, the Senate receives, scrutinizes and amends bills passed by the National Assembly. Unlike the Houses of Chefs in both Botswana and South Africa which have only delay powers over bills, the National Senate in Malawi can pass motions to confirm or reject bills passed by the National Assembly and it has authority to deliberate on any matter (Agbese, 2004).

In Zimbabwe, the 1985 Zimbabwean Constitution provides a constitutional status for traditional rulers. However, the Constitution notes that an Act of Parliament shall provide that in appointing a chief, the President shall give due considerations to the customary principles of succession of the people over which the chief will preside. The constitution also provides that Parliament should prescribe the qualifications of candidates for election to

the Council of Chiefs. The tenure of office is also determined by Parliament. Today the Zimbabwe Constitution, like the South African Constitution provides for both national and provincial houses of chiefs (Acquah, 2006: 65).

The House of Chiefs system is not limited to Southern African countries only. In the West African sub-region, Ghana aside, Nigeria is a country whose constitutions have continuously provided for the House of Chiefs. In Nigeria, the first House of Chiefs was established for Northern Nigeria by the 1945 Richards Constitution. This House of Chiefs was to be a legislative assembly. The McPherson Constitution which succeeded the Richards Constitution in 1951 extended the idea of a chiefs' legislative assembly to the Western Region by creating a Western House of Chiefs. Thus, under the McPherson Constitution, two out of the three regions in the country had legislative assemblies for chiefs. Continuing the trend begun by the 1945 constitution, the 1963 Republican Constitution gave constitutional status to traditional rulers by retaining the Houses of Chiefs for the North and West and creating one for the Eastern Region. When the Mid-Western Region was carved out of the Western Region in 1964, its own House of Chiefs was created. These Houses of Chiefs were the upper chambers in the bicameral legislative system of the regions. They did not have any formal judicial roles (Nwabauni, 1994; Sklar, 2003; Agbese, 2004). According to Agbese (2004), the 1979, 1989 and the 1995 Constitutions of Nigeria did not provide any meaningful political roles for traditional authority holders. However, the 1979 Constitution which was promulgated by the military, excluded traditional rulers from any formal legislative role but only made provisions for the establishment of a Council of Chiefs at the state level. Only limited advisory roles were provided for the Council of Chiefs. The 1979 Constitution also established a Council of State at the federal level. Among the membership of this body was one person from each State, to be appointed by the Council of Chiefs of the State from among them. The Political Bureau which the Babangida regime set up in 1986 as part of the steps that led to the 1989 Constitution had emphatically recommended that no formal constitutional role be established for traditional rulers under that constitution. The wording in the 1995 Draft Constitution of Nigeria concerning chiefs is the same as in the two preceding constitutions. The 1995 Draft Constitution of Nigeria added a new role for the Council of Chiefs to the effect that: The consent of the State Council of Chiefs shall be sought in matters of creating new chieftaincy or upgrading of any chief or making of any law which may improve the security of tenure or dignity of traditional institutions. The draft Constitution qualifies this new role by asserting that

the role shall not be construed as conferring any legislative, executive or judicial function on the Council. The 1999 Constitution however, does not make any provision for traditional rulers to exercise any political power. Under the 1999 Constitution, traditional rulers are not even represented in the Council of State. Thus, as Agbese (2004) observes, with respect to traditional rulership, the 1999 Constitution is the most radical in completely eschewing chiefs from exercising any formal political power. The omission of any mention of traditional rulers and councils in the 1999 Constitution has been widely criticized…Indeed the incumbent administration has pledged to restore the constitutional recognition of traditional authorities (Agbese 2004). However, "[W]hether or not some form of constitutional incorporation is restored in Nigeria, it is obvious that traditional authorities do not require that kind of validation in order to function effectively in their own dimension of political space" (Sklar, 2003:10).

