

# **The politics of inclusion and exclusion of traditional authorities in Africa: chiefs and justice administration in Botswana and Ghana**

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*In 'traditional' African societies, dispute settlement is often connected with a traditional political authority the fullest expression of which is often found in 'chiefs'. At the national level, the case of chiefs as the dominant traditional judicial and political authority is justified in the many state policies and reforms executed after British colonial rule. These policies were meant to either integrate or exclude chiefs from the process of justice administration and disputes settlement. This paper contends that even if a state pursues an 'anti-chief' agenda, their relevance in justice delivery cannot be underestimated. In establishing this, the paper undertakes a comparative study of state legislations that culminated into the inclusion or exclusion policies of chiefs in dispute resolution at the local or national levels in Botswana and Ghana respectively and their impact on the outcome on traditional justice administration.*

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## **Introduction\***

With the coming of Europeans, efforts were made to streamline dispute settlement practices along western rules and institutions in many African societies. The colonial powers especially the British introduced western models of social control and justice administration including the law courts, the police, legal bureaucracies, judges, lawyers in their colonies. Despite colonial authorities became the new centers of political power, traditional<sup>1</sup> authorities, particularly chiefs, still retained some of their important pre-colonial obligations such as acting as agents of peace and order and as actors in the socio-economic and political development of their respective areas. In British colonial Africa, chiefs were allowed to administer customary norms and rules for resolving communal disputes and grievances in agreement with western normative tradition of law. After independence, the new African nationalist regimes pursued and sustained the colonial or 'modernist' projects to guarantee their legitimacy, protect their interest and promote national unity. These nationalist policies, as will be established, produced legislations that either withdrew the judicial powers hitherto allocated to chiefs in some societies, or co-opted these chiefs and their customary courts into 'common law' in others. However, even where the powers were altogether withdrawn in law (even if the

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<sup>1</sup> In this paper the word 'tradition' or 'traditional' connotes the same meaning. In this article, something is considered traditional if it is used in Africa for an "extended period of time ... without being a product of purely of external importation" (Zartman 2002: 7). 'Tradition' is not used pejoratively to mean old, backward, uncivilised, unchanging, static or set against modernity and progress. It describes an institution and a practice that has survived over a period of time among a group of people.

new laws stipulated that chiefs retained no formal power in justice administration), in practice, chiefs still conducted dispute resolution in their societies in line with traditional prescription.

As a result of these changes most modern Africa states with a history of traditional leadership, either by law or in practice, observe a dual legal system. One legal system is state based and reflects the laws and values of the former imperial regimes; the second reflects the values and laws of the local people. State law, however, remains dominant since the statutory courts have the power to ignore, review or overturn cases brought before traditional authorities for settlement. In Africa, states have facilitated this by enacting laws that protect the powers of these formal courts. Nonetheless, to pay no attention to traditional authorities in dispute settlement is to ignore the very existence of a parallel system of justice administration in countries in which chieftaincy thrives.

This comparative article examines the position of chiefs and their function of dispute settlement in the modern state. It conducts this analysis by looking at the legislations that culminated into inclusion or exclusion policies of chiefs in dispute resolution at the local or national levels in Botswana and Ghana. It also attempts to further examine if inclusion and exclusion policies made any significant impact in practice. What will be argued is that despite the existence of such policies, in practice, in both countries chiefs appear to be playing similar roles in justice administration. To explain this phenomenon, the paper also

discusses the possible reasons why indigenous mechanisms continue to appeal to their numerous users. By carrying out this exercise, the paper wants to make a distinct contribution to the debate on the relevance of traditional authority and justice administration in Africa.

The paper is organized in five sections. The first examines the nature and scope of chiefs in indigenous mechanisms for conflict resolution. Section two looks back into the legal history of chiefs and customary courts in Botswana and Ghana. Section three provides insights into lessons learnt from these case studies and assesses chiefs' courts and their appeal to the people. The last section concludes the paper by restating the arguments in this article as well as suggesting a synthesis of both legal systems into something the people could identify with.

### **Indigenous conflict resolution**

Every society, literate and pre-literate, has its own methods, procedures, or mechanisms for dealing with or resolving disputes. In Africa, indigenous mechanisms use both local socio-political actors and traditional community based judicial and control structures to manage and resolve conflicts within or between communities without resorting to state institutions or other external structures. Wilfried Scharf (2003) however notes that,

“[[t]he character of these indigenous institutions and their patronage vary greatly depending on a wide range of factors. Among these are the nature of the state and its capacity; the diversity of the population in terms of ethnicity/race, religion, ideology, language and income. In the twenty-first century,

crucially important are also the levels of urbanization and the type of economy, the moral economy as well as commercial one”.

