CHIEFTAINCY AND THE LAW IN MODERN GHANA

by

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It is not proposed in this article to give a detailed account of the institution of chieftaincy as it operates in the various communities in Ghana. What follows is merely an attempt to highlight the main features of the institution, the main factors influencing and directing it and the major land-marks in the constitutional evolution of the institution and some of the problems connected with the viability of the institution as a social-legal phenomenon contributing to the overall constitutional development of the country.

THE PRE-INDEPENDENCE PHASE

(i) Pre-Colonial Era

As was the case elsewhere in West Africa, the political systems in Ghana before the arrival of European colonialists, were as varied as there were tribes. Each of the main tribal groups


had its particular political forms, ranging from the closely knit and specialised administrative structures of the great states like the Asante to the loose, rudimentary and after ill-defined structures associated with the extended family and kinship groups such as the Fra Fra of the Northern Region. There were those system in which the political structure and kinship organisation were completely fused, those in which the framework of the political system was the lineage structure and those in which the political system was structured on an administrative organisation.  

Whatever be the diversified nature of the trial societies, however, the undeniable fact is that traditional government revolves around the institution of Chieftaincy. Whether as head of an extended family, of a village, or a kingdom, our traditional system of government has always recognised leaders at various levels of society. In a typical traditional area, authority was hierarchically structured. There is a Head Chief followed by divisional chiefs, village chiefs and elders or heads of the various lineages. The chief's position as ruler was often strengthened by the magico-religious powers invariably attributed to him. In him were believed to rest powers over fertility of the land and over rainfall and powers of life and death over the community. Continuity of government was maintained by requiring each new chief upon his installation to participate in certain ritualistic ceremonies through which the powers held by his predecessors were supposed to pass on to him and to communicate with his predecessors by offering them food and drinks from time to time. Thus the chief was generally believed to be a sacred figure. There were reasonably well-defined rules and procedures for the choice of chiefs and their removal from office. These rules combined loosely-democratic principles remarkably with ideas of royalty or primo-geniture.

Few chiefs in the traditional governments of the various Ghanaian ethnic groups could be considered as autocrats. In nearly every case, and at whatever level, the chief was assisted
by a Council sometimes made up of elders or of the heads of other lineages within the group. In the Akan communities, the commoners had a leader who served as a filter for infusing the views of the masses in the traditional government. The chief ignored his council to his doom. In some communities, apart from the Chief’s Council, there was provision for the expression of popular opinion on matters concerning the welfare of the group as a whole—meetings of the entire male adult population might be held to discuss and decide on important questions. The Chief or the Chief-in-Council exercised the executive, legislative and judicial functions of state.

There was a complex system of social interaction within each community, regulated and maintained by behavioral prescriptions often deriving from magico-religious sources. Everyone knew the consequences flowing from anti-social behaviour. The society was orderly and predictable except when the gods were wronged. Government, in the Western sense of the term, was an integrated part of this whole system.

The effects of the introduction into these closed ethnic communities of the money economy of the Western world, industrialisation, western religion and education, unobtrusively at first but with force and vigour towards the last quarter of the nineteenth century, struck at the heart of the traditional political system—the authority of the chief—and undermined the group solidarity.

(ii) Colonial Period

The problem of the transfer of authority from the traditional leadership—the Chief and his Councillors—to the new elective bodies has been a difficult one everywhere in Ghana. Tribal custom and the authority and loyalty retained by the Chiefs have, at many points, but especially at the local level clashed with the new institutions of government which were first introduced by the colonial government in the twentieth century.

In Ghana, the British naively assumed that the traditional governmental arrangements in the various communities must all be like those found among the Akan communities. Thus, on the coast, this assumption led to the elevation of the Mantse

8 Usually the commoners select one of their more prominent members to perform this role. See Busia, op. cit., supra n. 1 at 9.
9 Amenumey, op. cit., supra n. 1 at 50–60.
10 There was no institutional “separation of powers” in these systems, though functions were clearly differentiated; however the people were not subjected to tyrannical rule because of the power of removal, the vigilance and awareness, on the part of the people, of the limits to a Chief’s power.
(Chief) of Accra town (a traditionally religious functionary connected with the stool)\(^\text{11}\) to the status of Paramount ruler of the Ga Traditional Area and building around him a structure that has no root in tradition. The traditional, religion-based sanctions governing the conduct of individuals lost their strength and because the people were slow to grasp the new secular sanctions of law and order and to adjust themselves to their new masters and sources of authority, there ensued a social disintegration of a kind the traditional set-up had not known and with which it was ill-equipped to deal.

The first great inroad made into the authority of our chiefs during the colonial era was to make their position dependent upon recognition through Gazetting by the colonial government but this was not achieved in a day. The British first had to consolidate their legal hold on the country as a whole, a difficult task. In the first two decades of the 20th Century, for example, educated Ghanaians vehemently argued that the jurisdiction of the British could only be exercised as authorised by the treaties with the Chiefs. The British, however, convinced themselves that the cumulative effect of treaties like the Bond of 1844\(^\text{12}\) and the various Annexation and Protection Orders in Council was that they had vested in them the power to administer the areas concerned. They therefore set out to modernise the indigenous institutions and mould them according to British models. This was done through the colonial policy of "indirect rule".\(^\text{13}\) Dr. Lucy Mair has defined indirect rule as the "progressive adaptation of native institutions to modern conditions."\(^\text{14}\) In short, indirect rule meant ruling through indigenous agencies.