In analyzing mixed government in Africa, East African countries are comparatively less visible. However, Uganda provides a very interesting case of more of parallel than a mixed government different from what has been described here in Southern and Western African countries. The Buganda kingdom, representing the most powerful traditional political structures in Uganda, comprises about 16% of Uganda's population (Englebert, 2002). It was a very powerful kingdom during the colonial rule and maintained a high level of autonomy throughout British colonial rule and after (Apter, 1997). In 1963 after the country attained independence, the king of Buganda, Mutesa II also became the first ceremonial president (Johannessen, 2005) of Uganda, whilst most executive powers were vested into the office of the Prime Minister, Milton Obote (Englebert, 2002:348). This arrangement however did not last long. In 1966, the Prime Minister suspended the constitution and removed Mutesa II from presidency. In reaction, the Buganda government ordered the central government to remove itself from the soil of Buganda. As a consequence, the Ugandan army assaulted the palace of Mutesa II who fled into exile in England (Englebert, 1997; Johannessen, 2005). Subsequently, all kingdoms were abolished and only revived in 1993 with the coronation of the son of Mutesa II, King Mutebi. The revival saw an attempt to establish an autonomous Buganda state with its own cabinet, parliament, and bureaucratic structures, without any attempt to mix elements of the Buganda state with those of the Ugandan state. Even at the local level when King Mutebi created local administrative structures to be run by his appointees, the structures largely run parallel with state structures with no effective attempt to mix the two (Englebert, 2002).

However, with no standing army and sources of regular income, coupled with the rejection of federalism which would have enabled the Buganda kingdom to "capture the physical powers of districts as well as their allocations from the national budget" (Englebert, 2002: 352), the Buganda kingdom depended heavily on popular mobilization and donations, and was unable to create dual state, and for that matter dual citizen ship though some Ugandans might have been citizens and subjects for the Ugandan state and the Buganda kingdom respectively. A successful Buganda state within Uganda would have provided very interesting case for political scientists and sociologists studying African states, and would equally have had a tremendous impact on other African states such as Ghana where the Ashante kingdom has been a very powerful one and its king has been placed above all traditional authority holders in Ghana by the 1992 Constitution.

Traditional Resurgence in Africa

The resurfacing of chieftaincy in Africa, or what Englebert (2003) referred to as traditional resurgence in Africa has attracted many explanations. Particularly in the case of Ghana Tonah (2006:21) explained that:

> Several reasons have been adduced for the growing interest in Chieftaincy and for its survival against all odds. These include the continuing allegiance of large sections of the populations including in recent times the educated elite, to their traditional leadership; the inability to create a national identity out of the numerous ethnic groups forced together into a nation-state; the continuing association of chieftaincy with power and wealth; and the flexibility of the institution and its ability to adapt to the changing political order of the postcolonial period.

Tonah's position is that, though chiefs have little administrative and legislative powers within the postcolonial nation-state, chieftaincy positions are still very much sought after and competition for high office in many traditional areas in Ghana remains very high. Besides, Tonah explains the resilience of the chieftaincy institution based on chiefs' ability to adapt to changing political order of the postcolonial period. This ability, is what von Binsbergen (1987) referred to us chiefs' ability to shift alliance as a survival strategy. Many have therefore called for chieftaincy to be part of Africa's democratic renewal if chieftaincy and the postcolonial state are transformed (Van Nieuwaal, 1996). Writing about chieftaincy in Nigeria, Olufemi Vaughan has pointed out that the "apparent limitation of modern state

structures at the grassroots has inevitably enhanced the status of paramount chiefs as important actors in a loosely defined ruling coalition at the federal, state and local government levels.