In traditional Africa, a dispute is seen as a threat to human and social harmony; disputes disrupt and violate accepted norms and values recognized for the protection and promotion of human relationship in the community. Moreover, disputes are seen as evil forces capable of disturbing or at worse destroying a society's unity and survival. Even more prominent is the belief that disharmony sparks famine, drought and death - a proof of the gods' disapproval. As a result, every effort is made to ensure society's peace and unity through negotiation, mediation, arbitration and adjudication often involving community members and institutions.

Vast cross-cultural anthropological literature confirms the use of native forms of dispute settlement in several societies in Africa (Evans-Pritchard 1940: 272-296; Fred-Mensah 2000: 31-47; Gluckman 1955; Uwazie 2000: 15-30; Masina 2000: 169-181). Literature on duelers, negotiations, mediations, arbitration, and adjudication techniques in these works give a fair idea about the range of variations in patterns of formally recognized rules and institutions that relate to the settlement of disputes in specific societies.

Among the Nuers, an acephalous society in southern Sudan for instance, disputes are resolved through negotiations and bargaining relationships. The Nuer society is described as an egalitarian society, governed by rules and

regulations and a form of authority respected and obeyed without any use of force or violence. Among the Nuer, nobody exercises central political authority to hold the several highly organized major, minor, and minimal kinship groups together. Yet it is considered ordered because despite the absence of a centralized political system, the people have a form of confederal system within itself, as well as principles for remaining united without having an overall ruler similar to monarchic and modern states. According to Evans-Pritchard, law and order are achieved by a settled system of compromise through bargaining (Evans-Pritchard 1940: 291-295). Bargaining is not aimed at determining who is at fault, rather it is to discover a compromised solution that leaves neither party so strongly aggrieved as to prevent future amicable relationships. The Nuers accept the mediation of an institutionalized neutral 'leopard skin chief', who at best is a religious rather than a political leader.

A centralized system like the Akan in Ghana also has a similar approach to resolve disputes among litigants. The only difference here is that, unlike the acephalous societies such as the Nuers who settle their disputes through a non-political leader, the Akan society has a formalized, hierarchical, institutionalized dispute resolution mechanism. Chiefs settle disputes depending on the gravity of the cases. Less complex cases are resolved by either clan or lineage head if the case involves disputants from the same lineage, or the head of the various lineages whose members are disputing. More complex cases are handled by the whole community through the traditional court headed by the chief.

Reparations for minor delicts include appeasement of the victim or injured party and the gods while seeking the restoration of peace and harmony between the disputants or the offender and the community. Originally, however, dealing with serious offences in the Akan society and the like took the form of severe and inhumane punishment, such as loss of rights, banishment, mutilation or physical dismemberment, or even death. It was also not uncommon for certain conflicts to be tried by ordeal or magic. Many of these practices were to change with the coming of the Europeans. The structural re-arrangement of society by colonial rule led to the marginalization of these indigenous mechanisms and an increasing advocacy for western written law and legal procedures. In other words, the building-up of colonial institutions had a displacing effect on traditional institutions in Africa and created a situation where states had mixed reaction towards native institutions, especially with regards to administering justice, as well as maintaining law and order in their communities.

### **Chiefs in Africa**

In most sub-Saharan African societies, traditional authority and leadership finds expression in forms such as religious leadership, lineage headship, leadership in extended families, and chieftaincy (Assimeng 1996). Chieftaincy is, however, the fullest institutionalised expression of traditional rule, it embodies the basic features of “prescribed kinship and lineage succession to office; awe and sacredness of office and office holders; specific forms of contractual

relationships between chiefs and their subjects; and institutionalised procedures for conflict resolution, decision-making and implementation mostly at the levels of community or kingdom” (Assimeng 1996). Chiefs therefore have a contractual arrangement towards their people in the maintenance of peaceful relations within the family/community as well as a host of general wellbeing functions.

