

THE POWERS AND INDEPENDENCE OF JUDICIAL COMMITTEES OF HOUSE OF CHIEFS IN GHANA: AN EXPOSITION AND CRITIQUE*

I. INTRODUCTION

All hierarchical ethnic groups in Ghana, like in many other parts of Africa, had traditional rulers long before colonialism,¹ and the British found it useful to support this institution in order to use traditional chiefs as auxiliaries to the colonial rule. But soon after Ghana attained its independence, the ruling government sought to weaken the power of chiefs vis-avis the powers of the organs and agents of central government and restricted them from politics. Also clientelism and elitism (based on wealth and education) became dominant in Ghanaian society which hampered the progressive development of the chieftaincy institution. In spite of the anti-chieftaincy tendencies, chiefs remained popular and powerful,² and recognised by previous and the present Constitution of Ghana,³ though not very clear functions in government.⁴

While a section of the Ghanaian public showed cynicism towards the efforts of government since the Second Republic (1970) to give powers to chiefs to arbitrate on disputes without involving them in active politics, others continued to regard it with respect and reverence.⁵ With the passage of the Chieftaincy Bill into law,⁶ chiefs now have legal power to arbitrate on disputes under the new Act which the Minister of Chieftaincy and Culture described by saying “a new impetus has been given to the

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1 Justice G.K. Acquah, a former Chief Justice of the Republic of Ghana traced in his book entitled, “The Judicial Role of the Chief in Democratic Governance”, the historical antecedents of the judicial power of the chief in Ghana and other African Countries. He emphasized that in the pre-colonial era, generally, there were in each state, three ranks in the ladder of courts: (a) the village courts (which were vested with original jurisdiction in both civil and criminal offence originating within the geographical limits of the village); (b) the courts of divisional chiefs (which had both original jurisdiction over cases from villages and towns and has also appellate jurisdiction); (c) the Paramount or the Kings court. The learned judge quoting from J.E. Casely Hayford’s book entitled Gold Coast Native Institutions wrote, “the King is the Chief Magistrate of the Community and there are minor courts exercising concurrent, but not co-ordinate jurisdiction with the King’s court. You have first the Courts of Headmen, then Chiefs Court and finally the King’s Court (which is both a court of first instance and a court of Appeal). In suitable cases, the King’s Court can reserve a matter before a minor court to be brought up before it for adjudication”. This according to Justice Acquah was the order of the day before colonization. He wrote “However the policy of the colonial government towards native tribunals changed in 1927 with the passing of Native Administrative Ordinance (No.23). Thereafter, aboriginal judicial tribunals ceased to exist and every tribunal which should exercise judicial functions as distinct from arbitral functions had to derive its jurisdiction from an enactment. See, Chieftaincy in Ghana, edited by Irene K. Odotei and Albert K. Awedoba, p 65-68.

2 In this regard, see for example the Feature Article of 26 April 2006 on “The Role of Chiefs in Ghana: Otumfuor Osei Tutu II, Role Model for African Chiefs” at www.ghanaweb.com/Ghana Home Page/News Archive [assessed 6 June 2008]. Also see, Irene K. Odotei and Albert K. Awedoba, Chieftaincy in Ghana, 2003; Justice S.A. Brobbey, Law on Chieftaincy in Ghana, 2006

3 Chapter Twenty-Two of the 1992 Constitution of Ghana (Articles 270-277)

4 At least some of the chief emerged as legitimate interlocutors of the government on behalf of their subjects and their development aspirations some go so far as to lobby donors for development aids.

5 See, Pro-Chieftaincy and Anti-chieftaincy arguments at www.ghanaweb.com/Ghana Home page.

6 The Chieftaincy Act which is awaiting Presidential assent, was passed by parliament on 6th June, 2008. its passage comes 38 years after the bill was first introduced in Parliament in 1970 during the Second Republic. It is believed that the frequent coup d’etats that cut short the life span of the Second Republic, were largely responsible for the delay. The new law consolidates, with amendments, the Chieftaincy Act, 1971 (Act 370) to bring it in conformity with the provisions of the 1992 Constitution and to include new proposals. It also consolidates eight pieces of enactments which are amendments to the Act.