In recent years, traditional institutions have gained power and influence in many African states. Several writers including Agebese (2004) have associated this phenomenon with the administrative and political problems of many African states, arguing that the `traditional' realm expands or maintains its authority to the detriment of the `modern' state apparatus. Mamdani (1996) for instance links the perceived dichotomy between the modern and the traditional with the urban-rural divide. He suggests that, while Africa's urban centres are part of an emerging civil society, rural power continues to be represented by the decentralized despotism of the local rulers whose legitimacy is entrenched by notions of community and culture. Van Nieuwaal (1999) maintains that traditional authority inevitably poses a challenge to the political and administrative process in Africa, believing that the state is losing ground in the conflict with the traditional. Von Trotha (1996:91) even suggests that traditional authorities are the ideal candidates to preside over the `political tribalisation' of the social order in Africa. However, the increased role given to traditional authority even in successful or `strong' states like South Africa would suggest that the perceived dichotomy between traditional and state authority does not characterize all of Africa. In concluding this section, it is worthy of stating that the resurgence or otherwise of chieftaincy in Africa is attributable to postcolonial regimes more than colonial regime types. That is, it did not matter whether a particular country was colonized by the British, the French, the Portuguese, or the Belgians; the incorporation of traditional authority holders such as chiefs into modern state structures, depends largely on postcolonial governments.

The Houses of Chiefs in Ghana

Ghana became an independent state in 1957 and in 1958 the Independence Constitutional provisions for "a measure of devolution and for the protection of chieftaincy" (Brempong, 2001:29) was effected. As a consequence, five regions were created[9]. These five regions were each to establish a Houses of Chiefs which were to act as appellate courts to the then state councils[10] in resolving chieftaincy disputes with an Appeal's Commissioner acting as an impartial arbitrator in those disputes. They were also to deal with traditional and customary matters and to advice the government on these concerns. The records of the first meetings of the House of chiefs suggest that they met as

thoroughly cowed institutions. Although their advice rather than consent was required, they all approved the amendment that chiefs needed not even be consulted over proposed legislation dealing with chieftaincy itself. The Houses of Chiefs were to meet very infrequently. The rules of engagement were spelt out in a somewhat courageous comment by the President of the Eastern House of Chiefs at its inaugural meetings on 17th December 1959. According to him, it is a plain fact," he said, "that the chiefs are the same as the government and automatically anyone who comes to power no doubt will make us experience an unexpected difficulty and even more than we suffer now" (Rathbone, 2000a:141). A few months later, when the same House of Chiefs was discussing the Government's plans for a Republican Constitution, one of the chiefs suggested as follows: "Our main duties are to advise the Government…we are not in a position to openly criticize… (we should) be more cautious in dealing with the modern political trend… (and) register our loyal support to the government of the day" (Rathbone, 2000a:141). The chiefs were not satisfied with their situation. The action most of them took to declare their unalloyed support for the CPP government was a rational response to a situation they had little control over. Schram (1967:42) described these Houses as follows:

> The Houses of Chiefs were never very impressive bodies…They were from the beginning… dictated to at every turn by the Ministry of Local Government and the office of the Prime Minister, and later of the President. They were allowed no scope for original thinking and were given no real duties except to agree with the government and to praise or to condemn, according to the policy of the party at any particular time. Chiefs who found such a role repugnant were openly threatened with destoolment and exile from their states, and there were numerous enough examples of this for anyone who doubted the strength of the government to bring about his downfall. The Regional Commissioner became all-important in the life of each House, "suggesting" resolutions to be considered and times of meetings, and from time to time coming to the House in person to warn or admonish the chiefs. On such occasions he was always received with wordy speeches in his praise and the praise of the party.

