

**CUSTOMARY LAW AND THE 1992 CONSTITUTION OF GHANA:
A COMPARATIVE THEORETICAL STUDY**



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ABSTRACT

Ghana's 1992 Constitution entrenches Fundamental Human Rights and Freedoms, some of which do not exist in the customary law of the tribal polities with whom the state shares citizens. The state's efforts to assert this liberal identity as the people's; and the tribal polities' commensurate efforts to resist the erosion of the socio-political identity they have chosen for themselves and their subjects; create tensions that, unmanaged, are apt to culminate in destructive conflict. My thesis casts the state-tribe friction in terms of a struggle over sovereignty and seeks a theoretical strategy to address that challenge.

I compare three philosophical constructs: federalism, bicameralism, and constitutional pluralism. I draw on Nigeria's experience to conclude that though federalism might preserve the citizen-subject's tribal identity, it does so at the cost of her statal one. Based on Botswana's experience, I reject bicameralism for over-aligning state and tribe, thereby distorting the latter, and, thus, robbing the citizen-subject of her native lens for navigating the world.

Rather than obsess about being the only entity making a sovereignty claim in the territory, constitutional pluralism (CP) teaches the state to concentrate on amplifying its effectiveness to match the scope of its normative claim, so as to render implausible all competing sovereignty claims. This new focus allows the state to tolerate its rivals and even optimise their existence thereby offering the citizen-subject equal access to both her statal and tribal identities. I therefore endorse it.

I craft a Ghanaian theory of CP which values the inter-order friction and establishes thereon a model of competition and collaboration in which the state gains both the benefit of the strengths and legitimacy of tribal authority, and, through its competing remedies, the power to trigger and mould the evolution of customary law rights regimes into a connotationally-compliant body of law.

TABLE OF CONTENTS

Table of Statutes.....	v
Table of Cases.....	ix
List of Abbreviations.....	xiii
Chapter 1: Introduction.....	1
Chapter 2: Sovereignty	19
Introduction.....	19
Part 1- A Working Definition of Sovereignty.....	20
1.1 Walker’s Definition of Sovereignty.	21
1.1.1. Supreme Ordering Power.	22
1.1.2. The Normative Claim of Sovereignty.	24
1.1.3 Sovereignty as A Discourse.....	28
1.1.3.1 Sovereignty’s Audience	28
1.1.4 Effectiveness as Audience Participation in the Sovereignty Discourse.....	01
Part 2- Three Objections Examined.....	34
Conclusion.....	41
Chapter 3: The State of Ghana.....	43
Introduction.....	43
Part 1. Sovereignty in the 1992 Constitution and Its Antecedents.	44
1.1. Sovereignty before the 1992 Constitution	44
1.2. Sovereignty in the 1992 Constitution.	48
1.3. Identifying Normative Claims Within the Text of the 1992 Constitution.....	51
1.4. Normative Claims in Other Legislation.....	60
1.4.1. Sanction-Backed Normative Claims Over	

Customary Law.....	61
1.4.2. Normative Claims Over Customary Law Without Sanctions.....	63
Part 2 - State Judicial Power as An Expression and Agent of State Sovereignty.	65
Part 3- Assessing the Effectiveness of The State’s Normative Claims.....	69
3.1. Internal Effectiveness.....	69
3.2. Effectiveness Of Externally Asserted Normative Claims.....	72
3.3. Effectiveness Over Customary Law and Asante.....	73
3.4. Gaps In the Effectiveness Of The Normative Claim.....	75
Conclusion.....	77
Chapter 4: Asante.....	78
Introduction.....	78
Part 1- Asanteman- An Overview.....	79
1.1. History.....	79
1.2. The Hand of Asante’s Past on The Ethos of Its Present.....	84
1.3. Political and Constitutional Configuration of Asanteman.....	86
1.4. The Impact of Decentralisation on Identity for The Asanteni.....	90
1.5. Asante Constitutional Symbols and Rituals.....	90
1.5.1. Kumasi.....	91
1.5.1.2. The Symbolism of Kumasi’s Role in Translating Asanteman Into the Identity of Asantefoɔ.....	92
1.5.2. The Golden Stool.....	93
1.5.2.1. The Symbolism of The Golden Stool for Asantefoɔ.....	93

1.5.3. Oaths.....	95
1.5.3.1. The Symbolism and Legal Role of Oaths in Asanteman’s Cohesion and Asantefoo Identity.....	98
1.6. The Constitutional Offices of Asante.....	101
1.6.1. Asantehene.....	101
1.6.2. <i>Asantehemaa</i>	103
1.6.3. <i>Ɔkyeame</i> [Plu <i>Akyeame</i>]	105
1.7. Rules Of Succession to Office in Asanteman.....	107
1.8. Powers and Functions of Chiefs.....	111
1.8.1. Executive.....	111
1.8.2. Legislative	112
1.8.3. Judicial	112
Part 2: Asante Judicial System and Process.	114
2.1. Dispute Settlement	114
2.2. Causes of Action in Asante Customary Law.....	117
2.3. The Judicial Process	118
Conclusion.....	120
Chapter 5: Asante-State Turf Wars.....	122
Introduction.....	122
Part 1. The Constitutional Ideologies of Asanteman and The State in Summary.....	124
Part 2: The Sovereignty Challenge.....	128
2.1. Rival Law-making Claims.....	128
2.1.1. Rights That Overlap.	133
2.1.2. Rights Which Diverge.....	136
2.2. Rival Adjudicating Claims	141
2.3: Jurisdictional Challenges	146
2.4. Symbolic Rejections of State Sovereignty.	150
2.5. How Does the Difference in Ideology Inform the Configuration of Judicial Power and The Judicial Process in The Two Entities?	156

2.6. What The State Brings to The Table.....	159
2.7. What The Tribal Orders Bring to The Table.....	161
Conclusion	167
Chapter 6: Federalism, Rights, And Diversity; Lessons from Nigeria.	170
Introduction.	170
Part I- Federalism as A Manager of Diversity.....	172
1.1. What Is Federalism?	172
1..2 The Rationale for Federalism	176
Part 2- Nigerian Federalism.	184
2.1 Why Nigeria?	185
2.2. Introduction To Nigeria.	186
2.2.1. The Federal State.....	186
2.2.2. The Nigerian Judicial System	190
2.2.3. Tribal Polities, Tension and Sovereignty.....	192
Part 3- Federalism :the Solution to The Diversity and Constitutional Congruence Challenge?	194
3.1. Do Theory And (Nigerian) Practice Diverge?	195
3.1.1 Preserving Diversity by Preventing Interethnic War.	195
3.1.2. Local Resolutions to Local Conditions Thus Nurturing Cultural Identities.....	196
3.2. Federalism, Constitutional Congruence and Sovereignty.....	199
Conclusion.....	206
Chapter 7: Bicameralism, Diversity, Constitutional Congruence, and Botswana..	209
Introduction.....	209
Part 1- How Bicameralism Preserves Diversity and Generates Constitutional Congruence in Theory.....	211
1.1. Generating Constitutional Congruence.....	215

1.2.Preserving Tribal Identity.....	221
Part 2- Botswana: An African Bicameral System.....	227
2.1. Why Botswana?	227
2.2. Introducing Botswana.....	228
2.2.1. The State	228
2.2.2. Tribal Diversity, and Tension Within and With the State.....	231
Part 3- Theory vs. Experience.....	234
3.1. The Argument for Constitutional Congruence.	244
3. 2. Bicameralism as a Preserver of Diversity.	252
Conclusion	257
Chapter 8: Constitutional Pluralism	257
Introduction.....	250
Part I: Explaining Constitutional Pluralism.....	261
1.1. What Is Constitutional Pluralism?	261
1.2. Explanatory Pluralism.....	266
1.3. Normative Pluralism.....	272
1.4. The Normative Value of CP.....	277
1.5. The Distinction Between Constitutional Pluralism and Legal Pluralism.....	280
Part 2- Insights for An African Model of CP.....	283
2.1. From Mortal Enmity to Toleration.....	286
2.2. The Strengths of Constitutional Tolerance.....	291
2.3. Constitutional Tolerance Criticised.....	294
2.4. Operationalising CP: Methodological Insights.....	296
2.4.1. The Principles of Contrapunctual Law	298