Before Africa was colonised, most indigenous states had a well-organised system where chiefs and their council of elders governed. The headman, who was the leader of the smallest constituent, was responsible to the village chief. The village chief was subject to the senior or divisional chief who is in turn subject to the paramount chief. It is also worth noting that in every village there are structures for conflict and dispute settlement through the chief and his council of elders. Thus, for example in Uganda, among the Karimojong, the elders resolved disputes important by means of discussions and debates. In Ethiopia, among the Boran, the village council and the *Aba Olla* (village head) had far reaching political, social, economic and judicial functions. Likewise, amongst the Samburu in Kenya, who operated a very distinctive clan-based administration and age-set system, there is evidence of binding mechanisms for arbitrating disputes. The traditional authorities therefore were responsible, *inter alia*, for maintaining peace and order and for resolving disputes.

Chieftaincy came under attack in the early years of Africa’s post-colonial period. This was a time when the wind of modernity was impacting all facets of society,



and modernisation theorists argued that chiefs and chieftaincy were outmoded and should be replaced by “modern” representative and more accountable institutions inherited from the colonial state (Nyamnjoh 2002). Nowadays, this view has not entirely disappeared, as some scholars continue to argue for a common political and legal regime that guarantees equal citizenship for all, and for the abolition of the ‘decentralised despotism’ that informs bifurcations like ‘citizen’ and ‘subjects’ (Mandani 1996). However, another school of thought which includes both critical thinkers and democratic governments increasingly acknowledges the resilience and contribution of chieftaincy institution by emphasizing the value of observations over opinions (Nyamnjoh 2002: 2-3). Their argument is based on evidence of sustained socio-cultural, economic and political contributions chiefs make in the areas under their influence.

### **Chiefs’ courts**

Justice delivery through dispute resolution is conducted in the customary court. The type of law used in such courts is called customary, native, traditional or religious law. Apart from customary usage, chiefs in some countries are granted accreditation by their national constitutions in an attempt to guide the resolution of cases in line with modern law. Botswana and South Africa provide examples of countries where formal laws serve as reference points in traditional justice delivery (Scharf 2003).

The traditional court is based on interpreting evidence, imposing judgments, and managing the process of reconciliation as the case is in Botswana and Ghana. In this process, the chief alone or with his council (made of community elders/advisors who assist the chief in his day to day administration) are recognized as the mediators who lead and arbitrate discussions of the problem. Contending parties typically do not address each other and interruptions are not allowed while the parties state their case. The deposition of statements is followed by an open deliberation process, which comprises listening and cross-examining witnesses. After the statements of the disputing parties are rigorously reviewed, the chief and his council of elders pronounce the judgement. If the judgement enjoys unanimous consensus it is delivered on the spot.

From the above, it can be argued that the processes in chief's court are similar to modern judicial institutions - trial by jury. The only difference is the kind of justice dispensed. The chief's courts are based on the restorative principle which allows both victims and the offenders to actively participate in defining dispute and the resolution of the conflict. The guiding principle of the traditional court is the vindication of the victim, and holding the offender accountable to both the victim and the community while further attempts are made to reconcile the victim with the offender.

Since colonial rule, African states have made efforts to streamline the judicial activities of chiefs; the end product of these reforms has either included or

excluded chiefs from the administration of justice. Botswana provides an important example of an African state where customary law court has been co-opted into the modern legal system. Ghana, on the other, constitutionally bars chiefs from holding themselves as judges. Using a historical approach, the following section looks at legislations defining the space and duties of chiefs in regards to justice administration or dispute settlement.

### **Botswana**

Botswana formerly known as Bechuanaland included, in the pre-colonial structure, eight kingdoms: Bakgatla, Bakwena, Bamalete, Bamangwakeetse, Barolong, Batawana and Batlokwa (see Vaughan 2003b: 5). Prior to any contact with the Europeans, the Batswana were primarily herders and farmers and were ruled by chiefs in the eight separate kingdoms.

In the late 1800s, Britain formed the protectorate of Bechuanaland to prevent territorial encroachment of Boers from the Transvaal or German expansion from South West Africa. With the incorporation of the people of Botswana into British protectorate, the British colonial authorities administered Bechuanaland with a strategy that sought to control the eight kingdoms through the prevailing indigenous socio-political structures (Vaughan 2003b: 5).