institution of chieftaincy which will help in resolving the numerous disputes which have plagued it”⁷ Chiefs,⁸ as the custodians for the traditional groups and families, are confronted daily with critical issues involving stool lands, customary law, and lines of succession of chiefs applicable to stools or skins. In all these, it is embedded with disputes which the ordinary courts find very difficult to handle without whipping up tribal sentiments. The 1992 Constitution, in its efforts to preserve the sacred authority of the institution, has provided for the establishment of judicial committees under the various Houses of Chiefs and Traditional Councils solely with the responsibility of determining any cause or matter affecting chieftaincy which was based on certain justifiable grounds.⁹

With the passage of the Chieftaincy Act 2008, arising questions include: whether the chiefs are not given greater powers than they need? Or if it is not a usurpation of judicial powers from the ordinary courts? Whether the judicial committees of the Houses of Chiefs and Traditional Councils can be independent of executive and judicial powers of State in the performance of their judicial functions? Are their decisions binding on other statutory tribunals such as the Commission on Human Rights and Administrative Justice (CHRAJ),¹⁰ the National Labour Commission¹¹, or the ordinary courts established under the Constitution and Courts Act¹²? Attempts are made to answer some of these questions, though not the focus of the present paper.

The primary aim of this paper is to critically examine the legal regimes of Judicial Committees of the House of Chiefs and Traditional Councils, their legal powers and independence to arbitrate on disputes within the context of the 1992 Constitution of Ghana and the Chieftaincy Act. Materials presented here would, hopefully, serve as guidance to effective implementation of the new Chieftaincy Act and also from the basis of later approach to a more comprehensive research on contemporary chieftaincy issues in Ghana and other parts of Africa.

II. EXCLUSIVE POWER OF JURIDCITION

It is undisputable that, the judicial power of Ghana is vested in the judiciary.¹³ Under Article 125 (1) of the 1992 Constitution, the Judiciary is enjoined to be independent and subject only to the Constitution. In particular it states “Justice emanates from the people and shall be administered in the name of the Republic by the judiciary which shall be independent and subject only to this Constitution.” The Court

7 The Ghanaian Times No 15433, June 7, 2008 p 1, and 4.

8 “Chief” is defined in Article 277 of the 1992 Constitution as “a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen-mother in accordance with he relevant customary law and usage”

9 Justification for giving chiefs the power of arbitration (adjudication) include: technicality of subject matter (to facilitate consultation with chiefs who can readily understand the chieftaincy issues and committees are not composed of judges or government official, though assisted by a lawyer of not less than ten years’ standing); pressure upon the ordinary courts (court procedures are slow, too formal, detailed and costly); the need for flexibility regarding certain traditional matters (to take care of unforeseen administrative difficulties which may appear); the need for quick action (to prevent tribal conflicts or collapse of the community network); they are more attractive and accessible to the people for resolving their disputes.

10 See, CHRAJ Act 1993 (Act 456)

11 Labour Act, 2003, which replaced the Special Labour Tribunal created under the repealed Industrial Relations Act, 1965 (Ac 299).

12 Courts Act, 1993 (Act 459)

13 Article 125 (3) of 1992 Constitution Article 126(1) of the 1992 Constitution emphasized as follows: The Judiciary shall consist of – (a) the Superior Courts of Judicature comprising – The Supreme Court, The Court of Appeal, The High Court and Regional Tribunals.

Act 1993) (Act 459) in fulfillment of Article 126 (l) (b) “shall establish the lower courts and tribunals of Ghana as Parliament may by law establish.”¹⁴

Notwithstanding this omnibus mandate given by the 1992 Constitution to the judiciary, the determination of Chieftaincy disputes are exclusively vested in the Judicial Committees of the National House of Chiefs¹⁵, the Regional House of Chiefs, the Traditional Councils and appeal lies to the Supreme Court.¹⁶ In particular Article 273 of the 1992 Constitution states:

- “(1) The National House of Chiefs shall have appellate jurisdiction in any case or matter affecting chieftaincy which has been determined by the regional House of Chiefs in a region, from which appellate jurisdiction there shall be an appeal to the Supreme Court, with the leave of the National House of Chiefs, or the Supreme Court.”
- “(2) The appellate jurisdiction of the National house of chiefs shall be exercised by a Judicial Committee of the National House of Chiefs consisting of five persons appointed by that House from among its members.”
- “(5) A Judicial Committee of the National House of Chiefs shall have original jurisdiction in any cause or matter affecting chieftaincy;
 - (a) which lies within the competence of two or more Regional Houses of Chiefs; or
 - (b) which is not proper within the jurisdiction of a Regional House of Chiefs; or
 - (c) which cannot otherwise be dealt with by a Regional House of Chiefs”
- “(6) An appeal shall lie as of right in respect of any cause or matter dealt with by a Judicial Committee of the National House of Chiefs under clause (5) of his article to the Supreme Court.”