2.4.1.1. Pluralism.....	299
2.4.1.2. Consistency and Coherence.....	300
2.4.1.3. Universalizability.	301
2.4.1.4. Institutional Choice.	302
2.4.2. Critiques of Contrapunctual Principles.	303
2.4.3 The Strengths of Maduro’s CP.....	309
Conclusion.....	314
Chapter 9: Ghanaian Constitution Pluralism- Theory and Practice.....	317
Introduction.....	317
Part 1- A Ghanaian Theory of CP.....	317
1.1. What Does the Theory Aim to Achieve?	317
1.2. The Theory.....	318
1.3. The Theory Explained.....	323
1.3.1. Principles of Commonality Between the State and Asanteman.....	324
1.3.2. The Hierarchical Pillar of Ghanaian CP.....	327
1.3.3. The Three Cs of Ghanaian CP: Conflict, Competition And Collaboration	330
1.3.3.1. What Is the Value of Conflict?	330
1.3.3.2. Why Should the State Collaborate?	331
1.3.3.3. Why Should the State Compete?	334
1.4. Creating The Collaborative Prong.	339
1.4.1. Pluralism.....	339
1.4.2. Consistency, Coherence and Universalizability.....	340
1.5. Creating Competition.....	343
1.5.1. The Role of The Principle of Institutional Choice.....	343

Part 2- Practical Steps.	345
2.1. Changes Not Requiring Constitutional Amendment.	346
2.1.1. Creating Collaboration	346
2.1.1.1. Closer Collaboration with The Houses of Chiefs.....	347
2.1.2. Creating Competition.....	350
2.1.2.1. Restoration of (an Improved) and Intentional Lay Magistracy Programme.....	351
2.2. Constitutional Amendments.	352
2.2.1. Encouraging Collaboration.....	352
2.2.2. Towards Competition.....	356
Conclusion	356

TABLE OF STATUTES

BOTSWANA

Abolition of Marital Power Act 34 of 2004 ...	232
Bogosi Act 2011..... §17.....	324
Chieftainship Act of 1987.....	240
Constitution of Botswana 1966 as amended in 2005	
§77.....	224, 240
§78.....	240
§85.....	224
§87(1)	225
§88(2)	225
ChII.....	231
Customary Courts Act 19	
§7.....	225
§20.....	226
§23.....	226
§30.....	226
Mineral Rights in Tribal Territories Act 1967... §2.....	234
Ntlo ya Dikgosi (Salaries and Allowances)	235
Act 2019	
Tribal Territories Act 54 of 1968.	240

GHANA

Alternative Dispute Resolution Act 2010	61, 63, 64,
(Act 798)	128
Chieftaincy Act of 2008..... §58(a)	247
Constitution of Ghana 1957.....	
Constitution of Ghana 1960	46, 46
§13	69
.....	66

§§44-45	
Constitution of Ghana 1964.....	48
Constitution of Ghana 1969	48,336
Constitution of Ghana 1979.....	48
Constitution of Ghana 1992	
art 1.....	52
art 2.....	67, 69, 70, 349
art 3.....	55
art11.....	52, 128, 139
art13.....	554
art14.....	54
art 15.....	54
art 16.....	54
art18.....	55
art 19.....	24
art21.....	54,55,69
art22.....	55
art 24.....	56
art 26(c)	54
art 27.....	54
art 28.....	56
art 29.....	56
art 32.....	132
art 42.....	55
art 56.....	55
art 93(2)	60
107.....	65, 127
art 127.....	65
art 129(3)	66, 67
art 142.....	66

	art 146.....	65
	art 267.....	57, 58
	art 270.....	59
	art 272(b)	351, 352
	art 273(5)	340, 347
	art 274(3)(d)	340, 347
	art 275.....	59
	art 296(c)	70
	Ch6.....	249
	Ch25.....	127
Constitution of the Gold Coast 1916		45
.....		
Constitution of the Gold Coast 1925.....		45
Constitution of the Gold Coast 1946.....		45
Constitution of the Gold Coast 1950		45
Constitution of the Gold Coast 1954		
	§§4,	46
	§4-6.....	28;
	§4-8.....	45
	§§5.....	45
	§§43-49.....	46
	Sched II.....	45
Consultative Assembly Law, 1991, (PNDCL §14(3).....		49
253)		
Courts Act 1993, (Act 459 as amended by Act 620) Ghana		
	Part I.....	66
	§55(5)	343
Criminal Offences Act 1960 (Act 29) Ghana...	§49A.....	61, 231
	§88A.....	61, 62
	§314.....	61, 62
Ghana Independence Act 1957.		45,46

Head of Family (Accountability) Law (PNDCL 114)	61, 63, 128, 231
Intestate Succession Law (PNDCL 111)	61, 62, 343
Judiciary (Retention of revenue) Act, (Act 661)... §3.....	65
Supreme Court Ordinance 1876 §19.....	55
§83.....	57

NIGERIA

Constitution of the Federal Republic of Nigeria, 1963 §2.....	181
Constitution of the Federal Republic of Nigeria, 1999 §8.....	183
§9.....	183
§10.....	Ftnt 402
§251.....	198
Chapter IV.....	185
Evidence Act 1945 (Nigeria) §14(2)	185
Evidence Act 2011 (Nigeria). §17.....	185
Nigeria Independence Act 1960..... §§8,9.....	329
The Unification Decree: No.34, 1966 (Nigeria)	181

TABLE OF CASES

BOTSWANA

Gaseitsiwe v The Attorney General 1996 BLR 54	236
Kamanakao v AG 2002 (1) BLR 654 (HC)	241
Matsipane Mosetlhanyane & Ors v. The Attorney General [2011] CivilAppeal No. CACLB-074-10 (Bots.)	241
<i>Ramantele v. Mmusi & Others</i> , [2013] BWCA 1	236
Sesana and Others v AG (52/2002) [2006] BWHC 1 (13 December 2006)	242

GHANA

Abu Ramadan v EC [2013-2014] 2 SCGLR 1654	55, 70
Adjei-Ampofo v. AG [2003-2004] SCGLR 411	72, 143
Ahumah-Ocansey v Electoral Commission [2010] SCGLR 575	70
Amidu v. A-G, Waterville Holdings (BVI), Woyome (Supreme Court of Ghana, November 28, 2017)	71
Apaloo v EC [2001-2002] 2 GLR 372	55, 70
Apenquah's case, Fanti Law: Reports of Decided Cases on Fanti Customary Laws, 1861	87
Banful v the A-G [2017] GHASC 21	70
Bomfeh v AG [2019] GHASC 2,	119
Dawuni v Dasana (SC,23May2018)	73

Ex Parte A-G (NML Capital Ltd & Republic of Argentina Interested Parties)	72
Ex Parte CHRAJ (Richard Anane Interested Party 2007-2008) SCGLR 213	70
Ex Parte Ebusuapanyin Yamoah II (unreported,SC decided 25 July 2018)	73
GBA v A-G (Abban case) [2003-2004] SCGLR 250	70
GBA v A-G [2016] GHASC 43	70
Ghassoub v. Sasraku. [1961] GLR 496	342
GIBA v A-G (unreported, decided 03/11/ 2017)	70
Huago v Djangmah II, [1997-98] I GLR 300 – 336	74, 336,
In the Matter of Chude Mba v. The Republic of Ghana No. HRCM/376/15 (High Court Ghana, 2016)	72
JH Mensah v AG [1996-97] SCGLR 320	70
Kudjo Ghambra v Kwamin Ewa 2FLR 65	107
Mensah v EC [2015] GHSC 10	70
NPP v AG (31 st December case) [1993-94] 2 GLR 35	67,
NPP v EC [1993-94] 1 GLR 124	67
NPP v GBC [1993-94] 2 GLR 354	70