British administrators, while leaving a significant autonomous space to the Tswana rulers, also conferred important administrative duties on them (Vaughan

2003b: 5). During the first decade of Botswana's incorporation, colonial administrators exercised minimal supervision over the administration of local communities, adjudication of law, and the maintenance of order (Vaughan 2003a: 135). Between the 1910s and the 1940s, when the British authorities promulgated a series of landmark ordinances, the *Kigosi* (chief) and their subordinates retained firm control over the affairs of the native administration. According to Olufemi Vaughan, Simon Roberts notes the impact of British ordinance on chiefship in Kgatla territory in the earlier years of the colonial rule:

An element of continuity was assumed by the colonial power in that, subject to the overriding control of the high commissioner and his subordinates, the Tswana rulers were to continue governing their people; and the understanding was that they would do this with very little interference from the protectorate administration. Thus, whatever misunderstanding, re-interpretations, and changes in the meaning there may later have been, the agents of government at the local level within Bechuanaland were same as the years immediately after the founding of the protectorate as they were before the event.... Nevertheless, despite minimal interference by central government in the early years, the position of Tswana rulers was transformed. Drawn into the overarching political unit of the protectorate, their position was at once strengthened and weakened: strengthened in the sense that in exercising their domination they had the backing of a higher tier of government; weakened in the sense that they were themselves subject to that external constraint. Thereafter, in the early years of the protectorate the formal arrangements and the overall practice of central administration were such that existing Tswana governance, including dispute processes, was interfered with

to a minimal extent. Initially, all that was done was to withdraw from the ruler to deal with cases of homicide and disputes involving Europeans (Roberts 1985: 81 quoted in Vaughan 2003a: 29- 30).

Despite the limited British intervention especially introduced in the legal administrative arrangement and in the earlier years of colonial rule, colonial authorities established the critical framework on which the administrative structure would be transformed (Vaughan 2003b: 30). First, British authorities clearly defined the boundaries of colonial jurisdiction; second, they curtailed the powers of the *Kigosi* (chief) in adjudicating murder cases; third, they imposed taxes which the *Kigosi* were expected to enforce, and finally, they appointed British officials as representatives of colonial government in all the administrative headquarters (Vaughan 2003b). Despite colonial rule imposed numerous administrative changes, chiefs in Tswana society maintained their dispute settlement authority throughout the colonial era.

### **Involving chiefs in justice administration in Botswana**

In order to co-opt customary courts in the evolving administrative system, British authorities instituted the first major administrative reform in 1919 through the Native Court Proclamation Act. The 1919 ordinance gave the local people the power to appeal the verdict of the native courts to the district commissioner, a position created in the ordinance. Later, the British authorities introduced the Native Tribunal Proclamation to further streamline the *Kigosi's* judicial powers within the colonial native courts. This new provision curtailed the extensive judicial powers of the *Kigosi* in criminal and civil cases; and formally withdrew the

chief's authority over the adjudication of criminal cases involving Europeans and the local population (Vaughan 2003b: 40). However, due to the ineffectiveness of the colonial state in local communities and local popular patronage, chiefs and their subordinates retained considerable influence in the adjudication of criminal cases (Sekgoma 2003: 3-4 cited in Vaughan 2003b: 41).

In 1943, the British authorities introduced another ordinance named the Native Administration Proclamation. The ordinance curtailed the power of chiefs by entrenching the power of the high commissioner to “approve, recognize, suspend, and dismiss chiefs, sub-chiefs, and headmen whom he (the high commissioner) deemed threats to peace, order, and good government” (Vaughan 2003b: 42). While containing chiefs’ power, this ordinance also extended the legal jurisdiction of the native court authorities over important civil and criminal cases, notably “prohibiting gambling and manufacturing liquors, regulating fire arms, preventing crime, suppressing prostitution, and restricting the sale, supply, use, or cultivation of noxious plants, and manufacturing of noxious drugs” (Vaughan 2003b: 42).

Despite the transformation of society and the significant increase in the powers of the magistrates and high courts, customary courts (the reformed native courts) remained widely accessible and in line with local customs and values. According to Vaughan, “in comparison with the English system, customary courts primarily settled the majority of court cases in both rural and urban areas” (Vaughan

2003b: 44). Nevertheless, this influence was not without opposition as the *Kigosi's* authority flourished at a time when educated elites challenged the chiefly power among the rural people. As a strategic response to the growing threat posed by the educated elite some *Kigosis* opposed decolonization and openly claimed that the people of Bechuanaland were not prepared for independence.