The ouster of jurisdiction of the ordinary courts in respect of cause or matter affecting chieftaincy¹⁷ and the restoration of same in the adjudicating bodies mentioned above has been given meaning in Section 57 of Court Act 1993 which states that:

“subject to the provisions of the Constitution, the Court of Appeal, the High Court, Regional Tribunal, a Circuit and Community Tribunal shall not have jurisdiction to entertain either at first instance or on appeal any cause or matter affecting chieftaincy”. The cases of *Tobah v. Kweikumah*¹⁸ and *Republic v. Tekperbiawe Divisional Council, Exparte Nene Korle II*¹⁹ respectively have been referred, to underline the exclusive jurisdiction given to judicial committees to determine cause or matters affecting chieftaincy. In the former case, the plaintiffs had obtained ax default judgement in the High Court in respect of the fact that the defendants had no right to nominate or appoint or outdoor any person as the Chief of Agona Division of the Ahanta Traditional Area. A

14 Section 39 of Court Act 1993 (Act 459)

15 Article 273 (1) (2) of 1992 Constitution

16 Article 273 (1) of 1992 Constitution

17 The term “a cause or matter affecting chieftaincy” has been defined under the Chieftaincy Act, 1971 as any cause, matter question or dispute relating to any of the following –

- (a) The nomination, election, appointment or installation of any person as a chief or the claim of any person to be nominated, elected, appointed or installed as a chief.
- (b) The destoolment or abdication of any chief
- (c) The right of any person to take part in the nomination, election, appointment or installation of any person as a chief or in the destoolment of any chief
- (d) The recovery or delivery of stool property in connection with any such nomination, election, appointment, installation, destoolment or abdication.
- (e) The constitutional relations under customary law between chiefs.

18 [1981] GLR 648 CA

19 [1972] 1 GLR 199

motion at the instant of the defendants to set aside the judgment on the grounds that the High Court had no jurisdiction to hear the claim was dismissed. On appeal, the decision was disaffirmed. The Court of Appeal held that since the plaintiff's claim before the High court was "a cause or matter affecting chieftaincy", it was the judicial committee of the Ahanta Traditional Council that had the exclusive jurisdiction to hear the matter. In *ex parte Nene Korle II*, Abban J said: "I think the contention of the learned Counsel for the respondents that the Traditional Council has exclusive jurisdiction to adjudicate on chieftaincy dispute is well founded".

It would be pertinent to point out here that jurisdiction of the judicial committees to try chieftaincy disputes does not extend to ordering the destoolment of a chief or queenmother. This principle was elaborated upon in *Republic v Asokore Traditional Council, Ex-parte Tiwaa*²⁰ which held *inter alia*, that what the judicial committee has to do is to determine whether or not the destoolment charges have been established. Thereafter, it is to refer the matter to the Traditional Council who may relay it to the elders for the actual process of destoolment to be performed and to impose the appropriate punishment. The foregoing analyses illustrate that the powers vested in the Judicial Committees of Chiefs is not absolute but subject to procedural limitations and judicial review and there is also a right of appeal from decisions of the Committees. Judicial review in this respect is concerned with the legality of the decision made by the Committee (ie, the manner of the decision-making process).²¹