NPP v IGP (1993-94) 2 GLR 459	70
Occupy Ghana v AG (unreported) SC decision 14/06/2017.	65
Re Akoto [1961] 2 GLR 523,	119
Sakyi Maami v Dede Paulina [2005–2006] SCGLR 1116, 1124	73
Sam (No 2) v AG [2000] SCGLR 305	67
Shalabi v. A-G [1972],1 GLR 21	7
Republic v Judicial Committee of the Brong Ahafo Regional House of Chiefs, Ex Parte Obaapanin Amma Mansa, (Unreported,SC decided 23 rd January 2013)	203, 347, 351
Tehn-Addy v Electoral Commission [1996-1997] SCGLR 589	55, 70
Tinieye v. The Republic [1980] GLR 565-574	7
Vanderpuye v Botchway 3 Sel. Judg. Ct. App. W. Afr. 164 (Gold Coast 1951)	248, 341

NIGERIA

AG Bayelsa State & Anor [2012] SC 106/2009	189
AG Nasarawa State v. AG Plateau State [2012] LPELR- SC 214/2007	189

AG Nasarawa State v. AG Plateau State [2012] LPELR-SC 189
214/2007.

AG Ogun State & Ors v. AG Federation [2002] 14 SCM 189
19.

AG Ondo State v. AG Ekiti State [2001] 17 NWLR (Pt. 189
743)

AG Plateau State v. AG Nasarawa State [2005] 9 NWLR 189
(Pt. 930).

AG Rivers State v. AG Akwa Ibom State & Anor [2011] 189
SC 27/2010

OTHER

Brown v Board of Education 347 U.S. 483 119

Dred Scot v Sandford 60 U.S. 393; 119

Military and Paramilitary Activities in and against 34, 35
Nicaragua (Nicaragua v. U.S.) *Merits, Judgment of 27 June*
1986[1986] ICJ Rep. 14 para. 202.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217 169

List of Abbreviations

AFRC	Armed Forces Revolutionary Council
Comp Stud Soc Hist	Comparative Studies in Society and History
CUP	Cambridge University Press
EC	Electoral Commission, (Ghana)
EJDP	European Journal of Developmental Psychology'
EUP	Edinburgh University Press
Eur Law J	European Law Journal
Eur. J. Soc. Psychol	European Journal of Social Psychology
FHRFs	Fundamental Human Rights and Freedoms
GAAS	Ghana Academy of Arts and Sciences
GLR	Ghana Law Report
GoG	Government of Ghana
GSS	Ghana Statistical Service
GUP	Ghana University Press
Hague J. Rule Law'	Hague Journal on the Rule of Law
HUP	Harvard University Press
IAS	Institute of African Studies, University of Ghana
IEA	Institute of Economic Affairs (Ghana)
IUP	Indiana University Press
J Econ Inequal	Journal of Economic Inequality
JAH	Journal of African History
JAL	Journal of African Law
JBS	Journal of Black Studies
JMAS	Journal of Modern African Studies
LUP	Leiden University Press
MUP	Michigan University Press
NCCE	National Commission on Civic Education
NDC	National Democratic Party
NHoC	National House of Chiefs
NLC	National Liberation Council
NMC	National Media Commission
NPP	New Patriotic Party
NRC,	National Redemption Council
Ohio UP	Ohio University Press
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PNDC	Provisional National Defence Council
PoLAR	Political and Legal Anthropology
PUP	Princeton University Press
Rev Relig Res	Review of religious Research
RGL	Review of Ghana Law
SCGLR	Supreme Court of Ghana Law Report
SMC	Supreme Military Council
UC Press	University of California Press
UCP	University of Chicago Press
UMP	University of Michigan Press
UTP	Univeristy of Toronto Press

UWP
YUP
THSG
JSAS

University of Wisconsin Press
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Chapter 1

Introduction

After nearly thirty years of shaping life in the West African country of Ghana, the 1992 Constitution has finally matured in credibility. For the first time in the country's six and half decade history, law teachers are teaching the same Constitution they themselves studied. Citizens no longer think of it as 'the supreme law...for now'. Instead, an attitude of permanence has attached to it as faith in its longevity has increased over time. This confidence in the Constitution's authority to determine inter-human, human-state, human-institution relations is evident in the sheer scope and volume of constitutional enforcement and interpretation litigation that has been initiated by ordinary persons- legal and natural- in the course of this Fourth Republic. But the Constitution's battle to be the truly, tangibly, and only supreme law is far from over. It stands in competition on several fronts with the multiple tribal polities that predate it, exist independently of it, and to which its citizens also belong. These tribes are configured very differently from the constitutional state fashioned on western liberal democratic principles.

Given the constitutional distance between the state and the tribal polities, there would have been conflict between the two sides even were they agreed on the ends and purposes to which they should be applied. But as they are both rooted in the world view that proceeds from their constitutional *raison d'être*, the experience of citizenship they offer differs -in some cases irreconcilably- one's from the other's. The battle for supremacy is therefore fought out largely in the arena of citizen obedience; for it is in the compliance and self-definition of citizens that sovereignty is proved. Though it is,

in the first instance, a claim, sovereignty is also a fact - the fact that a substantial portion of the claim is or will be true in the future. Thus, only when citizens shape their identity and live their lives in line with the tenets of a polity is that polity entitled to call itself sovereign. For only then is that polity's claim shown to be plausible. Without sovereignty, a polity is not worth much. It is like a child who, though wealthy and talented, must submit to the word of a guardian. Sovereignty represents the constitutional maturity of a polity. As S Huntington has pointed out,¹ and our study of Asanteman will confirm, sovereignty may exist by degrees. But partial or absolute, it must exist. As such, the sovereignty question is a critical one for polities.

This accounts for the unbending stance the state in Ghana has historically adopted towards tribal polities within her borders. It fears that any acknowledgment or concession which could be construed as the state accepting these polities as sovereign amounts to an admission that, it (the state) is not itself sovereign. The tribal polities, in response to this posture, but also as a denial of the state's sovereignty over them, actively, and almost instinctually resist the state whenever possible. There is, consequently, a tension between the two entities as they struggle for supremacy in the lives of their shared citizens. That tension carries with it the danger of combusive collision and with that, in turn, the demise of the state and/or the tribal polities. The tension is therefore not an inconsequential reality. But the option of removing one of the combatants does not exist since both sides perform key functions in citizens' lives. To guarantee that the state authored by the 1992 Constitution continues to exist, it is

¹ Samuel Huntington, *Political Order in Changing Societies* (Yale 1968) 20

critical to find either a resolution to this tension, or a philosophical approach to its management that prevents the latent destructive potential from materialising.

This thesis studies that tension and identifies a theoretical strategy, which it commends to the state as best protecting its interests in this matter. While it is addressed to and about the state of Ghana, it holds critical insights for all similarly situated postcolonial African states. The study is based on doctrinal work, and secondary data in the form of ethnographic and sociological literature for its empirical knowledge. Dissecting the tension to identify its nature and sources, it places the struggle firmly within the arena of sovereignty. Though its intended central beneficiary is not the state, but rather, the ordinary, rural Ghanaian, the thesis addresses its recommendations to the state. Notwithstanding its greater resources, the young age of the state, its origins, its current impact- or lack thereof for large swathes of the population-, and its greater responsibility for and towards citizens make it the underdog in the struggle. A sustainable solution will make the state more efficient (as it will not need to expend resources on the struggle) and more resonant (since it will be able to use the saved resources toward doing more for citizens).