In 1966, the educated elite succeeded in pushing for Botswana's independence under the Botswana Democratic Party (BDP). The independence constitution of 1966 affirmed the establishment of a House of Chiefs, where *Kigosis* could deliberate over laws the National Assembly enacted and policies the central government formulated. This notwithstanding, there were persistent criticism of the BDP government regarding the state of chiefs and their customary courts. Despite these criticisms, the BDP central government instituted reforms in customary courts matters that were meant to wane the authority of *Kigosis* and their subordinates in local administration. The Customary Court Law of 1966 further reduced the power of the chiefs to adjudicate civil and criminal cases (Vaughan 2003b: 81). The Customary Court Law of 1966 excluded traditional leaders from presiding over serious criminal cases such as murder, rape and treason. The law also barred *Kigosis* and their subordinates from civil cases that required technical legal knowledge, for example, insolvency, company and property law. These powers were transferred to the magistrate and high courts. By means of imposing strict legal guidelines on the cases chiefs could handle,

the BDP government sought to reconcile both modern demands and the customary concerns of the people.

The BDP government also enacted a comprehensive legal reform in local communities by passing in 1968 the African Courts Amendment Law. “The law sought to resolve the anomalies that had affected most customary courts in African states following their independence. The African Courts Amendment Law of 1968 provided the legal basis for improving the administration of justice by the customary courts. Furthermore, the reform expanded the jurisdiction of customary courts by giving them limited authority over tax cases” (Vaughan 2003b: 81).

Indeed, chiefs were never satisfied with BDP government policies on customary courts. In 1980, chiefs through the House of Chiefs presented a motion “criticizing the performance and workload of the customary courts and requested [the] government [to] upgrade the standards of the customary courts and increase their judiciary powers in civil and criminal cases. The chiefs complained that the BDP government had neglected these critical customary courts, where the masses of the people, especially rural dwellers, obtained legal recourse in accordance with native law and custom. Moreover, the chiefs charged that the state regulations, lack of adequate financial remuneration, and cumbersome legal procedures hampered their duties” (Vaughan 2003a: 143).



In reaction to the chiefs, and in line with BDP government's policy of accommodation the Customary Courts Law of 1986 was passed. This law gave litigants the right to appeal the chiefs' decision in the customary court to a newly created customary court of appeals and the magistrate courts, and also established the office of a commissioner to supervise the performance of all customary courts in Botswana (Vaughan 2003b: 140). Even though these reforms did little in response to the demands of the chiefs and their *Kgotla* (a traditional court), it did not preclude the Government's commitment to the traditional institution, especially because other African countries eradicated them completely.

Post-colonial reforms and constitutional provisions were consciously carried out in recognition of the authority of *Kigosis* in the justice administration of local communities. Vaughan notes that "in spite of their marginalization from state affairs, *Kigosis*, and sub-chiefs, headmen, and elders exerted significant influence over critical institutions of local governance" such as the *Kgotla* (Vaughan 2003b: 132). The *Kgotla* for example, exercises considerable statutory jurisdiction over criminal matters extending to powers of imprisonment for up to four years. Today, Botswana provides a case where the integration of customary courts into formal justice delivery systems has contributed to its overall peace and stability. Giving evidence to the contribution of chiefs, Bogosi Otlhogile noted that the overwhelming majority of Botswana prison population was sent there by the customary courts (Otlhogile 1992: 15-17).

## **Ghana**

Before British colonial rule took firm root in the Gold Coast<sup>2</sup> in 1874, the traditional ruler occupied a unique position. Like the case of Botswana, the British colonial system recognized the traditional significance of chiefs and made them central figures for local administration through a system of indirect rule (Buah 2005). The system of indirect rule in the country worked as follows, within a traditional state, or a group of smaller states, the paramount chief and their leading sub-chiefs and counselors were constituted into a native administration, later named native authority, and was controlled by a paramount chief. The powers and functions of the native authority covered matters mainly relating to traditional and customary institutions and practices. The policy of indirect rule meant that the colonial power utilized the chiefs as agents to indirectly administer and rule the subjects in the colony. These authorities operated under the general direction and control of the colonial district commissioner (Buah 2005).

### **Erosion of the powers of the chief**

After the establishment of colonial rule in 1874, the British government proceeded to enact laws that withdrew the substantial powers hitherto held by chiefs. Legislative intervention into chieftaincy matters did not start until 1878 when the Native Jurisdiction Ordinance was passed. The Native Ordinances of 1878 and another in 1883 controlled the supreme power of the chief (Odotei

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<sup>2</sup> In March 1957 the British colony of Gold Coast changed its name to Ghana and became formally independent.