III HIERARCHY OF EDUCATION

By hierarchy, the Supreme Court has the final appellate jurisdiction over all matters concerning chieftaincy dispute which are decided by the Judicial Committee of the National House of Chiefs²². It must be pointed out clearly that the Supreme Court has no original jurisdiction to determine a cause or matter affecting chieftaincy. The case of *Yiadam I v. Amaniampong*²³ is instructive in this direction. In this case, the plaintiff by his action invoked the original jurisdiction of the Supreme Court *inter alia* for a declaration that the first defendant had disqualified himself from continuing in office as the Paramount Chief of Asante Mampong for the reason that adverse findings had been made against him by a Committee of Inquiry. Having held that the claim was a cause or matter affecting chieftaincy, it was held that the appropriate forum for the issue which involved a paramount stool was the Ashanti Regional House of Chiefs. It was further held that the Supreme Court did not have concurrent jurisdiction with the judicial committees of the Regional House of Chiefs in Chieftaincy matters rather it had appellate jurisdiction over decisions of the judicial committee of the National House of Chiefs on chieftaincy matter. However, the provision that gives original jurisdiction to the Judicial Committees of Chiefs does not preclude the Supreme Court from exercising the powers of review and exclusive jurisdiction with regard to the production of official

20 [1976] 2 GLR 231, CA

21 In, *Ghana Commercial Bank v. The Commissioner, CHRAJ*, (SC 2002 Civil Appeal; No 11/2002), the Supreme Court determined that the law gives courts the power to review decisions of CHRAJ and for that matter decisions of all statutory bodies but not the merits of the case. See also the *Republic v. CHRAJ, Ex Parte Dr. Richard Anane* [March 13th 2007] per Baffoe Bonnie.

22 Article 273 (1) (6) of 1992 Constitution.

23 [1981] GLR 3

documents as specified in articles 130, 131, 132, 133(1) and 135 of the Constitution respectively.²⁴

The Judicial Committee of the National House of Chiefs is the next authoritative body vested with appellate jurisdiction on chieftaincy disputes. The same judicial committee also has original jurisdiction in chieftaincy matters.²⁵ The circumstances under which the original jurisdiction of the National House of Chiefs can be invoked were summarized by the Supreme Court *Kwaframoah III v. Sakrakyie*²⁶ as follows:-

“...the original jurisdiction of the National House of Chiefs could not be invoked

As of right; it could be invoked only within the ambit of the provisions of Article 273(5) of the Constitution 1992. Accordingly, it was incumbent on a petitioner who was desirous of the National House of Chiefs to show, at least, in his petition that the Regional House of Chiefs which under normal circumstances should assume jurisdiction could not do so due to one or more of the reasons spelt out in Article 273(5) of the Constitution 1992, i.e. the Chieftaincy dispute

- (a) Lay within the competence of two or more Regional Houses of Chiefs; or
- (b) Was not properly within the jurisdiction of a regional house of chiefs, or
- (c) Could not be dealt with by regional house of chiefs.”

Next to the National House of Chiefs, is the Judicial Committee of the Regional House of Chiefs as provided for by Article 274 (3) (c) and (d) of the Constitution 1992. Article 274(3) of the 1992 Constitution states that;

“A Regional House of Chiefs shall (c) hear and determine appeals from the traditional councils within the region in respect of the nomination, election selection, installation or disposition of a person as a chief. (d) Have original jurisdiction in all matters relating to a paramount Stool or Skin, including a queenmother to a paramount stool or skin”.

The Judicial Committee of the Traditional Council is the next on the ladder in respect of determination of a cause or matter affecting chieftaincy. The judicial function as stipulated in the Chieftaincy Act 1971 (Act 370) Section 15 (1) reads follows:-

“Subject to the provision of this Act and to any appeal therefrom, a Traditional Council shall have exclusive jurisdiction to hear and determine any cause or matter affecting chieftaincy which arises within its area, not being one to which the Asantehene or a Paramount Chief is a party”.

Obviously this provision authorizes the judicial committee of the Traditional Council to determine any dispute involving any chief below the status of a paramount chief, such as divisional chief.

From the foregoing analysis and the decided cases cited it can be inferred that, the work of the Judicial Committees of House of Chiefs and Traditional Councils does not and can not constitute a usurpation or duplication of the courts or any other

24 For a detailed examination of these specific jurisdictions, see Bimpong-Buta, S.Y: “The Court System under the 1992 Constitution: Jurisdiction and Powers of the Court” being Lectures delivered on 18th March 1993 at the Law School at the first workshop on Continuing Legal Education organized by the Ghana Bar Association.