Within certain limits, traditional authorities had initiative of their own, and the extent of these limits depended on the level of sophistication of the traditional administrative organisation.\(^\text{15}\) Under this policy the Chief came to assume a dual role. In local government, he was an authority in his own right though this authority was heavily and carefully circumscribed. Secondly

\(^{11}\) Hailey, W. C., Native Administration in the British African Territories, Part III (London: His Majesty's Stationery Office, 1951) Ch. VIII at 194; Field, op. cit., supra n. at 158.

\(^{12}\) For the legal effect of this Bond, which has been somewhat exaggerated, see Daniels, Common Law of West Africa (London, Butterworth, 1964) p. 18; Hailey, op. cit., supra n. 11 at 196.


\(^{15}\) Crowder & Ikime, op. cit., supra n. 1 Introduction xix.
he was an agent of the central government, in the sense that he was required to execute decisions, within this area of jurisdiction, made by the central government.

The first major piece of legislation to create a state of uncertainty with regards to some of the powers of the Chiefs was the Supreme Court Ordinance of 1876. Though in theory this Ordinance did not affect the inherent 'judicial' powers of the Chiefs, it eclipsed it by introducing a modern system of justice and thus weakened the Chiefs' influence. For as Sarbah put it, "in the African (i.e. Ghanaian) mind, leadership carries with it the administration of justice."18

A further attempt was made to define the jurisdiction of the colonial government vis-à-vis the Chiefs with the enactment of the Native Jurisdiction Ordinance of 1878 which set out "to facilitate and regulate the exercise in the Protected Territories of certain powers and jurisdiction by Native Authorities."19 This Ordinance did not purport to bestow any jurisdiction on the Chiefs but to define it.20 But as aptly noted by one writer, "this definition, by non-traditional legislative process, was the first step towards making the British government the source of the Chiefs' authority."21 The colonial government was explicitly given the power to "dismiss" a Chief though because of doubts about the legality of the latter power the Secretary of State for Colonies laid down the proviso that such power should be exercised only with the prior consent of London.22 However, because of opposition to the Ordinance shown by some Chiefs it was never implemented.23

In 1883, the 1878 Ordinance was repealed and was re-enacted with one major modification by which the decisions of the Chiefs' tribunals were made subject to appeal to the British Courts.24

17 So it was decided by the Full Court in Oppon v. Ackinle (1887) 2 G. & G. 4.
19 Ordinance No. 8 of 1878, see Also Kimble, op. cit., supra no. 16.
20 Sections 3, 4, 10 and 30 thereof made it clear that the Ordinance treated the jurisdiction of Chiefs as existing, though requiring regulation.
21 Kimble, op. cit., supra no. 16 at 460.
22 Ibid.
23 Ibid.
24 Ordinance No. 5 of 1883, as amended, Cap. 113, 2 Laws of the Gold Coast Colony 1928 p. 1195. It must be noted that the decision in Oppon v. Ackinle (note supra 17) took the view that this Ordinance also merely regulated an already existing jurisdiction vested in the traditional authorities and that it did not even impair their right to imprison offenders. On this point, see also Quaoe Koom v. Owea and Kudjoe Tainee; Amocoo v. Duker (1878) 2 G. & G. 2; Bainyi v. Dansi
It initially applied only to six Head Chiefs and gave to such chiefs as were designated by Order and their Councils some limited law-making and judicial powers. The legislative powers were, however, little used while serious malpractices bedevilled the administration of justice in the Chiefs' courts which were mainly used by the traditional authorities as income-generating sources.

But the Ordinance left the major question undecided. Did the traditional authorities possess inherent power to judge their people or could they exercise only those powers granted them in the Ordinance? So charged and strong were the discussions and protests involving what the Chiefs and the educated Ghanaian thought about the encroachments being made by the Colonial Government on the traditional authority of the Chiefs that one writer has suggested that the 1883 Ordinance might be said to have laid the foundation for the co-operation of the Chiefs and the intelligentsia when the Aborigines Rights Protection Society came to be formed."

In 1900, the Concessions Ordinance was enacted to regulate the granting of Concessions for the exploitation of timber and mineral resources, which had hitherto been granted without adequate compensation and without proper accounting of the proceeds. The Concessions Ordinance gave a division of the Supreme Court superintending powers as far as concessions were concerned. It was to certify, as valid, a concession which, in its opinion, was granted by the persons having authority to do so, providing for adequate valuable consideration and which protected the customary rights of the indigenous people living in the area. The Court was authorised to modify the terms of a concession and impose such conditions as it thought fit. Concession rents were to be paid to a treasurer appointed by the Governor and distributed to the entitled individuals. Considering the special position occupied by the traditional authorities in our customary land tenure system, the effect which this Ordinance had on our Chiefs cannot be underestimated.

and Bainvi v. Applah, (1903) 2 G. & G. 11; and Mutchi v. Kobina Annan, Kobina Nketsia (1907) 2 G. & G. 27, which deal with the effect of the various Ordinances on the traditional powers of chiefs up to 1906.

Sections 5-8 and also 10-30 of the Ordinance. Section 2 defined a Head Chief as "a Chief who is not subordinate in his ordinary jurisdiction to any other Chief, and includes the Chiefs known as Ohen, Ohene, Manche, and Amagah."

Kimble, op. cit., supra no. 16 at 463; Sarbah, op. cit., supra no. 18 at 120-140 for a full discussion of this Ordinance. It remained the basis of Native Administration up to 1927.