I argue that the root of the state's intransigence is its colonially bequeathed Westphalian view of sovereignty which renders it unable to accept the tribal polities as self-referencing sites of authority. Meanwhile, the resistance on the part of the tribal polities is purely from a place of self-preservation. Therefore, this thesis argues, the state must lead in any effort to resolve or manage the tension. Thus, it explores both the problem and some possible ways of dealing with the state-tribe sovereignty tension.

The important foundational insight on which this thesis rests is the idea that a total resolution of the tension is undesirable. This idea runs contrary to the traditional position in literature on pluralist legal orders, which views the tension as injurious and therefore to be resolved. If one is concerned only with the present condition of the state, then resolving the tension in its favour is a natural and logical aim of the theorising enterprise. The conclusion that the tension is actually a good thing is arrived at by centring the study of the legal order on the welfare of the average Ghanaian. When one shifts the focal point to the citizen, the perimeter of the philosophic enterprise becomes the ends to which persons constitute themselves, first, into peoples and then into states. From this perspective, the aim of the theorising venture is to secure the welfare of the citizen.

The key question then is how do we give the rural citizen (who comprises the majority of the populace), the benefit of her membership of her tribal polity and, at the same time, the lived experience of citizenship guaranteed by the 1992 Constitution? The answer to this question is that we must somehow arrive at a state of affairs wherein the tribal polities are preserved, but their laws are shaped by the 1992 Constitution. The theorising efforts of this thesis are thus geared towards achieving the dual goals of preserving cultural diversity while still achieving a constitutional consilience between the two sides to ensure that every Ghanaian has access to a standard experience of citizenship irrespective of her tribal affiliation or geographical location within the country. It is the argument of the thesis that this objective is best attained, not by resolving the tension so that it is dispelled; but by *managing* it so that it remains latent—neither exploding nor dissipating. In this way, the Ghanaian can achieve an empowering balance between her dual identities as a citizen-subject.

I endorse constitutional pluralism as the way to achieve this tense truce between the two sides. I establish a model of competition and collaboration between them which, while allowing both the state and the tribal communities to maintain their understanding of sovereignty; nevertheless, causes them to assert it from a non-monist perspective. The state's historical intractability has been at the steep cost of the opportunity, on the one hand, to tap into the strengths of traditional authority (collaboration), and, on the other, to leverage its own strengths against the tribal polities and thereby force them to evolve within and predicated on the 1992 Constitution (competition). The value of the Janus-faced relationship I recommend is that it uses each side as a check on the other and thereby allows the rural citizen to carve a life which is neither stuck in a frame of reference dictated by a past way of life unsuited to navigate a modern world, nor emptied of meaning by a lifestyle unconnected to who she understands herself to be.

To give context and fullness to the discussion, I situate it in the sphere of judicial power. So that, though the principles of the discussion are applicable to all aspects of sovereign power, this thesis demonstrates, explicates, and models its points with judicial power as the expression of sovereignty. Still, limited reference is made to the other arms of sovereign power where useful. Judicial power is sometimes mistakenly considered to be the weakest of the three forms of state power.² Executive power is backed by the ability to enforce sanctions, and legislative power creates sanctions- or, as Hamilton put it, they are backed by the sword and the purse respectively³. The leverage these two departments wield is tangible and thus, it is easy to believe, stronger. However, the

²E.g., Alexander Hamilton writes in Federalist 78 that judicial power is the weakest in the state.

³ Ibid.

work of the executive is usually impersonal and institutional because it deals with citizens as a collective rather than as individuals. In a society in which the Rule of Law prevails in any appreciable degree⁴ the executive offers services to the generality of the people in a generic way, making its outcomes predictable. Similarly, in such a society, the legislative power is not exercised to target specific persons but to guide general conduct. Indeed, this is what made life in Ghana under military rule frightening. Executive or legislative power could be exercised with a single and particular person in mind.⁵

Judicial power is the power that interacts with the citizen in the most individualised way. Disputes that end up before official judicial authority are usually matters of deep personal importance to the parties involved. Thus, judicial power occupies an emotive position in the life and affections of citizens. In adjudicating crime and constitutional rights, it bends individuals to the will of the state. By resolving private law disputes, it imposes the viewpoint of the state on the economic, and professional affairs of citizens. It can be argued that the Constitution's direct relationship to citizens is more attributable to the work of the judicial power than either the executive or the legislative power. Data from the EU suggests that when the other two branches work well, they invoke no especially strong emotions of attachment to the state.⁶ But, when they work badly, they

⁴I subscribe to Raz's view that the Rule of Law is a matter of degree not an all or nothing issue. Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law* (OUP 1979) 210

⁵ E.g., *Shalabi v A-G* [1972] 1 GLR 21; *Tinieye v. The Republic* [1980] GLR 565-574

⁶ Victor Dahl et al, 'Apathy or Alienation?: Political passivity among youths across eight European Union Countries' (2017) 15 (3) EJD 284; Therese O'Toole et al, 'Tuning out or left out? Participation and non-participation among young people. (2003) 9(1) Contemporary Politics 45; Inta Mierina, 'Political Alienation and Government-Society Relations in Post-Communist Countries.' (2014) 185 Polish Sociological Review 3; RH Kimberlee, 'Why Don't British Young People Vote at General elections?' (2002) 5(1) J.Youth 85.

elicit collective fear and frustration.⁷ Every judicial experience, on the other hand, is personalised to the individual, whose opinion of the state is thereafter permanently informed by that encounter. For that reason, the judicial power in a state is, in my view, the strongest of the three powers. It most clearly articulates the constitutional identity of the state.

In a state like Ghana where it also has the power to check executive and legislative abuse, judicial power holds the sustainability of the state in its palm. Similarly in traditional polities, especially because they place such emphasis on the collective as opposed to the individual, customary adjudication represents an area of particular access and participation for subjects. Tribal judicial authority thus occupies the same central role in the subjects' lives and hearts as does state judicial authority in its citizens. Focusing this study on judicial power cuts to the heart of the matter, for the Constitution's rein on adjudication within the polity is critical to its ability to fully articulate and substantiate a claim to establish, sustain and perpetuate the polity's identity *qua* polity (ie a sovereignty claim).

Again, for purposes of depth, rigour and structure, I exemplify the constitutional lived experience with the human rights enshrined in the Constitution. I juxtapose this with the customary law equivalent. My discussion, conclusions and recommendations on the inter-polity tension, its implications and management strategies are informed by

⁷ Robert Rotberg, *When States Fail: Causes and Consequences* (PUP 2004), Ch1

and directed toward achieving the collabo-competitive relationship in the area of citizens' rights. While the identity, and totality of the 1992 Constitution's sovereignty claim is not captured simply in the human rights regime it sponsors, that aspect of it does provide a ripe example of the tangibility of a constitutional claim to control life within a jurisdiction by a state. In respect of tribal polities with unwritten constitutions and laws, no area more clearly furnishes a study with the content of its sovereignty views and claims than the rights and responsibilities that individual members of these societies possess. This makes rights regimes a most apt field within which to study, assess or theorise sovereignty and sovereignty relations between overlapping politico-constitutional entities in Africa.

Despite a significant body of literature condemning the use of the word 'tribe' in studying indigenous polities, particularly in Africa, this thesis prefers that term to any of the more politically correct terms that are nowadays used in its place. These terms range from commonly used substitutes like 'ethnic group/ethnicity'⁸ to less popular ones like 'galactic polity'⁹. The fall from grace of the term 'tribe' can be traced directly to the fall of colonialism and the imperial thinking behind it. Twentieth century anthropological descriptions of 'tribe' are so diminishing¹⁰ that, the term is now often understood as being intended to communicate beside-or perhaps as much-the specific sociological phenomena encapsulated in it, a pejorative view of their value.