After its establishment by Ghana's Independent Constitution, the Houses of Chiefs were guaranteed by the Chieftaincy Act, 1971, Act 370, and recently the Chieftaincy Act, 2008 Act 759. Structurally, there are three different categories of the Houses of Chiefs in Ghana; the Traditional Councils, the

Regional Houses of Chiefs, and the National House of Chiefs. The 2008 chieftaincy Act, Act 759, section 12, (sub-sections 1 and 2), establishes the Traditional Councils in Ghana, which are at the basis of the hierarchy of the Houses of Chiefs. At each Traditional Council, the paramount chief of the Traditional Area is always the president, and all other divisional chiefs within that Traditional Area are members. It is from these Traditional Councils that chiefs are elected to represent the Traditional Areas at the Regional level in the Regional Houses of Chiefs. Every region of Ghana's ten regions has a Regional House of Chiefs. All the ten Regional Houses of Chiefs were built by the state and have being continuously maintained and expanded by the state to cater for the increasing numbers of paramount chiefs. Each House has a President and a Vice-President elected by the members amongst themselves for a three-year term. The National House of Chiefs has a membership of fifty with each Regional House of Chiefs sending five elected representatives. Also, each of the ten Regional Houses of Chiefs and the National House of Chiefs has certain state personnel such as the Registrar of the House who is the administrative head, a legal counsel to the House, a Court Clerk, an accountant and a typist. In other Houses however, one could also find other personnel such as the Deputy Registrar and the Research Officer. These are the administrative personnel appointed by the state to assist in the everyday administration of the Houses of Chiefs and Traditional Council especially in judicial their administration.

Mixed Actors in the Houses of Chiefs

The 1992 Constitution of Ghana has stipulated the functions[11] of the House of Chiefs among which it has granted the original[12] and the appellate[13] jurisdictions to the Regional House of Chiefs, and to the National House of Chiefs. The judicial functions of the National House of Chiefs are outlined in articles 154, 178, and 271 of the 1969, 1979, and 1992 Constitutions respectively. Thus, all Regional Houses of Chiefs and the National House of Chiefs can hear cases originally emerging from their areas of jurisdiction, and those appealed from the lower judicial bodies. In the Houses of Chiefs, there are many committees but the judicial committees are special committees mandated by law to adjudicate on chieftaincy disputes. The special committees that sit on these cases are called judicial committees. The members are called judicial committee members or panel members who are addressed with the honorific title of 'My Lord' during judicial proceedings. Members of Judicial Committees are chosen from the Traditional Councils and Houses of Chiefs. Every judicial committee chooses its chairman who serves as the leader of the committee but technically, it is the legal counsel

who takes charge of the case during judicial proceedings. At the Traditional Councils, judicial committee membership is three and in both the Regional and the National House of Chiefs, the numbers are four and six respectively including a legal counsel[14] as an automatic member. Unlike what pertains in the Traditional Councils, legal counsel must be present in the Regional and National House of Chiefs to assist the judicial committees in their works. In the Regional House of chiefs, the counsel should be a lawyer of good standing of not less than five years in active service, and in the case of the National House of Chiefs, not less than ten years in active service. Whilst the judicial committees of the Regional Houses of Chiefs are established by article 274 (4) of the 1992 Constitution, that of the National House of Chiefs was set up by article 273 (2) and (5). Only chiefs who have been sworn in the three oaths[15] can sit on chieftaincy cases. The composition of every judicial committee is a constitutional requirement as well as provided in Acts 570. A chief's position in a Traditional Council or in a House of Chiefs does not automatically qualify him for a membership of a judicial committee. At the Regional Houses of Chiefs, non-literate chiefs are sometimes made part of the judicial committees. A chief is incapable of becoming a member of a House of Chiefs or a Traditional Council unless he has been registered and his name has been published in the *Chieftaincy Bulletin* as provided by Chieftaincy Act, 759, s 57 (5). Judicial committees are also formed such that a committee member does not sit on a case coming from his Traditional Area in order to ensure neutrality, impartiality and fairness. By the Court (Amendment) Act, 2002, (Act 620), s 5 which amended Act 459, s 39, the National House of Chiefs, the Regional House of Chiefs and every Traditional Council in respect of the jurisdiction of that House or Council to adjudicate over any cause or matter affecting chieftaincy is part of the lower courts of the country.