Ibid., Sections 12, 14 and 32.
However, the first major onslaught made on chiefly status came in 1904. In that year, the Chiefs' Ordinance was passed. This Ordinance provided a machinery whereby Chiefs and Head Chiefs could apply to the Governor for the confirmation of their election and installation. The Governor had to assure himself that the applicant had been elected in accordance with native custom and the confirmation, by him, determined the lawfulness of the applicant's status as Chief in all courts of the colony. As Lord Hailey correctly observed about this provision, it "was only intended to render the position of a Chief unassailable in law; it did not enable the government to maintain that a Chief can exercise no legal powers till formally recognised as a Native Authority." And yet, as another writer also observed, by this provision "the wedge of governmental participation was thus inserted into the procedures of the indigenous order by which Chiefs were elected and installed." This situation in Asante and the Northern parts of modern Ghana were by this time brought to par with that of the Colony. Thus we can safely state that by 1910 the central government had, through legislation, considerably weakened the authority of the traditional rulers, the Chiefs, by making their position dependent both in law and in fact on central government prop.

This was the position until the Guggisberg Constitution of 1925. This Constitution established Provincial Councils in the three colonies of the Gold Coast. A Provincial Council consisted of the Head Chiefs of that Province, that is to say Chiefs who in the opinion of the Governor were "Chiefs not subordinate in their ordinary jurisdiction to any other Chief, and whom the Governor shall from time to time by instrument under his hand declare to be recognised Head Chiefs for the purpose of this Order." There was, however, provision for Head Chiefs who had not been so recognised by the Governor to present a case for recognition to the appropriate Provincial Council which was to advise the Governor by way of

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29 The Chiefs Ordinance No. 4 of 1904, Cap. 21, 1 Laws of the Gold Coast 1928, p. 151.
31 Harvey, op. cit., supra n. 2 at 84.
33 Ibid., para. XVI.
34 Ibid.
recommendation on the matter. Provision was also made for the delegation of the functions of the Head Chiefs in the Provincial Council.  

The three Provincial Councils were authorised to elect six of the members of the Legislative Council. These Provincial Councils were not intended to exercise only an elective function, however. They were introduced to strengthen African authority by providing an opportunity for the discussion of matters of ethnic interest and to advise the government on any proposed legislation affecting the people. But this was to further accentuate the protest of the intelligentsia about the role of the Chiefs. For, as Harvey has noted, "this development gave the Chiefs closer identification with the British administration and provided settings for political and governmental activity that had no basis in the traditional order." Further, this new role served to alienate them from their own people, especially the politically progressive elements of the society, since the Chiefs came to be identified with British imperialism.

Then in April 1927 a new Native Administration Ordinance was passed with the object of regulating and "placing on a sound basis the powers and jurisdiction of the Tribunals in their order of precedence and within their territorial limits with the necessary powers for enforcing their judgement and verdicts." It recognised a Paramount Chief who was defined in the same terms as the Head Chief of the 1883 Ordinance, but significantly, in addition, he was a person "elected and installed as such in accordance with native customary law to administer a state." A State was defined as "one of the territorial areas of the Colony under the administration of a Paramount Chief," and a State Council was for the first time recognised and defined as "the Highest Native Authority within the State in all matters relating to the welfare and government of the State in accordance with native customary law." It was made responsible, subject to appeal, to the Provincial Councils which were now given administrative and judicial powers for stool

35 A Head Chief unable to attend any particular session of the Provincial Council could send an accredited representative. Such representative had to be one of the following: Ohene, Manche, Fia, Asafohene, Asafointsewa, Mankralo, Tufuhene, Awadada, Chief Linguist. The representative enjoyed all the powers of his Head Chief.
37 Harvey, op. cit., supra n. 2 at 76.
88 Apter, op. cit., supra n. 4 at 147.
39 For an interesting discussion of this legislation, see the judgment in Eku alias Condia III v. Acquaah, (1968) 2 G. & G. 323.
disputes. The Provincial Councils were also given jurisdiction over demands by sub-Chiefs for independence though the Governor was to be the final arbiter on all stool disputes and matters affecting native custom.

The jurisdiction of the Paramount Chiefs’ Tribunals was extended in civil matters, such decisions being made enforceable by execution against property. But like the preceding Ordinance, the 1927 Ordinance did not introduce any effective measure or reform nor did it clarify existing doubts because it “did nothing to show that a State Council, as such could exercise powers only when so authorised by the government and only to the extent of that authorisation,” and failed to control the use of stool resources or set up native treasuries.  

In 1946 the Burns Constitution was passed. In the Legislative Council established under this Constitution, the representation of the Chiefs was increased. The Joint Provincial Council now had nine members and four members were also elected by the Ashanti Confederacy Council. This increased role of the Chiefs and the prominence it gave them further drew protests from educated Ghanaians. The feeling was that the Chiefs, who were mostly under British control, tended to support official policies as a price for their survival.

Coussey Committee

In spite of the attempts to improve native administration there were still defects in the system. These defects were dealt with in the Coussey Report and a number of recommendations were made. The Coussey Committee recommended that Native Authorities should be designated as Local Authorities. The separate and distinct Councils, which were to remain and to retain the power to declare native customary constitutional disputes connected with stools, should henceforth be called ‘State Councils’ throughout the Colony, Ashanti and the Northern Territories.