25 Article 273 (1) (5) of 1992 Constitution.

26 [1995-96] 1 GLR 542, SC)

institution. These Committees are specialized bodies established solely to adjudicate on chieftaincy disputes within their jurisdiction but with limitations as illustrated above. There is the need for collaboration between the judicial councils and other public institutions such as the police, the Commission on Human Rights and Administration (CHRAJ), Lands Commission, the Local and District Councils in realisation and assertion of their adjudicative powers.

IV HOW INDEPENDENT ARE THE JUDICIAL COMMITTEES?

Although judges are appointed by the executive, judicial independence is secured by law, by constitutional custom and by professional and public opinion²⁷. Clearly a judge must be able to decide a case without fear of reprisals, whether from the executive or a wealthy cooperation. It is clear from the above statement that at the barest minimum, and for proper and fair adjudication of disputes, a judge should not compromise his duty as an interpreter of the law. Again, in deciding cases an adjudicator must do so without fear of any consequential danger on his part for the decision arrived at. In Ghana, like in many other States, judicial independence is fully ensured by constitutional guarantee.

Other guarantees for judicial independence include those dealing with matters involving appointment, retirement and removal of justices of superior courts.²⁸ Article 146 (1) in particular states: "Justice of the Superior Court or a Chairman of the Regional Tribunal shall not be removed from office except for stated misbehaviour or incompetence or in ground of inability to perform the function of his office arising from infirmity of body or mind".

The constitutional guarantee for judicial independent is, however, limited in its application to the judicial committees of the Houses of Chiefs and Traditional Councils. The Constitution in dealing with judicial independence focused much on the judiciary, in the sense of judges who have acquired provisional legal knowledge and have been appointed to a full time judicial service.

The Chieftaincy Act gave Paramount Chiefs the prerogative to appoint members of judicial committees for their traditional areas to try cases involving destoolment of divisional or sub-Chiefs. The Act probably took it for granted that Paramount Chiefs would exercise that privilege with such dignity, responsibility and impartiality as the prerogative implicitly demanded. Evidence enough, many Paramount Chiefs have failed to live up to expectation as far as cases of destoolment are concerned. For where a Paramount Chief does not favour the destoolment of a particular Chief who may have showered favours on him or who is in his good books, he will go all out to stubbornly keep him on the stool damn the weightiness and strength of the destoolment charges preferred against the chief in question and by that undermining their power and independence²⁹. Also in the appointment of judicial committees, which is the prerogative of the Chiefs themselves (Council), the tendency of appointing only favourites is high especially as the /traditional Council level. In that process, as is often the case, the appointed Committee may decide the case to suit the Paramount chief notwithstanding the merits of the case. It clearly goes to suggest that the principle of judicial independence of the judicial committees in some cases could be abused.

On the issue of appointment procedure with regard to the practice of Traditional Councils, it became apparent that the appointment of membership is solely done by the President of the Traditional Council. In reality, this stands against Section 28(2) of the

27 A.W. Bradley and K.D. Ewing, Constitutional and Administrative Law 12th Edition Pages 94, 414

28 Article 44 of the 1992 Constitution

29 See, Abbey Lincoln, a columnist of Ghanaian Weekly Spectator, Saturday December 3, 1994

Chieftaincy Act (Act 372) concerning issue of appointment to judicial committee. Such a function is required to be performed by the Council as a whole.

The appointment at the Ashanti Regional House is peculiar only to the Ashanti Region. In the other Regions, the appointment is done by the House upon receipt of nomination from the Standing Committee. The case of Ashanti Region is due to the unique nature of its customary law and role of the Asantehene. Under the Ashanti custom which the 1992 Constitution recognize, Asantehene is empowered to solely appoint members of the judicial committee to hear a chieftaincy matter within the Ashanti Region.

The position of the law as provided under the combined effect of Articles 273 (4) and 274(6) of the 1992 Constitution is that a member of a judicial committee of Traditional Council, Regional and National Houses of Chiefs may be removed from office on the ground of proven misbehaviour or infirmity of mind or body by the votes of not less than two thirds of all members of that particular House or Traditional Council. Indeed, it is very rare to have a member removed, sacked or withdrawn under that provisions. However, most often than not, objections are raised against members of the Judicial Committees for *ultra vires*, improper procedure, irrelevant consideration, lack of evidence and rules of natural justice.