In performing their judicial functions, certain key actors are worth of note. These are the traditional authority holders who are chiefs and who sit as judges in these Houses of chiefs, the administrative personnel who are civil servants appointed and paid by the state to assist in the judicial functions, and, the legal counsel; a trained lawyer in the English common law who is attached to the chiefs when they sit on chieftaincy disputes. This is a very interesting combination of mixed actors where they both work together in mutual respect of experience, for tradition and modernity.

A person who wants to bring a cause or matter affecting chieftaincy to the notice of a House of Chiefs does so through a counsel by filling a petition.

Upon a successful filing and the payment of the necessary court fees, the petitioner is given a date to come back to the House to direct service; a process by which the petitioner goes with the bailiff to show the place of residence of the defendant in order that he be served. When the other party is served, he in turn responds and the response is also served on the petitioner and his lawyer(s). As soon as that is done, a day is fixed for the hearing of the matter. The actual judicial proceedings involve the appearance of both parties and their counsel before the judicial committee. The petitioner is led in evidence by his counsel, cross examined by the counsel of the other party, and re-examined by his own counsel. If there are witnesses, they each go through the same cycle. Then the defendant also presents his case and goes through same process of examination, cross examination from the counsel of the petitioner, and re-examination.[16] What is significant is the way the administrative personnel, especially the Court Clerks goes about conducting the business of the day when the House has a sitting. On such a day, the Court Clerk usually (but not always) dresses formally in a tie and with a coat, and is seen carrying dockets, the Record Book and other files briskly from offices into the Hall which serves as "the Court" in every House of chiefs. When all is set, he or she leads the judicial committee members to the hall whereupon in getting to the entrance of the hall he or she stops, and bangs at the door three times and shouts "court rise", and everybody rises before ushering the members inside. Whilst everybody remains standing, the Court Clerk leads the panel members to their seats. When they sit down, the lawyers and their parties (facing them) bow to the panel members bow to them and sit down and every else does some kind of bowing before sitting. The Court Clerk arranges copies of the dockets in front of each member. And then calls out the case and the parties involved who will respond accordingly. The chairman of the committee then takes over briefly stating the issue(s) before the last adjournment and asking if all is set to commence the judicial proceedings. If all is set, the legal counsel who normally does the recording of the proceedings reads out the last sentence recorded during the last sitting before proceedings resume. At the close of judicial process, a decision is taken. The judicial committees do not have the mandate to enforce their own judicial decisions. The winner of a case first applies to the Registrar of the Judicial Committee for execution to be issued. The Registrar then refers the case with the judgment and the court order to the Registrar of the High Court in case of the National House of Chiefs and the regional House of Chiefs, or to the District Court in the case of the Traditional Council. An appeal from the Traditional Council or from a Regional House of Chiefs is allowed within the first thirty days[17] after judgment is delivered. The

judgment operates as a stay of execution as provided by Act 759, s 34 which literally means that the status quo at the time of the start of the litigation should prevail till the appeal is heard.

Conclusion

Theoretical and empirical analyses of mixed government have always looked at the role of chiefs in the legislative process, playing advisory roles in the passage of bills into laws but never becoming a second chamber. For instance, South African chiefs campaigned for the establishment of the House of Traditional Leaders based on the model of the British House of Lords and demanded that their representation in this house ought to be based on democratic principles of one man one vote (Van Kessel and Oomen, 1997: 562; Bank and Southall, 1996). In Botswana, before the Independence Botswana Constitution came into force, the chiefs also demanded a second chamber to be called the House of Lords (Proctor 1968, Jones 1983: 133-9). In Southern Cameroon, the chiefs called for the establishment of a "powerful House of Chiefs with legislative powers" (Chem-Langhëe, 1983: 672). In Ghana however, the demand by chiefs for a second chamber was not a very strong one (Rathbone, 2000a). Ghana rather developed its Houses of Chiefs system to assist in the adjudication of chieftaincy disputes. Whilst the micro processes in the legislative role of chiefs have not been explained in mixed government, the attempt by this paper to do so in the judicial process of Ghana's Houses of Chiefs is to take the analysis of mixed further, and to reveal the particular organ of government where the mixed government is well pronounced. Traditional authority is very much alive in Ghana and several senior civil servants, business men and those in the Diaspora have held and continue to hold various levels of traditional authority. As a consequence, I will argue that as far as Ghana is concern, and I dare say some other parts of Africa such as South Africa, Bostwana, Nigeria, Togo, Uganda and Malawi, and many others, the death of chieftaincy is far from near. Earlier predictions of the death of chieftaincy in the wake of modernization, representative democracy and increased bureaucratization of state institutions has been abandoned whilst renewed attempts are being made both at theoretical and empirical levels to explain the resilience of chieftaincy, and the actual workings of the mixed government.