2003: 332). By these ordinances, first, decisions in the native court were subjected to appeal in British courts and second, it gave the governor power to remove a chief without any reference to his council or subjects (Kludzie 2000: 402). The 1878 Native Ordinance was followed by two other ordinances in 1883 and 1927. But a significant feature of the Native Ordinances of 1878, 1883, and the Native administration Ordinance of 1927 is that they allowed customary law and native courts to function alongside the English judicial system.

The colonial government took sweeping decision in 1944 to pass the Native Authority Ordinance and Native Court Ordinance. The Native Authority Ordinance of 1944, like in Botswana a year before, introduced a revolution in respect to the position of traditional authorities. Traditional authorities were now to be appointed by the government and remained in office subject to the decision of the governor (Buha 2005). Secondly, Native Court Ordinance, created native courts consisting of panels of chiefs and nominees of chiefs (Kludzie 2000: 405). Under this ordinance, traditional courts were graded A.B.C and D. in descending order of importance. The 1944 Native Court Ordinance was also comprehensive on the nature and limits of the jurisdiction of the traditional courts. Section four of the ordinance states that chiefs could not exercise any judicial function unless they were empowered to do so by a warrant under the hand of the Governor (See Harvey 1966; Casely-Hayford 1970).

In 1948, the Watson Commission recommended the establishment of a committee to study the possibility of reforming and developing traditional laws and courts that could be assimilated into the general body of national law. Preceding this, the Coussey Committee of 1947 also offered a suggestion that could improve the traditional courts, including the appointment of non-members of the state within chiefs' council, a reduction in the number of courts' grades, the introduction of a supervision system, and direct appeals to the Supreme Court (Harvey 1966: 208-209). However, born out of the Watson Commission's recommendation was an entirely African commission, the K. A. Korsah (later Chief Justice) Commission of 1949. This Commission's report was scathing and nothing positive was found about traditional courts. The report was not surprising because African Lawyers were excused from pleading at the traditional courts. Therefore, this commission offered them an opportunity to 'crucify' the traditional system of justice administration. The Korsah Commission made sweeping and far-reaching recommendations including the replacement of traditional courts with a new system of local courts, under the Chief Justice, where advocates would be permitted to represent clients. Nonetheless, for several years, the unavailability of qualified professional lawyers made the establishment of local courts impossible.

Eventually in 1958, the local courts were enacted into law, and under this Act traditional courts were to cease operation after the establishment of the local courts. Ideally, these new courts should have been under the supervision of the

Chief Justice but the new nationalist government of the Convention Peoples Party (CPP) led by Dr Kwame Nkrumah, suspicious of the Ghana Bar association and judiciary's opposition to his rule, decided to place local courts under the Ministry of Interior. The decision to place the local courts under the executive could be seen as a political move to protect Nkrumah's vision and political aspirations, it was also a decision in line with Nkrumah's policy to do away with the traditional chiefs, whom he accused of supporting imperial rule. Therefore, the establishment of local court could be viewed as a political agenda rather than an attempt to benefit the rural population.

From 1958 to 1961, The Nkrumah government passed a series of Parliamentary Acts which effectively abolished the judicial powers and relative political autonomy of traditional authorities. van Rouveroy van Nieuwaal, buttressing this point, rightly observed that "the Nkrumah government issued an unremitting stream of legal measures pointed unmistakably at the elimination of chiefly power" (van Nieuwaal 1987: 17-18 cited in Boone 2003: 146). With these policies, the regime usurped chiefly power in the following domains: chiefs were stripped of authority over communal lands; chiefdoms were deprived of their economic base and left almost completely dependent on central government (Boone 2003: 196). Nkrumah's CPP government converted chieftaincy into a government institution and could therefore appoint, de-stool chiefs, and create new paramountcies at will. With these measures, chiefs became to be likened to pawns in the political game of chess.

Despite the government's plan and policies the local courts achieved little success. According to Harvey (1966: 230) this could be due to the fact that 'noneducables', as he called the illiterates, were appointed magistrates and officials of local courts and the local courts were also not appealing to the rural population. As a result, in the 1980s, the government of the Provisional National Defense Council (PNDC) introduced "public tribunals" to bring justice to the doorstep of the people. However, this also did not work because of the abuses, intimidations and excesses associated with these tribunals.