These recommendations were generally accepted by the government and as a result the Local Government Ordinance, No. 29 of 1951 was passed. It repealed the Native Authority Ordinance of 1944 except the provisions relating to State Councils, which were to remain in force until repealed by another enactment. All

40 Hailey, Native Administration, Pt. III, p. 203; see also the judgment quoted in note 4 supra. An attempt was made to clean up matters in 1944 through Native Authority (Colony) Ordinance (No. 21 of 1944) and Native Courts (Colony) Ordinance (No. 22 of 1944).
41 The Gold Coast and Ashanti (Legislative Council) Order in Council, (1946) 1 G. & G. 76.
42 Committee on Constitutional Reform 1949.
local government functions and general administration which were formerly performed by the Native Authorities were transferred to the local councils. A radical change was made in the membership of the State Councils, which were now to include largely non-traditional members. The separation of the State Councils from the local government councils was completed by the enactment of the State Councils ( Colony and Southern Togoland) Ordinance No. 8 of 1952.44

By various pieces of legislation, the legal position of the traditional authorities in Asante and the Northern Territories were made the same as in the colony. Thus it can be incontrovertibly asserted that by the 1950s, as an offshoot of the policy of indirect rule, the Chiefs had been stripped of their traditional powers. Uncertainty had been created as to whether chiefs could only exercise those powers which were expressly granted them by statute.45

As we have noted earlier, the authority of the Chief became limited during the colonial period in the sense that he was no longer independent. At the same time, the colonial regime removed for the Chiefs many of the limitations to their authority under the traditional system. Thus though under indirect rule the chief lost his sovereignty, he increased his powers over his subjects because the traditional checks and balances to the exercise of his authority were removed or at least watered down by the colonial authorities. Where traditional checks and balances tried to reassert themselves, a Chief who was on good terms with the colonial administrator could effectively neutralise the persons concerned by branding them malcontents and trouble-makers.

The result of all this was to weaken the personal ties between the Chief and his subject, and this led to many destoolments and attempted destoolments, and a shift in the basis of traditional authority.46 Checks to increasing authoritarian tendencies in the chiefs under indirect rule were left to the educated elite. Though the Chief continued to exercise most of his traditional powers, this was by specific dispensation of the colonial power enshrined in statute.47 He worked within the framework of a system laid down by the British. The British political officers' role in this ranged

45 See, however, the judgments of Apaloo and Lassey JJ.A. in the Condua case, note 39 supra.
46 See Busia, op cit., supra n. 1, Ch. VI.
47 Crowder & Ikime, op. cit., supra n. 1. Introduction XVI. This was done through the various Ordinances, Orders in Council and Proclamations.
from that of adviser in the more sophisticated native authorities like Akim Abuakwa to supervisor of the smaller native authorities which were often grouped together to form a more viable administrative unit, for example Aflao and Somc.

The Chiefs initially resisted colonisation and now and again teamed up with the intelligentsia to protest against encroachments on their traditional powers. But once colonial rule became a fait accompli and the chiefs who dared to oppose the colonials openly were deposed, the efforts of most of the Chiefs became geared towards survival. They had learnt from experience that, by co-operating with the colonial power, they could retain some of their former powers and indeed in some cases even increase them. They enjoyed the prominence their participation in the deliberations of the Legislative Councils had given them and they were not at all sure of their fate in an independent Ghana, besides they were uncertain about the educated elite who considered the Chiefs to be lackeys of the colonial government. These rising intelligentsia looked on the increasing influence of the Chiefs with disfavour and tended to make derisive remarks about the Chiefs. The Chiefs who were chosen more for their legitimacy than ability, and most of whom were illiterate, began to show the strains as the demands of local self-government became more complex and more modern.

Official action through legislation was by no means the only factor contributing to the weakening of the institution of Chieftaincy in colonial Ghana. As noted elsewhere in this article, commercial activity centering on the cocoa industry, increased social mobility, introduction of Christianity and the expansion of educational facilities which brought to the fore a generation of literate young men were other factors. Thus by the mid-1950s when Ghana was on the verge of becoming independent the position of the traditional authorities had become very much uncertain. Without doubt, Chieftaincy retained its emotional appeal but its potency otherwise was now difficult to determine.

THE POST-INDEPENDENCE PHASE

The Era of Convention Peoples Party Government

The legal measures taken by the central government after independence were largely the result of the role played by the

48 As happened, for example, when the Asantehene was exiled in 1896 returning only in 1924. Busia, op. cit., supra n. 1 at 192: see also Apter, op. cit., supra n. 4 at 26.
Chiefs in the constitutional struggles immediately preceding independence in 1957. Some of the Chiefs, particularly those in Asante joined the elements in the country who opposed the Convention Party’s desire for a unitary government. So, for example, after independence the C.P.P.-dominated legislature passed laws designed to strangle financially the Chiefs in Asante and Akim Abuakwa considerably. These laws brought the financial resources available to the traditional authorities in these areas under government control, to prevent their being used to finance the Opposition Parties.

The 1957 Constitution guaranteed the office of Chiefs “as existing by customary law and usage” and made other provisions for the regulation of the institution of Chieftaincy; in consequence of which the House of Chiefs Act was passed in 1958. Then in 1959, the Chiefs (Recognition) Act was enacted. Under this Act, enstoolment or destoolment of a Chief was to be ineffective unless recognised by the Governor-General. The Governor also had power to prohibit any one from exercising the functions of a Chief and to place a residence ban on him. In this way for the first time in Ghana, the central government rather than the Traditional Councils, had become the ultimate authority in determining who could legally be a Chief. It was also made clear that the government would not tolerate ‘unofficial chiefs’. However, these newly-acquired legal powers did not involve the central government in the actual process of initiating enstoolment or destoolment proceedings. It may approve or refuse to recognise actions affecting the status of the traditional authorities but that was all it could do.