Notes

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2. Nevertheless, it is important to note that chieftaincy has been much weakened in several African countries such as Burkina Faso, Niger, and Uganda, and was effectively abolished in Tanzania.

3. One of such early attempts is the definition given by the 1927 Native Administration Ordinance according to which a Chief meant and included Odikro (Odzikro), Asafoatse, Amega, and Asafohene, occupying a stool and elected and installed in accordance with native customary law, and at the same time and being subordinated either directly to a Paramount Chief or to a Paramount through a Divisional Chief (Native Administration Ordinance, 1927, Part I (2), page 68). In the same act, the term "Paramount Chief" was to include an *Omanhene, (Omanhin*), *Manche*, *Konor*, *Awame Fia*, and *Fiago*, and to be a person elected and installed as such in accordance with native customary law to administer a state, who was not a subordinate in his jurisdiction to any other Paramount Chief (Ibid.70).

4. According to the Daily Graphic (Thursday January 24, 2008) "majority of Ghanaians live in the rural areas where chiefs and their assistants ensure peace and development. Ghana has about 43,000 communities of which only about 12,000 have the presence of central government agencies-the district assembly offices, the police, etc. The remaining 31,000 communities are under the direct control of chiefs."

5. For more on divided authority, divided sovereignty, and divided legitimacy, see Ray (1998, 2003).

6. See Article 77 (1) of the 1966 Botswana Constitution which establishes the House of Chiefs. However, Gillett (1973: 184) thinks the Houses of Chiefs were established in 1965.

7. See http://www2.ohchr.org/ (accessed: January 24, 2009).

8. 11 March 2008. Available at www.unhcr.org/(accessed: January 24, 2009).

9. According to Section 63 (a-e) of the Order-in-Council, the five regions were; Eastern Region (including present day Greater Accra Region), Western Region (including the present Central Region), Ashanti Region (including today's Brong Ahafo Region), Northern Region (including present day Upper East and Upper West Regions), and Transvolta/Togoland (the present Volta Region) Brempong (2001:35).

10. For a comprehensive discussion of these State Councils, see Rathbone, (2000a, 2000b).

11. For an elaboration of the general functions of the Houses of Chiefs, see (Ray 1998, 55, 2008, 109-112).

12. See Article 274 Clause 3 (sub-section d) of Ghana's 1992 Constitution sections 22 and 26 of the 2008 Chieftaincy Act, Act 759.

13. The Chieftaincy Act, 2008, Act 759, section 27 (sub-sections 1and 2), and section 23 (sub-sections 1 and 2).

14. Section 28 (4) in the case of a Regional House of Chiefs

15. A High Court Judge swears in members of the House of Chiefs. The various oaths they swear in are, the Oath of Membership, Oath of Secrecy, and the Judicial Oath.

16. For a comprehensive analysis of the judicial process in the House of Chiefs, see Anamzoya (2009; 2010).

17. Section 29 (4) in the case of Traditional Councils and 33 (1) in case of a Regional House of Chiefs. In the National House of Chiefs however, a separate application for stay of execution has to be made first in the National House of Chiefs, and if that fails, to the Supreme Court (Brobbey 2008, 2010).

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