⁸ PP Ekeh, 'Social Anthropology and Two Contrasting Uses of Tribalism in Africa' (1990) 32 *Comp Stud Soc Hist* 660, Ekeh credits Aidan Southall with this terminological shift.

⁹ Richard Werbner, *Reasonable Radicals and Citizenship in Botswana: The Public Anthropology of Kalanga Elites*, (IUP 2004) 36.

¹⁰Even Malinowski's effort to redeem the image of the tribesman is replete with terms like 'savage' and 'primitive'. Bronislaw Malinowski, *Crime and Custom in Savage society* (Kegan Paul 1966).

This accounts for the shift away from its use in the academy. However, the problem with the replacement terms is that they do not accurately describe the phenomenon that is the native political entity. Yet, in a constitutional study, it is imperative to correctly identify the exact entity being studied. Ambiguous terms serve only to obfuscate and confuse, rendering any insight obtained inutile. An example is instructive. The Asante are culturally and linguistically related to several other groups including the Fante, Akyem and Akuapem. These peoples view themselves as collectively forming the ‘Akan’ although not all their languages are mutually intelligible. They acknowledge a kinship of very loose sort with all other Akan collectives, but not with individual members thereof. They are not all organised alike politico-constitutionally. But their political structure is not responsible for the internal boundaries of kinship. How does one accurately account for these multiple levels of identity through ambiguous terms?

The boundaries of ‘tribe’ are precise- at least internally,¹¹ in ways that the replacement terms simply lack. Indeed, it actually facilitates our nuanced four-level sense of personhood- as members of our: (1) smaller, tightly defined and defining native geopolitical unit of peoplehood (i.e., town/oman (‘nation’)); (2) within our larger political, socio-cultural unit of tribe; (3) in juxtaposition to others within the purely cultural, originative bounds of ‘ethnicity’; (4) sometimes within, sometimes next to our even looser, not entirely tangible (yet) territorially defined, constitutional, national

¹¹ I am aware of the debate about the imprecision of the *definition* of a tribe. But that is always a problem faced by outsiders. Members of a tribe have no doubt what the boundaries of the term are or where their own unit’s label ends. Ligaya Mishan, ‘What is a Tribe?’ (New York Times (1 April 2020) <<https://www.nytimes.com/interactive/2020/04/13/t-magazine/tribe-meaning.html>> provides an eloquent explanation of why this is.

citizenship. I, for instance, am from Cape Coast, a standalone political unit (1), within the Fante tribe (2), which makes me Akan (3), and-not therefore- I am Ghanaian (4). I use 'tribe' to avoid conflating these levels of identity.

The thesis reaches its recommended solution, not only by presenting the virtues of its preferred philosophy, but also by engaging with the perceived strengths of alternative philosophies. It does not claim constitutional pluralism (CP), which it endorses, is the solution to all the state's problems. Rather, it makes the much humbler claim, that CP is *comparatively* more capable of preserving diversity while stimulating constitutional congruence and thereby achieving the balance in identities citizens need to self-actualise in a jurisdiction containing overlapping polities. As constitutional philosophies touted for their potential to manage diversity, federalism and bicameralism are appropriate comparators in this study.

However, I must emphasise, this is not a general comparison of the three philosophies; but a limited one; constrained by and concerned only with their potential outcomes in respect of the dual goals already mentioned. It draws on the experience of Nigeria with federalism and Botswana with bicameralism to demonstrate the superiority of constitutional pluralism in achieving both stated aims for Ghana: i.e., the experience of similar rights for all citizens and the preservation of the identity and sense of self rooted in their native polities. I conclude the study by suggesting some adjustments to current practice and some constitutional amendments that will infuse our order with a CP ethos.

The thesis is organised into two thematic parts. In the first Part, I introduce the reader to all the important elements of the discussion. Ghana is an under-researched jurisdiction as far as its constitutional affairs are concerned. It would thus be unreasonable to commence the discussion with the assumption that the reader is possessed of sufficient familiarity with the jurisdiction's history, experience, or configuration to properly assess the positions I advance. Part I provides that bridge.

In chapter 2, I engage with the scholarship on sovereignty and settle on Neil Walker's definition of sovereignty as the working definition of this study. It is an important chapter. For, being a centuries old concept, sovereignty has meant different things to different peoples in different times and played a critical role in the political and constitutional development of Europe. Through colonialism, European conceptions and uses of sovereignty have shaped African states. But Africans, being so distinct from Europeans in history and culture, have not responded to the concept in the same ways as European societies did. Therefore, African states have not functioned as have the Westphalian models on which they were built. Chapter 2, with its in-depth discussions of what sovereignty is, where it came from, and what its role in a state is sets the stage for the discussion on the struggles over sovereignty plaguing Ghana and many other postcolonial African states.

Chapters 3 and 4 introduce the reader to the two sides in the struggle. The profiles I build elucidate the constitutional *raison d'être*, configuration, and the resulting ethos of each side. I explore the ways in which they express sovereignty. In Chapter 3, I zoom in on the state of Ghana. I give a brief historical account of its manifestations of sovereignty before the Constitution entered into force in January

1993. I then sketch the normative claim that the state makes in the small-c constitution. By examining the text of the 1992 Constitution and a selected sample of legislations, I highlight the normative claims it makes over the territory and its people generally and over customary law specifically. I pay particular attention to chapter 5 of the Constitution which contains the Fundamental Human Rights and Freedoms. I draw, additionally, on chapter 7 of the Constitution which contains the political rights so central to democracy. I also equip the reader with a grasp of the judiciary of Ghana and the Supreme Court which heads it, and through whom judicial expressions of sovereignty are made. I then assess the effectiveness of the normative claims teased out in the earlier part of the chapter. At its conclusion, the reader is sufficiently acquainted with the state of Ghana to engage with the discussion.

The nature, constitutional configuration, and general ethos of the over eighty tribal communities in Ghana so differ that it is often impractical or misleading to speak in generalised terms when speaking of customary law systems. For that reason, it is difficult to achieve depth or rigour in any study that treats the myriad customary law polities as one kind of entity with universal characteristics, or bundles them into clumsy groups based on geography, ethnicity, or other metric. In order not to compromise on texture and thoroughness, therefore, I use a single customary law polity as a paradigm of tribal polities. As the largest and most centralised tribal polity in pre-colonial Ghana, Asante has had a disproportionate effect on Ghana's political and constitutional development since its rise in the seventeenth century. I therefore use State-Asante relations as the archetype of the sovereignty struggle this thesis studies. Some reference will be made to other polities where an exclusively Asante focus muddies the argument.

Chapter 4 explains the constitutional configuration, offices, and judicial system and processes of Asante. I describe and discuss its key constitutional symbols and their role in creating a consistently religious and military ethos across its history. I show how these elements of its society intertwine to create a distinctive Asante identity based on the pillars of communalism, social harmony, and religion. I also assess the extent to which Asante's self-perception matches or is misaligned to its actual legal power. The chapter leaves the reader with no doubt as to the resonance of Asante identity and therefore the Asante polity for those who belong to it; illustrating vividly the distance between the two sides and therefore the scope of the mutual incomprehension that dictates their relationship.

Chapter 5, which concludes this first part of the thesis, painstakingly draws out the import of the differences between the sides and shows how these differences play out as a sovereignty conflict and the ways in which that conflict develops. After articulating the problem which arises out of the truths in the preceding chapters and with which this thesis is concerned, chapter 5 explains why the problem is both serious and worth solving. It deliberates on the value of each side and concludes that allowing the tension to grow unmanaged until it culminates in a combustive collision is undesirable regardless which side emerges victor-if indeed, final victory is even possible. The chapter concludes that a management strategy to keep the tension in abeyance is the only viable way forward.