To guarantee the independence and assertiveness of Chieftaincy institution Article 276(1) provides that: "A chief shall not take part in active party politics; and any chief wishing to do so and seeking election to Parliament shall abdicate his stool or skin." Notwithstanding the above provision and paragraph (c) of clause (3) of article 94³⁰ of the same Constitution, a Chief may be appointed to any public office for which he is otherwise qualified.

V. CONCLUSION AND RECOMMENDATIONS

In respect of the Chieftaincy Act, the judicial role of the Chiefs in the present democratic development is restricted only to the adjudication in the Traditional, Regional and National Houses of Chiefs on causes or matters affecting Chieftaincy, which expression is defined in Section 66 of Act 370. It should be emphasized here that although Chiefs lack statutory power to adjudicate on civil and criminal matters, that does not in anyway deprive them of their customary authority to arbitrate in petty civil issues within their jurisdiction.

The most plausible solution to the problem of getting justice to the doorsteps of the people is to examine how far the arbitral tribunal of chiefs can be molded and regulated to handle other minor disputes at the rural levels.³¹ First people do not have to travel long distances to district court to seek redress on petty social squabbles. Second, the procedure in these arbitral tribunals is simple, flexible and expeditious. Third, it is user friendly and it curtails distortion as result of interpretation. But such a role should be given to chiefs who have had some form of formal education.

30 It states, a person shall not be eligible to be a member of Parliament if he is a Chief. [Article 94(3)©]

31 There is the need, however, to regulate such a function by legally unprofessional institution in order to avoid miscarriage of justice as happened in the case of Debrah V The Republic (1991) GLR 517, in which the accused collected unwanted swept-off chippings that had been used in tarring the road in front of the chief's palace. This act was alleged to be customary barred. The accused was summoned to the chief court and found guilty. He was fined but he refused to pay. He was subsequently arraigned before the District Court on a charge of insult to the chief. On submission of no case which was dismissed by the trial court on appeal the High Court quashed the ruling and acquitted the accused. It is clear as acknowledged by Acquah J. that there was something wrong with the charge, proceedings and decision of the arbitral tribunal which inter alia relate to charging and punishing the accused for an offence unknown to inhabitants of the area.

There is the need for the promotion of legal literacy among Chiefs. That is, they should be exposed to regular seminars, workshops and training programmes in basic principles of law such as natural justice rules, the rule of law, the discourse on democracy and constitutionalism, judicial accountability in democratic governance, judicial independence, the power of judicial review, and jurisprudence.

An effective and efficient judicial committee of House of Chiefs is critical for the consolidation of democratic governance in Ghana. The concepts of natural justice and rule of law should promote a check on the Chieftaincy institution against the abuse of power, in particular *ultra vires* decisions and improper procedures and subject their actions and decisions to judicial review.³² They should be in position to provide the necessary conditions for the minimum protection of individual rights through an impartial and accessible judicial system. The Constitution of the Republic of Ghana and the newly enacted Chieftaincy Act have placed more powers in the judicial committee of the House of Chiefs. However, the judges, who are mere human, are fallible and susceptible to all the bad social, economic and political influences. It is therefore of equal importance for not only judicial control but also the public, especially the media, to watch over the judicial committee as well as maintaining a conducive atmosphere for it to exhibit its independence without executive or legislative interference.

32 Judicial Review in this respect is concerned with the legality of the actions and decisions made by Chiefs on Judicial Committees (the manner of the decision-making process) and not necessarily with the merit of the particular case). This can be illustrated by the case *R v. Chief Constable of Wales Police, ex parte Evans* [1981] which established the principle that, a court of law is to ensure that the exercise of any power which has delegated to any adjudicating body has been lawful according to the power given to that body by the Act of Parliament. In the UK two basic constitutional principles are paramount in ensuring the lawfulness of such decisions namely: Parliamentary supremacy and the rule of law. In *Ghana Commercial Bank v. The Commissioner, CHRAJ* (Supreme Court, 2002), Civil Appeal No. 11/2002), the Supreme Court ruled that the law gives courts the power to only review decisions of CHARJ or any other adjudicating body without going into the merits of the case or calling witnesses.