Despite the failure of these local courts and tribunals, governments in Ghana, since independence, did little to formally revisit and acknowledge the judicial contribution of indigenous institution like chieftaincy. The biggest recognition of chieftaincy by regimes after Dr Kwame Nkrumah was the passage of provision that protects the institution of chieftaincy from abuse. The Chieftaincy Act of 1971 created the National House of chiefs to deal with issues relating to or affecting chieftaincy. Section 5 of the Chieftaincy Act, 1971,<sup>3</sup> merely preserves "the power of any chief to act extra judicially as an arbitrator under customary law in any dispute in respect of which the parties thereto consent" (Kludzie 2000: 541). Article 272 of the 1992 Constitution also did very little to protect the judicial function of chiefs in their communities. The 1992 constitutions like the 1971 Act only conferred jurisdiction on the House of chiefs in case or matters affecting chieftaincy. This power does not extend to other civil let alone criminal matters in

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<sup>3</sup> Act 370. This re-enacted section 5 of the Chieftaincy Act, 1961 (Act 81); see Kludzie (2000: 541).

their chiefdoms; instead it vested exclusively all judicial powers in statutory courts (Kludzie 2000).<sup>4</sup> Chiefs are therefore to act extra judicially and as A.P.K. Kludzie observes the implications of this is that “statutory provision downgraded the chief’s role in dispute resolution to that of arbitrator”. The logical consequence is that, Kludzie continues, chief’s role in “dispute settlement is arbitration and not a formal judicial proceeding” (Kludzie 2000: 541). Furthermore, the chief has no statutory power to compel the attendance of the parties because the chief can only act when the parties ‘consent’ to his intervention. The chief, therefore, has no power to order the production of evidence and no machinery for enforcing his decisions.

In practice, however, the chief’s position in dispute resolution has not declined even with these legal restrictions in place. The King of the Asante in Ghana indicated that he has solved nearly 500 cases related to land, chieftaincy, criminal and civil cases that would otherwise be sitting in the law books of the modern courts (Osei Tutu 2004). The current success story of eminent chiefs constituted by the government in resolving the Dagbon crisis leading to the burial of the Ya Na Yakubu Andani is yet another testimony of chiefs’ role in dispute settlement. Another example is that of Nene Klangbojo Animle, a paramount chief in the Greater Accra region of Ghana, at a public forum<sup>5</sup> he insisted that “[they] (chiefs) have the right to arbitrate (contrary to constitutional provision to

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<sup>4</sup> See also Article 125 of the 1992 Constitution.

<sup>5</sup> This public forum was organised by the Judicial Service in collaboration with the United Nations Development Programme at Dodowa, a district capital of Dangme West in Ghana, and was held on October 25, 2007.

mediate) if parties agree” (Public Agenda 2007). Nene Animle in asserting his judicial authority, remarked that he still has “his own police, court and prison and judicial administration running smoothly” despite state restrictions (Public Agenda 2007).

Given these historical facts, the issue at stake is no longer whether chiefs have legal basis for their actions or not but whether it is possible to ignore chiefs in dispute settlements in their communities. The relevance of indigenous systems forms part of the discussion in the next section.

### **Lessons from the case studies**

There are lessons to be learnt from Batswana and Ghanaian legal history. First, like many countries in British colonial Africa, chiefs in both countries experienced a reduction in their powers over their communities under state rule, but these legal reforms were cosmetic and not without resistance and defiance. Chiefs either formally protested or ignored these state directives by conducting their time-honoured duties as required of them by their communities. The defiance of chiefs in turn triggered the enactment of series of other ordinances by governments to further regulate the powers granted chiefs in dispute resolution in their chiefdoms. Moreover, the Botswana and Ghanaian experience offers an opportunity to rethink the values of traditional mechanisms for conflict resolution. It explains the reason why the British colonial policy “preferred to co-opt (integrate) customary law into the state system with its variant of separate-but-



equal doctrine based on indirect rule” (Odinkalu 2005). Finally, the study also shows the persistence of laws drawn from two normative traditions: western and customary. The above-mentioned observations from the case studies indicate some potent peculiarities in the traditional system that equally needs some attention.