The second part of the thesis seeks to identify this management strategy. It explores three philosophic concepts and concludes with practical recommendations for implementation in Ghana. In chapter 6, I explore federalism in relation to the dual goals

of diversity preservation and constitutional congruence in state-tribe interactions. Federalism is often justified in terms of diversity preservation. I explore the literature in this vein and find some encouraging insights on that point. I test their applicability in the African context through the lens of Nigeria- West Africa's oldest and largest federal Constitution. The study suggests that while federalism does a fair job of managing diversity, it can entrench difference in ways that make constitutional congruence unattainable. As a way to keep the sovereignty tension latent and thereby balance the two identities of the African citizen therefore, federalism's potential is not encouraging.

Chapter 7 uses Botswana as its study jurisdiction on bicameralism. This is because the thesis is not so much concerned with bicameralism generally as with a form of bicameralism that incorporates tribal leaders into the state legislative machinery as a second chamber. The chapter discusses bicameralism's ability to bring all players to the same table and forge a collectively agreed upon direction, the implementation of which is participated in by both sides. It however finds that the process so comingles tribal authority with state authority as to distort the tribal polities themselves, costing them their constitutional cultural identity and authenticity; a great loss to tribal subjects for whom that polity shapes the meaningfulness of their existence. Thus, for bicameralism too, managing the sovereignty crisis to balance the dual identities is unachievable.

Chapter 8 explores constitutional pluralism (CP), which this thesis endorses as being able to accomplish this balance of identities -if imperfectly, at least sustainably. I discuss CP literature, extracting guiding insights for my own theory in the scholarship

of Joseph Weiler and Miguel Maduro. CP's great strength is that it seeks toleration by each side of the other's sovereignty claim. Rather than tamper with either side's investment in the idea of its sovereignty, it offers them a different way to compute it; redirecting their efforts to back their claims, away from eliminating rival claimants, toward expanding the sphere of their effectiveness. In the battle for the citizen-subject's willing obedience, the tension is sustained but defused. The citizen-subject becomes recipient of increasingly better offers from both her identity-creating entities and is thereby empowered to self-actualise.

In the final chapter of this thesis, I craft my own theory of CP for Ghana and exemplify its application through recommendations for change to current judicial practice. I propose two sets of adjustments the state can make. The first set does not require legislative action to implement and includes greater collaboration between state courts and National and Regional Houses of Chiefs in determining customary law rules during litigation. The second type of recommendations require constitutional amendment. The repeal of articles 273(5) & 274 (3)(d) falls within this group. This thesis limits itself to the utility of the recommendations, leaving it to later work to engage more fully with questions such as the attainability of the consensus required to actualise them.

Constitutional theory informed purely by the African experience is uncommon in academic literature. This is largely because African states as they exist now are all so young, and much of their lives have been under colonial or authoritarian rule or both. The jurisdictions studied in this thesis have the oldest democratic Constitutions on the continent; and none is even six decades old. The dearth of constitutional theory

literature is understandable, but nevertheless deleterious. The role of theory in statehood is to carve the path that action, policy, and legality take. It is theory that has created and sustained legal myths like the state, territorial borders, and regional blocs.

Without engaging, cultivating, and evolving our own constitutional theory, postcolonial African states condemn themselves to struggling to forge forward, misguided by Eurocentric concepts. This thesis takes an important step towards generating African constitutional theory. It not only provides the sole focused study on the Asante constitution in existence, it articulates as a problem in philosophy, the challenge that tribal authority presents to the state. Additionally, the chapters on Nigeria and Botswana provide a rare example of comparative African constitutional theory. Finally, the thesis in its closing chapter demonstrates how theory becomes practice by seeking to translate the theoretical insights into action steps. In so doing, it opens avenues of thought and offers new vistas for African legal scholarship.

PART I
THE PARTIES & THE PROBLEM

Chapter 2

Sovereignty

Introduction

The concept of sovereignty is so engrained in the ‘legal and political architecture of the state and of inter-state relations’¹ (i.e. the idea and functioning of the state), that it is implied in any consideration of relations between states and their citizens; states and other states; and states with large, organised non-state groups or entities. As Neil Walker puts it, sovereignty is ‘part of the deep and often taken-for-granted conceptual structure through which law is authorised and organized as law, and in terms of which we are able to conceive of legal order in general’.² This thesis seeks to resolve the challenges faced by the judicial power of the state of Ghana in its relations with the customary law systems of tribal polities within her territories as epitomised in state-Asante relations. At the base of the friction between the state and Asante is the need every polity has to be and demonstrate its sovereignty. The thesis is, therefore, in sum, a discussion of sovereignty in the context of the state of Ghana.

What then does the principle mean to me and why is my conception of it philosophically sound? In this chapter, I establish the theoretical parameters within

¹ Neil Walker, ‘Sovereignty Frames and Sovereignty Claims’ in Neil Walker, *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013), 2

² Walker n1, 2.

which I will work in resolving the concerns of the thesis. The chapter develops as follows: Part I discusses Neil Walker's definition of sovereignty which I adopt as the working definition of my thesis. The Part distils from it, the essential features of the concept for my purposes and explains why I endorse each element as a necessary component of the principle. Part II explores some objections that could be taken to the chosen definition. Though, I concede the force in some of them, I nevertheless find that they do not succeed in eroding the value of Walker's definition. At its conclusion, this chapter will demonstrate not only the implications of sovereignty for a state, but also, why it is inevitable and indispensable in every functional state. That insight clarifies the urgency and importance of this thesis's efforts to resolve the sovereignty challenges Ghana faces in the judicial realm when it encounters tribal judicial power.

Part 1- A Working Definition of Sovereignty

The centrality of sovereignty to coordinated group life in human societies is responsible for the long history of group struggles over its existence, absence and incidents. It continues today to 'silently frame the conduct of much of modern politics'.³ Consequently, myriad articulations have been offered of its significance over the course of several hundred years of modern statehood. This, in turn, has resulted in much recent scepticism as to the meaningfulness of the term.⁴ The task of this Part is to provide the theoretical parameters for this chapter's discussion on sovereignty.

³ Robert Jackson, *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*. (1999) 47(3), *Political Studies* 431, 431

⁴ Neil MacCormick, 'Beyond the Sovereign State' (1993) 56(1) *MLR* 1; Don Herzog, *RIP Sovereignty* (YUP 2020) esp ch5;

There are two sections to this Part. In the first section, I focus on Neil Walker's definition of sovereignty, which I adopt as the underlying understanding of the concept throughout this thesis. I begin the section by setting out the definition. I then discuss the elements of sovereignty he identifies; explaining what each implicates and why I consider them essential. In the second section, I identify and assess some objections that could be taken to Walker's definition and show how the definition withstands criticism. It must be noted at the outset that it is not the aim of this Part to conduct an exhaustive review of the very many definitions the concept of sovereignty has had. Rather, inspired by Barber's argument on the importance of common understandings to philosophical discourse⁵, I aim in this Part, to provide key common understandings and theoretical context for the main discussions and insights of the thesis that occur in later chapters.

1.1 Walker's definition of sovereignty.

Neil Walker defines sovereignty as:

the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the

⁵ NW Barber, 'The Significance of the Common Understanding in Legal Theory' (2015) 35(4) OJLS 799.

particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.⁶

It must be noted that the focal point of Walker's work on sovereignty is state sovereignty. He does not engage with such related concepts as popular sovereignty. The key elements which this definition encapsulates are: the claim as a discourse, a supreme ordering power as the maker of the claim, a normative assertion as the content of the claim, and the effectiveness of that assertion as proof of its plausibility. The remainder of this Part will discuss these elements of his definition.

1.1.1. Supreme Ordering Power.

In our working definition, sovereignty imposes on and over the polity a supreme ordering power. This idea connotes both voluntary subscription and mandatory compliance. Sovereignty is therefore as much a political as a legal concept.⁷ However, as Walker notes, in its political sense, sovereignty is a merely descriptive tool for empirically assessing the power dynamics between the people and their government. It is only in its legal sense, that sovereignty can become an explanatory model for the dynamics of the politics; for in that sense, it implies institutional autonomy and decision-

⁶ Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003), 6.