It would be remembered that the first attempt at rendering unassailable in law the position of traditional rulers who have been recognised or refused recognition showed its head in the Gold Coast Colony (Legislative Council) Order in Council, 1925 but this affected only Head-Chiefs later called Paramount Chiefs. In 1935 this was made to apply to all Ashanti Chiefs, so that by 1951 only in Asante was chiefly status defined in terms of central government recognition. This gap was closed and the legal

52 Act 11 of 1959.
53 Chiefs (Recognition) (Amendment) Act, No. 48 of 1959.
54 The Gold Coast Colony (Legislative Council) Order in Council, 1925 paragraph XVI and the Native Authority (Ashanti) Ordinance No. 1 of 1935. In the latter legislation, a Chief was defined as “a person whose election and installation as such in accordance with native law and custom is recognised by the Governor.”
status of all chiefs in Ghana was put on the same footing in 1961 by a comprehensive legislation which consolidated most of the earlier legislation affecting the institution and also introduced a few other innovations.55

The Act defined a Chief as "an individual who has been nominated, elected and installed as a Chief in accordance with customary law, and is recognised as a Chief by the Minister responsible for Local Government."56 It authorised the Minister to withdraw recognition from a destooled Chief, or, if he considers it to be in the public interest.57 The powers previously exercised by the Governor-General under the Chiefs (Recognition) Act of 1959, as amended, were now vested in the Minister. Thus he could prohibit a person from "purporting to exercise the functions of a Chief" and require such a person to reside outside a specified area.58

The State Councils were renamed 'Traditional Councils' and retained their role in hearing and determining matters affecting Chieftaincy which they now shared with hearing officers designated 'Judicial Commissioners'.59 The Traditional Councils were also authorised to make representations to the appropriate House of Chiefs for the clarification or modification of the customary law.60 Under the Act, Houses of Chiefs were to report on such matters as the National Assembly may refer to them. They may also declare or recommend modifications in the customary law though the Minister was authorised to vet such modifications or declarations. The Houses of Chiefs were also expected to participate in the procedures by which certain rules of the customary law may be assimilated by the common law of Ghana.61 Local government administration was secularised through the elimination of traditional representation, though the Chiefs were made ceremonial presidents of the new local government set-ups.62

The web around the institution of Chieftaincy was not complete. The traditional authorities were now left with only the power to initiate the selection and installation as well as the destoolment of a chief, and even this could be rendered ineffective by the central government refusing to recognise the end-results

56 Act 81 Section 1 (1).
57 Ibid., section 1 (2) (a) & (b); section 2 provided categories of chiefs.
58 See notes 52 and 53 supra and also section 4 of Act 81.
59 Ibid., sections 11-15 and 40-42.
60 Ibid., section 58.
61 Ibid., Sections 28, 59 and 60.
of their endeavours. One point that we may note in passing about Act 81 is that it was passed, not by an ignorant colonial government which we can accuse of distorting our ethnic culture for its own exploitative purposes, but by a legislature made up of Ghanaians. Not surprisingly, one writer, after a survey of the legislation affecting Chieftaincy up to 1961, concluded that a Chief attained and retained his office presently “only by the sufferance of the national government.” Later in the same survey, the same writer speculated on the possibility that the Chiefs might cease to be a significant factor in the social and political life of the country.

But the truth is that the Chiefs retained a strong enough appeal in many parts of the country to make them politically significant and therefore it has not been possible to eliminate them from the political scene. For, “in the eyes of the same persons the Chiefs may be symbols of reaction, symbols of group unity and symbols of price in national history.”

The Era of the National Liberation Council

The treatment meted out to Chiefs during the Nkrumah regime was to focus the attention of Ghanaians on to the proper role that must be assigned to the Chiefs in our society when that regime was overthrown in 1966. Legislation was passed, by the National Liberation Council, purporting to revert Chiefs to their status under customary law. The case of Frimpong v. The Republic showed that the decree was not without its own difficulties. It involved the refusal of the Kukuomhene, located in the Brong-Ahafo Region, to pay homage to the Asantehene in the Asante Region and his prosecution for this refusal. The Schedule to the decree, which was to effect its policy, made the Kukuom chief a sub-chief to the Asantehene. The Kukuom chief said, at custom, he was independent of the Asantehene and therefore refused to pay customary allegiance to him. That battle between the customary constitutional position as it was claimed under the Kukuom Constitution and the statutory scheme of things contained in NLCD 112, as aforesaid, was resolved interestingly in favour of the Kukuom Constitution. The courts acquitted the Chief of the charge. However, it has to be noted that in spite of

63 Harvey op. cit., supra n. 2 at 87.
65 Chieftaincy (Amendment) Decree, 1966 (NLCD 112). The ill-treatment given by the Nkrumah regime to the institution of chieftaincy was given by the military as one of the reasons for overthrowing the Nkrumah regime.
66 2 G. & G. 480.
67 On the Brong-Ahafo and Asante Chieftaincy disputes, see generally Arhin, K. Brong Kyempim.
the policy change towards chieftaincy reflected in NLCD 112, the legislation passed by the Nkrumah regime, namely Act 81 and its definition of a Chief remained the cornerstone of the law on chieftaincy under the military administration of the National Liberation Council.

The Akufo-Addo Constitutional Commission Proposals

Then in 1968 the Akufo-Addo Commission was set up to draft a Constitution for the future government of Ghana. This Commission made some interesting comments and suggestions about the institution of chieftaincy. It also made recommendations designed to protect the institution from central government politics. Since these form the basis of the current law on chieftaincy, the essentials of those recommendations will not be summarised.

The Commission rejected the belief held in some Ghanaian quarters that the chiefs had become cultural symbols only. Its view was that the wisdom, experience and influence of the chiefs and the whole chieftaincy apparatus can and should be harnessed for development, particularly in local government administration. To ensure stability and security for the Chiefs, the Commission proposed that “once a Chief has been enstooled or destooled customarily and the President is satisfied of this he should merely publish that fact in the ‘Gazette’ for the information of the general public. The publication of such a notice would be taken as prima facie evidence of the enstoolment or destoolment of the Chief. And to further insulate the chiefs from modern partisan politics, it recommended that ministerial responsibility for chieftaincy affairs should be transferred to the Office of the President. The Supreme Court was also to be the Court of last resort in chieftaincy disputes.