### **Why justice goes to the chief’s court**

Firstly, procedures in the chiefs’ court are simple. As a result, most disputes are settled at a single day’s sitting with a verdict announced on the same day. In addition to the fact that the procedure is expeditious, it is also cheap. For instance, in southern Ghana, one has to present only a small quantity of beer or alcoholic beverages to initiate proceedings in a chief’s court. The court convenes within few days after a complaint is lodged, when the facts are still fresh in the memories of all the parties and witnesses. This approach provides the cheapest way of disposing cases within days of its occurrences. Some may argue that the swiftness could compromise gathering enough evidence for fair trial but the alacrity with which these cases are approached explains the importance of the desire for peace and order in society.

There is another fundamental importance of customary courts. Statutory courts usually administer justice and make their awards and decisions solely on the basis of the facts accepted and the law as it is applicable thereto. In every formal court, there must be a winner and a loser; it is hardly a drawn game. Even if the verdict of the statutory court would permanently sour the relationships between

litigants or their families, this is not a critical or present concern of the court. If the party aggrieved by the decision subsequently misconducts him/herself to vent his/her frustrations or anger, s/he would only be dragged to the court one more time to suffer the consequences of his/her actions. The chief's court, on the other hand, generally perceives the end of justice differently. Retributive justice is generally eschewed since vindictive awards in the form of punitive damages are rare exceptions. In many cases, there may not be a winner or loser in a dispute settlement. Even if a winner is declared, the primary concern of the chief's court is not to be vindictive or punitive unless circumstances necessarily mandate such a solution. The primary purpose of justice in the chief's tribunal is to promote harmony and reconciliation between parties. The ultimate aim is the restoration of social equilibrium which had been disturbed by the offensive conduct. Therefore, even though there may be vindication of a party's position or claim, the consequential relief may not grant him/her any or all his demands for restitution or reparation. The adjudicators work to ensure that parties thereafter continue to live and relate to each other as good neighbors, friends and relatives even after the dispute.

It is also true that there are cases that formal judiciary may find far beyond its logic. Matters of customary nature arising from witchcraft, magic, hexing, taboo will be painfully difficult if not literally impossible to resolve in the formal portals of justice administration. This may also offer a reason why establishment of modern courts of law have not resulted in the disappearance of traditional courts. It is

also important to note that even in our 'new world' of science and circumstantial evidence, it is a commonplace to hear in Ghana and Botswana accusations of witchcraft, hexing, taboos and so forth. If this assumption is true in other societies in Africa, it underlines the importance of chiefs' courts in traditional societies.

## **Conclusion**

This article examined the position of chiefs and their function of settling disputes. This exercise was conducted by looking at the legislations that culminated into the inclusion or exclusion policies of chiefs in dispute resolution at the local or national levels in Botswana and Ghana. The article assessed the impact of inclusion and exclusion policies in both countries and contended that despite the existence of such policies, in practice, in both countries chiefs appear to be playing similar roles in justice administration. To explain this phenomenon, the essay discussed the possible reasons given for indigenous mechanisms' continued appeal to their numerous users.

From the study, it transpires that there is a duality of institutions in the performance of judicial duties in both case countries. This finding is based on the fact that traditional rulers played and still play a very important role in justice administration in both countries. The judicial or dispute settlement influence of the chiefs have not weaned off with the creation of the 'modern' state for several reasons. First, compared to the formal legal system, the chief's courts are cheap and expeditious and have very simple procedure. Second, it was also noted that

the chief's court more often than not promoted harmony and reconciliation between parties and make genuine efforts to restore normal relationship between parties in conflict. Furthermore, scholars like Bozeman argue that the locals' attachment to this traditional institution is the result of a social system beliefs and attitudes that may not change easily. Bozeman noted that "[t]raditional forms of conflict management in Africa emanate from 'established social practices' and are therefore comprehensive references, virtually synonymous with the entirety of social life" (Bozeman 1976: 228).

Therefore, whether legally 'included' or 'excluded', chieftaincy can still be deemed as an essential institution in the dispensation of justice for peace and stability, perhaps, except in cases of complex criminal justice which has been statutorily reserved exclusively to the statutory courts. A final or perhaps a major consideration therefore may be synthesizing the traditional justice administration structure with the modern legal system. Attempting to do this will be costly and will demand proper orientation for traditional authorities in legal processes and jurisprudence. Yet no political stability or socio-economic growth could be attained without building on the values embedded in these indigenous political and judicial structures.

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