⁷ Neil Walker, "Sovereignty and Differentiated Integration in the European Union." 1 1998) 4(4) Eur. Law J. 355, 357.

making authoritativeness and heteronomy.⁸ These features allow law and its influence to be evaluated discretely from all other factors⁹ because they do not increase or decrease according to public sentiment about specific events.

Unlike political sovereignty, legal sovereignty is not subject to the indefinable human factor that makes the former variable. Again, the absence of political sovereignty does erode, but does not negate legal sovereignty. What the contradictory persistence and impotence of the attempted state of Biafra illustrates is that while political sovereignty adds moral and operational force to legal sovereignty, it cannot achieve much without it. Thus, while I do engage with sovereignty in both its legal and political senses in the thesis, my discussion of it as a theoretical concept focuses on its legal sense.

The idea of a supreme ordering power requires that sovereignty be indivisible. But viewed as Walker does, indivisibility is not a question of locus. That is to say, sovereignty is not divided only because power is wielded by multiple agents. That viewpoint is the legacy of Westphalian sovereignty which reposed all power in a sovereign office, typically, the monarch.¹⁰ A better way to view sovereignty's indivisibility in the post-westphalian era is in terms of an ultimate source of validity from which the authority of the multiplicity of agents flows.¹¹ Although, as Barber

⁸ Neil MacCormick, 'The Concept of Law and 'The Concept of Law' (1994) 14(1) OJLS 1.

⁹ Walker, n7, 357

¹⁰ Jackson n3, 439-440

¹¹ Walker n7, 359

notes, an account of sovereignty is not automatically an account of the state,¹² the two are clearly intertwined. The self-perception of a state as the supreme ordering power of the polity renders sovereignty an attribute and, indeed, a virtue of all states.

As the supreme ordering authority over its land and people, the state acts in its own name and for its own ends. Though ideally, those ends are the welfare of its people, they need not be in order for the state to pursue them. Sovereignty:

comes into existence through a process in which a group of people within a defined territory is moulded into an orderly cohesion through the establishment of a governing authority that can be differentiated from society, and which is able to exercise an absolute political power.¹³

Thus, although sovereignty is born of the polity reaching a certain level of maturity, once formed, it owes its continued existence, not to the polity, but to the state.

It is therefore tempting, but misconceived, to think that a sovereign polity will always have a sovereign people. There is no necessary connection between a state asserting its sovereignty and its people being sovereign. As a separate entity, the state both requires, and can possess characteristics and powers its members may individually, or collectively not possess. The state's (potential) immortality is an example of the former and its ability to execute its criminal citizens are examples of the

¹² NW Barber, *The Principles of Constitutionalism* (OUP 2018), 22

¹³ Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (ed.) *Sovereignty in Transition* (Hart 2003) 56

latter. A state will be sovereign even if its people have little say in its direction. Popular sovereignty simultaneously creates and justifies a relationship between the people and their state and is, therefore, a way of understanding the sovereignty that the state asserts. But it is necessarily secondary to-perhaps even parasitic on- state sovereignty.

The position of supreme ordering power is claimed by the state equally in a state that subscribes to popular sovereignty as in one that does not. The main difference is that in states of the former type, the purpose of the state and the sovereignty it asserts is ascribed to the people's will. The truth of such an assertion may vary from state to state and is often linked to the strength of the state itself. Thus, popular sovereignty's claim to be the source of the authority of the state should not be taken to be an assertion to be the supreme ordering power. Rather, it is a claim to justify the existence of that supreme ordering power. It occupies much the same place in a republic as the divine-right of kingship occupies in a monarchy.

1.1.2. The Normative Claim of Sovereignty.

In our definition, the supreme ordering power asserts the normative claim of sovereignty. This claim contains two far-reaching assertions: first, that the Supreme Ordering Power is the power that shapes the character of the polity and, second, that it does so by being the ultimate authority within that polity. Walker argues that the supreme ordering power *must* possess 'an epistemological and ethical self-assurance' that translates into a normative claim 'to possess a guiding knowledge of the collective

affairs of those under its jurisdiction – that is finally magisterial.’ To do otherwise, would be to permit itself to be frustrated by any higher or competing jurisdiction of the good’.¹⁴

The claim is normative in that it is not simply a claim of fact, but critically, of right. The state bases its right to make the claim, not on strict reality, but on its identity. It contends that it should be obeyed because it is the state; not because all those it addresses, in fact, obey it. It is in this sense that Neil Walker calls sovereignty partly a ‘speech act’.¹⁵ It asserts a factual state of being; a claimed state of being, and a promised state of being. Or in Walker’s words it is locutionary, illocutionary and perlocutionary¹⁶.

The first leg of normativity which asserts the authority to shape the character of the polity, presents sovereignty as a unity and as a deliberative force. It is not simply an authority that tells members what to do. Sovereignty involves a concerted effort to shape the conduct of members so as to fashion both a common identity and a direction for its members. In so doing, it creates and maintains the polity through a culture, and a resonance that extends beyond either peoplehood or territory.

The second leg of the normative claim is focused on the nature of the authority by which the first leg is achieved. It too has two prongs to its composition: absoluteness

¹⁴ Neil Walker, ‘Out of Place and Out of Time: Law’s Fading Co-ordinates.’ (2010) 14 *Edinburgh Law Review* 13, 32

¹⁵ Walker, n6, 6–7.

¹⁶ Neil Walker, ‘The Variety of Sovereignty’ in Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen (eds) *Sovereignty Games* (Palgrave Macmillan 2008), 26

and finality. Finality- i.e. the claim that the state wields supreme authority over the people and territory to which it asserts title -is a claim of hierarchy. It asserts that there is no other entity with the authority to reverse or countermand it. Finality also means that the sovereign power, not others, is enforcing the rules it, not others, has made.¹⁷

A state that has control over its people and territory, but which enforces rules made by others is not the final authority in its territory. Ghana between 1954 and 1957 had internal self-government. Her cabinet was the executive authority in most matters, and there was a Legislative Assembly.¹⁸ But she did not have the power to refuse to enforce a rule made in Westminster.¹⁹ Therefore, she was not juridically autonomous²⁰ and so was not claiming to be sovereign. Her constitutional power was derived from another constitutional order. A normative claim to sovereignty fails unless the claim is to finality in its authority.

Absoluteness of authority is key to the continued validity of the normative claim. This is a corollary but distinctly different claim from finality. It is the claim that in no sphere of life, in no part of its territory is the state not the final authority. Thus, it is a

¹⁷Stephen Krasner, 'Problematic Sovereignty' in Stephen Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities*, (Columbia 2001), 2

¹⁸ Constitution 1954 §§4-6

¹⁹ Ibid.

²⁰ A key component of what Krasner calls 'Westphalian sovereignty' Stephen Krasner, *Sovereignty: Organized Hypocrisy* (PUP 1999) Many of the indices of Westphalian sovereignty are beyond the scope of this thesis. They include control of fiscal policy, trade relations etc. I therefore limit my use of the concept to judicial affairs. See Krasner, n17

claim as to the scope of authority. As Barber notes, if the state accepts that its authority does not extend to a portion of its citizenry or territory, it allows its existence, at least in that respect, to be disputable.²¹ A normative claim of sovereignty is therefore a claim that a state has and will have, in perpetuity, final and total control over the named territory and its inhabitants.