The 1969 Republican Constitution

The 1969 Constitution which was based largely on the Commission’s proposals guaranteed “the institution of chieftaincy together with its Traditional Councils as established by customary law and usage.” It established one National House of Chiefs and Regional Houses of Chiefs in each of the Regions

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68 Memorandum on the Proposals for a Constitution for Ghana, 1968 (hereafter referred to as the Akufo-Addo Commission) paragraphs 635-647.
69 See Articles 153–159 and 169 of the 1969 Constitution. In Article 172 a Paramount Chief was defined as “a person who has been nominated, elected and installed as such in accordance with customary law and usage”, just as had been provided in the Native Administration Ordinance of 1927, as already noted. The 1969 Constitution returned central government administration to civilians after three and a half years of military rule.
of Ghana. The National House of Chiefs was made up of five Chiefs to be elected by each Regional House of Chiefs. It had appellate jurisdiction in any matter relating to chieftaincy which had been determined by the House of Chiefs of a Region, with a further appeal lying to the Supreme Court. It was to advise any person or authority charged with responsibility for any matter relating to chieftaincy. The National House of Chiefs was also given the important function of undertaking a study of the customary law "with a view to evolving a unified system of rules of customary law and to perform any other functions which may be referred to it by Parliament.

The Regional House of Chiefs in existence prior to the coming into force of the Constitution were recognised and given wider powers. Under the Constitution a Regional House of Chiefs had original jurisdiction in all matters relating to a Paramount Stool or the occupant of such a stool and it had appellate jurisdiction to hear appeals from the Traditional Councils in respect of the nomination, election, installation or deposition of any person as a Chief. It was also to perform any other functions which may be conferred on it by or under the authority of an Act of Parliament. The traditional authorities were also given a significant role, under the Constitution, in local government administration.

In September 1971 a new legislation patterned on the provisions of the 1969 Constitution was passed. The Act defined a Chief as:

"an individual who has, in accordance with customary law, been nominated, elected and installed as a Chief or as the case may be appointed and installed as such and whose name for the time being appears as a Chief on the National Register of Chiefs. Provided that no person shall be deemed to be a Chief for the purposes of the exercise by him of any function under this Act or under any other enactment,

70 Chieftaincy Act, 1971 (Act 370). In January 1972, the Constitution was suspended as a result of coup d'etat. This ended the rule of the civilian régime of Dr. Busia and reverted the country to military rule. This military ruled from 1972 to September 1979 when a new civilian administration took over. That civilian administration was also overthrown two years later in December 1981. A military government, the Provisional National Defence Council has been in power since then. Though over the years Act 370 has been significantly amended (to be discussed later), it remains the basic statute regulating chieftaincy."
unless he has been recognised as such by the Minister by 
notice published in the Local Government Bulletin.71

Within a month from the date on which it is informed of 
the installation of a person as a Chief, the National House of 
Chiefs is to enter that persons' name in the National Register 
of Chiefs and provision is made for any one aggrieved by the 
refusal by the National House of Chiefs to register him as a 
Chief to appeal against such refusal.72 The Minister may pro-
hibit any person purporting to act as a Chief from so doing, 
require that no one shall treat such a person as a Chief and he 
may also impose a residence ban on any person so prohibited.73

Commenting on sections 48 and 52 above, it has been said 
that the cumulative effect of the two provisions is:

"that a person can be regularly enstooled as a Chief in 
accordance with custom and registered on the National 
Register of Chiefs, without being a Chief for the purposes 
of performing functions under the Act such as being a 
member of the House of Chiefs, because government does 
not recognise him. He cannot be a member of the divisional 
councils set up under the Act; he cannot be a member of 
the regional, district, or local councils under the Local 
Administration Act, 1971 (Act 359), or a member of the 
traditional council unless he is so recognised by govern-
ment. He cannot sell or dispose of stool land because such 
disposition is voidable unless made with the consent of 
the traditional council. A person might have been declared 
a Chief by the highest court in the land ... he would yet 
not be able to exercise the duties of a chief under any enact-
ment unless he is recognised by the Minister." 74

In other words, on this view, government, though no longer 
intolerant of "unofficial chiefs", was nonetheless determined 
that it had a say in who performs what statutory functions.

With respect, the question of the kind of functions an "un-
official chief" can perform is not as clear as the learned judge 
suggested, nor do some of his examples follow. For example, 
it is not at all clear that a Chief cannot be a member of a tradi-
tional council unless he is recognised by the government. This

71 Section 48 (1) of Act 370. However, it must have been clear to the sponsors of 
Act 370 that the definition was not all exhaustive. So by Section 49, that Act 
also provided, as in the case of Act 81, a statutory listing of the various cate-
gories of chiefs.
72 Ss. 48 (2), 50 (1) and (7) of Act 370.
73 Section 52 of Act 370.
74 Republic v. Boateng, ex. parte Adu Gyamfi II (1972) 1 G.L.R. 317 per Hayfron-
Benjamin J. (as he then was) at p. 335.
is because membership of the traditional council is regulated largely by the customary law as we have seen.\textsuperscript{75} While the statute recognises Traditional areas and their Councils, a close look at Part III reveals that the Act did not purport to establish Traditional Councils in the sense of creating them; it merely continued in existence an entity which has its roots essentially in custom. Consequently, it is submitted that a Chief might still be able, the language of section 48 (1) notwithstanding, to perform those functions which, although they have now been given statutory recognition, have their roots in custom and which he would have had jurisdiction over—as for example sitting and deliberating in the Traditional Council—without prior governmental recognition of his status as a Chief. Further, it is submitted that such a Chief can only be prevented from performing those duties recited in statutes, which can be properly described as statutory creations.

The Act confers important judicial functions on traditional institutions though, as was the case with the previous enactments, this jurisdiction is confined to Chieftaincy matters.\textsuperscript{76}

**Chieftaincy and the Third Republican Constitution**

The next major development with respect to the institution of chieftaincy was the promulgation of the 1979 Constitution.\textsuperscript{77} Its philosophy in relation to chieftaincy was to complete the process of returning the institution to its traditional moorings, a process thought to have been begun with the 1969 Constitution. This Constitution therefore did not only guarantee chieftaincy as has been the case with previous documents but contained a definition, for the first time, of a chief. A chief was defined as:

"a person who, hailing from the appropriate family and lineage, has been validly nominated, elected and enstooled, enskinned or installed as a chief or queen mother in

\textsuperscript{75} The exception relates to the places where the existing Traditional Area is an amalgamation of a number of previously independent chieftains into one Traditional Council. Where this has occurred the instrument causing the amalgamation specifies the members.

\textsuperscript{76} Sections 15, 22 and 23 of Act 370 and sections 52 and 113 (1) of the Courts Act, 1971 (Act 372). The law is now settled that this jurisdiction is exclusive to the chieftaincy Courts and that the regular courts, save the Supreme Court in its capacity as the court of final resort, have no power to adjudicate on these matters. They may however exercise supervisory control through the remedies of certiorari, mandamus, prohibition—See Tobah v. Kwekumah, (1981) G.L.R.D. 59 and also Bimpong Buta, Jurisdiction of the High Court in Chieftaincy Matters, (1981–1982) 13 & 14 Review of Ghana Law, 209–218.

\textsuperscript{77} This constitution came into force on 24th September 1979.
accordance with the requisite applicable customary law usage."\textsuperscript{78}

This definition replaced the statutory definition contained in Section 48 (1) of Act 370. It is significant for a number of reasons. Firstly, this was the first time that the Constitution, the fundamental law itself, expressly defined a chief. Since 1957, the constitutions of Ghana have guaranteed chieftaincy according to custom and usage but have left the identification of a chief to the legislature. The definitions in the various statutes have been at variance with the constitutional guarantee because they invariably involved central government in the process of attaining or losing chiefly status.

Secondly, the definition in the Constitution of 1979 recognised that, with some ethnic groups, a "queen mother" is a holder of chiefly office. Hitherto, the legislative definitions have been male-centred. This male-centredness now gave way to traditional constitutional reality.

Thirdly, the definition recognised that "enstoolment" and "enskinment", which presuppose the existence of stools and skins as the most important insignia of chiefly office, were not the processes by which a person became a chief. For as the Mensah Constitutional Commission noted in paragraph 256 of its Report,\textsuperscript{79} the earlier definitions excluded the Heads of certain well-defined communities, composed of persons originally not indigenous to these parts but who are now full Ghanaians. But since in many of these cases, the insignia of office does not include a \textit{stool} or a \textit{skin}, the earlier definitions denied their chiefly status and one had to go to the statutory list of chiefly titles to discover this. The use of the word "\textit{installed}" in Article 181 was to remedy this omission.

Fourthly, the framers of the Constitution were painfully aware, as indeed most of us have been, of the development by which some very wealthy and or prominent citizens, with only tenuous links or none at all to royal houses, have attempted to buy or bulldoze themselves into chiefly office with attendant tension and confusion. These attempts sometimes even led to the loss of human life. To prevent this, the constitutional definition required, not only that a person must be nominated, elected, enstooled or enskinned or installed but that such a person must, before going through the customary processes, "hail from the appropriate family and lineage." Thus a person does not become

\textsuperscript{78} Article 181.
\textsuperscript{79} The 1979 Constitution was based on proposals made by a Commission chaired by a Ghanaian jurist by name T. A. Mensah. It reported in 1978.
a chief even though he has been taken through the customary processes, if on the facts he or she is not a member of the appropriate royal family or lineage.

Apart from abolishing the requirement of central government recognition, the definition in the 1979 Constitution also did away with the problem of distinguishing between chiefs qualified to perform "statutory" functions and those who did not so qualify, associated with the earlier definitions. In this way, it was revolutionary. However, under the new constitutional umbrella, the chiefs were allowed to continue to perform the functions which did not exist at custom, for example, participation in the Regional and National Houses of Chiefs which were continued in existence. In this sense the regime it established was consistent with the one previously existing. The objectives of the 1979 Constitution could thus be said to have been two-fold—(a) to protect chieftaincy by returning it to its indigenous roots and (b) to utilise the chiefs' skills, experience, expertise and influence in the process of developing national integration.

**Chieftaincy Under the Provisional National Defence Council**

It was in this improved climate for chieftaincy that the Provisional National Defence Council came into power in December 1981. The Council abrogated the 1979 Constitution. However, its Proclamation recognised and retained the definition of chief contained in Article 181 of the 1979 Constitution. In spite of this retention, the early signs were worrying. There was the Osu Stool Property (Seizure) Law which authorised the City Manager of Accra, a commoner as far as the Osu Traditional Constitution was concerned and not probably from Osu either, to take possession of Osu Stool Property. Legislative skirmishes affecting other traditional areas followed. Then in 1985 the axe of central government once again fell on the institution of chieftaincy. P.N.D.C. Law 107 was passed. It purported strangely enough to substitute a new section 48 (1) for the original provision in Act 370. It merits quoting in full. It reads:

"(1) A chief is a person who, hailing from the appropriate family and lineage, has been validly nominated, elected and enstooled, enskinned or installed as a chief or queen mother in accordance with the requisite applicable customary law and usage.

80 See note 70 supra.
82 P.N.D.C.L. 38.
83 Examples include Nungua and Winneba.
(2) Notwithstanding any law to the contrary no person shall be deemed to be a chief for the purposes of the exercise by him of any function under this Act or any other enactment unless he has been recognised as such for the exercise of that function by the Secretary responsible for Chieftaincy matters by notice published in the Local Government Bulletin.”

It will be seen that Law 107 pieces together Article 181 of the 1979 Constitution as incorporated in the P.N.D.C. Proclamation and the proviso to the original section 48 (1) of Act 370. By its enactment, the whole process of returning chieftaincy to its traditional roots was reversed and the experiences of almost a century of central government interference in chieftaincy matters was thrown overboard. Once again those who man the central governmental machinery have equipped themselves with the legal tool by which they can make the incumbents of chiefly office malleable to their interests.

But Law 107 presents other difficulties. Firstly, it is supposed to be amending section 48 (1) of Act 370. As would be recalled that section was repealed by Article 181 of the 1979 Constitution. So that at the date Law 107 was enacted the original provision was no longer there to be replaced. Secondly, we are left in a state of confusion as to whether there are now two definitions of a chief—one under the P.N.D.C. Proclamation and another for the purpose of “performing statutory functions.”

Thirdly, since Law 107 does not define “statutory functions” we are thrown back into the mess and uncertainty of the pre-1979 law. In law as in other fields of human life one should strive for progress and not retrogression. Fourthly, as an implied repeal of the definition in the P.N.D.C. Proclamation, it is unsatisfactory. In an area as important as chieftaincy, repeal of the ground rules should be a conscious and express act and should not be left to be implied by lawyers.

The relative stability enjoyed by the institution of chieftaincy since independence is a cause for pride in the institution when compared with the instability which has plagued the modern central government structures during the same period. The idea of central government control through the recognition power which has been re-introduced by Law 107 will ultimately subvert not only the institution of chieftaincy itself but our efforts at achieving national integration and stability in national institutions.

84 i.e. Minister.
The justification given sometimes for this power is the responsibility of central government to maintain law and order. Admittedly, chieftaincy disputes do pose law and order problems. And without doubt, the most difficult and explosive of these disputes are the ones relating to the attainment or loss of chiefly office. In some cases, serious breaches of peace occur and life is lost or threatened. Concern, in the circumstances, that the disputes be controlled and sorted out with due despatch can be appreciated. Even where life is not threatened, the fact that chiefs act as linchpins to our modern local administration system means that the nation can ill-afford the vacuum created in the traditional leadership structure by a protracted succession dispute. It is nevertheless my considered opinion that, even so, the law and order 'theatre' cannot be so extended as to justify central government's active participation in the process of enstoolment or destoolment. For, a sober analysis of the evidence of central government's involvement in this process since the 1920s shows that it has not settled the disputes in which it has been most embroiled. All it has produced are temporary "ceasefires" between the disputants. As soon as government changes hands, the side which feels done in by the previous regime re-ignites the problem.3 Sometimes technical and difficult questions arise as to the effect of withdrawal of government recognition from a traditionally irremovable chief.

Conclusion

What is then to be done? Realism would suggest that the power be expunged from the law, as part of a process of returning chieftaincy again to its traditional roots.86 Ultimately, the judicial machinery provided by Act 370 for resolving these disputes judicially offers the mechanism, in my view, for dealing with them on a lasting basis. Central government's energies and resources should be utilised instead to assist the Regional and National Houses of Chiefs with the gigantic national task of conducting research to determine (a) the types of chiefly office available, (b) the rules of succession to them, (c) the families eligible to compete for each chiefdom and (d) the customary relations among the chiefs in each geographic region of the country. The results can then be formulated in a series of customary law declarations.

86 Cf. Goldschmidt op. cit., supra n. 85 at 220-221.
In this article, I have tried to trace the fortunes of one of the “autonomous zones” within the pluralistic constitution of modern Ghana, namely the institution of chieftaincy and the process by which the institution was hijacked from its traditional base. With the advent of British colonial rule, conflicts began between the British constitution and the ethnic constitutions of the indigenous people. Gradually and with superior force the ethnic constitutions were swallowed up. The main casualty of this swallowing up was the chief. From the position of the leader and chief executive of his people, he became an appendage, more or less, to the British colonial constitutional structure. The basic tool employed for the swallowing up was the power of recognition. Originally, the idea of recognition was presented as a way of shoring up and thus maintaining the dignity of the chief. His position was to be made thereby unassailable in the courts of the modern state. It was to be purely an evidential matter. This pretense did not last long. By the time the modern constitution of Ghana took shape and a strong central government was established chieftaincy had taken a back seat. Act 81 marked the height of the process of hijacking. Although the institution was granted a reprieve by the 1979 Constitution, it has turned out to be temporary. The P.N. D.C., through Law 107, has turned back the clock once more.

But, as we noted, the institution has remained vital to our nation-building efforts. It is this vitality which attracts central government to have a foothold in the institution. I have suggested that ultimately the best policy for central government would be to disengage itself from the processes of enstoolment and destoolment of chiefs and to foster instead a partnership with the institution. The astute reader would notice that partnership formed originally the basis of the British colonial policy of indirect rule. In practice, it turned out to be a policy of assimilation. In conclusion therefore, it is interesting to note that the main lesson from this article is that the original colonial policy of indirect rule, not its flawed practice, provides the best modus vivendi between the modern central government and chieftaincy, if the latter is to be able to play its proper role in our national development.