The normativity in the definition captures, moreover, a multi-temporal dimension of the identity-creating force of sovereignty. It refers to the past assertions of authority, (establish), asserts it in the present (sustain) and makes an assertion about and in the future (continuing source). In other words, sovereignty involves a claim to create and enforce ‘the whole of law and to the whole of life under the law for all who fall under its perpetual jurisdiction.’²²

Walker’s use of ‘purports’ in reference to the normative claim of sovereignty is not without significance. It is acknowledgement of the fact that the normative claim is always simultaneously partly true and partly false. Its claims in regard to the future are unproven. The claims it makes about its role in the past can as easily be made *ex post facto* as before. Only its proven claims about the present are objectively true. The multi-temporal dimension of the normative claim is thus a wholly claimed state of being within the discourse of sovereignty. But it is indispensable because it lends force to the normative-factual claims of finality and absoluteness²³. The normative claim is

²¹ NW Barber, *Principles of Constitutionalism*, (OUP 2018), 26

²² Walker n14, 31

²³ Hence Kelsen’s resort to the historically first constitution.

embedded in the constitution of the order, which makes it independent of the persons filling the offices of state at any time. This, in turn, means that the claim survives every set of officeholders. In this way, the normative claim provides for the continuity of legal systems²⁴ -ie its multi-temporality- and is therefore critical to sustaining sovereignty.

1.1.3. Sovereignty as a Discourse

A discourse requires two participants. For sovereignty to be a discourse, then, it must have a second participant who engages with the supreme ordering power and responds to its claims. So, who is sovereignty's audience? and how does that audience react to the sovereignty claim such as to make it a discourse?'

1.1.3.1. Sovereignty's Audience

Sovereignty is a discourse on two planes; that is to say it has two different audiences: one internal and the other external.²⁵ Krasner designates these as domestic and international sovereignty.²⁶ Internal or domestic sovereignty refers to claims made to the citizens and residents within the territory about the state's control over them. Or in the terms of our working definition, internal sovereignty is the supreme ordering power's claim *to provide a continuing source and vehicle of ultimate authority for the*

²⁴ HLA Hart, *The Concept of Law* (OUP 1961), 59-61

²⁵ Barber, n21

²⁶ Krasner, n20

juridical order of that polity.^[11]

External or international sovereignty refers to the state's claim that it is the power that actually governs and decides how it will govern the people of its territory to the exclusion of all others.²⁷ It is frequently presented as claims made exclusively in the international community *qua* comity and to other states as individual actors. But that view overlooks the critical fact that the people of the polity are also addressed in the claims of exclusivity.²⁸ A better way to view the distinction between internal and external sovereignty is that in the former case, the sole audience is the polity itself. The latter, however, addresses both the polity and the international community of states.

In the late sovereignty era in which we now dwell, the increased interactions in the international sphere, and the domestic reach that supranational entities have acquired has made the coherence of the discursiveness of sovereignty less obvious. But as Walker argues, it is in their mutual subscription to an epistemic claim to 'know and order the world in a particular way', that unifies the internal and external planes of the sovereignty claim.²⁹ A search for commonalities between the two planes is apt to confuse and lead to the conclusion that Walker's definition renders the principle protean and vague.³⁰ The sovereignty claims and consequently challenges of the state of Ghana

²⁷ Barber, n21, 25

²⁸ I'm indebted to Nick Barber for drawing my attention to this point.

²⁹ Walker, (n6) 8

³⁰ See Walker on Krasner's discussion of domestic and international sovereignty. Walker, (n6) 27-28

in its relations with Asante will not be simply in respect of internal sovereignty but also external. A claim made to the international community about the exclusion of all other states from interaction with Asante is a claim to Asante of the same. Therefore, the audience of international sovereignty is both the polity and others.

The sovereignty discourse must necessarily occur on both planes and, moreover, simultaneously. A state with firm internal control cannot be sovereign if it does not have external sovereignty, regardless of whether it has use or desire for it. Again, every time a sovereign state interacts with its citizens, it is asserting that it is not making the rule at the insistence of another authority, but of its own volition. It is also asserting that it has the right to use its volition in that manner. Both these claims will be directed towards those authorities who might have otherwise interfered, and those members who need to know why they must obey. It is in this essentially call-and-response nature in which the normative claim is communicated that the discursiveness of sovereignty lies.

1.1.4. Effectiveness as Audience Participation in the Sovereignty Discourse

The internal audience responds to a sovereignty claim by a two-fold reaction: first acceptance, then compliance. If a counterclaim is not made by any other group, the state's claim can be taken as accepted. The absence of resistance alone, however, is not enough. For it may be rooted, not in acceptance, but in indifference. The audience to a sovereignty claim must therefore take positive steps to comply with the claim.³¹

³¹ Leslie Green, *The Authority of the State* (Clarendon 1990) 73-75

Audience compliance with the normative claim is referred to in the literature as effectiveness. Effectiveness is thus the extent to which the state is a *de facto* authority.³² This means that the state is not only obeyed, it determines ‘how power is divided between its institutions—both in terms of the process by which the division of power is decided, and the ultimate scheme of division that is adopted.’³³

In the absence of audience participation, any entity - a household, school, geographical region, or religious sect - could attempt to make a claim of sovereignty. This would render the concept both meaningless and useless. Walker argues, correctly, that, the claim’s ‘capacity to make a difference to the world depends upon its plausibility’.³⁴ The extent to which the people (and the international community to a lesser degree) comply with the dictates the state makes, in consonance and pursuance of its normative claim, is what makes the claim plausible and as Walker puts it enables the claim to ‘make a difference in the world’.

In the period leading up to World War II, effectiveness was a major criterion on which sovereignty was judged. But in the aftermath of colonialism, effectiveness has diminished in importance as a condition prerequisite to recognition as a sovereign state in international law.³⁵ Although the dangers involved in prioritising effectiveness above

³² J Raz, *The Morality of Freedom* (Clarendon 1986) 26–28 [11] [SEP]

³³ Martin Loughlin, *The Idea of Public Law* (OUP 2003) 87–93

³⁴ Walker, n6, 7

³⁵ Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (CUP 1990)

all other requirements should not be overlooked,³⁶ neither should its importance. It has become clear that sovereignty acknowledged externally, if unsupported by internal effectiveness, may keep a chronically weak state from collapsing for a time; but cannot transform it into a long-term self-sustaining polity.³⁷ The value of the normative claim must, in Tucker's words, 'in the last analysis, depend upon a certain correspondence between its normative prescriptions and the actual behaviour of men'.³⁸ Internal effectiveness does not require the people to speak conclusively in one voice all the time. Even disagreement with instructions from the state is acceptance of the claim, though it may be contestation of the state's interpretation of the best interests of the people. When the people by and large comply with the claim, they render it effective. It is irrelevant to the internal dialogue of sovereignty whether the state ascribes its legitimacy in popular control or not.

The international community and individual states participate in the dialogue of sovereignty through recognition, and non-intervention. Legal recognition³⁹ is the means by which the international community accepts a state's normative claim to exclude it and its members from exercising uninvited authority in its territory.⁴⁰ Non-intervention

³⁶ These are exhaustively discussed by Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa*, (Brill 2004) chs3-4

³⁷ Kreijen, n36, chs3-4.

³⁸ Tucker, n10, 32

³⁹ As opposed to political, which as Kelsen points out is nothing more than a declaration of intent to enter into legal relations with the recognized state and does not impute a legal duty to the state so declaring. Hans Kelsen, 'Recognition in International Law: Theoretical Observations.' (1941) 35(4) *Am J Int Law* 605, 605

⁴⁰ See James Ker-Lindsay 'Secession and Recognition in International Politics' in *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (OUP 2012), Ch1

is how its compliance with the claim of exclusion can be measured.⁴¹ Contrary to the view held by some scholars, recognition does not grant sovereignty; it merely accepts it. Transnistria and Taiwan have not been recognised as sovereign by the international community. But this has not prevented either one from effectively exercising sovereignty within its domain.

In the case of Taiwan, there is an alternative state whose sovereignty over the territory is recognised by the international community: China. Transnistria on the other hand, simply has its own claim to sovereignty rejected by the international community. But neither Moldova-from which it seceded- nor the United Nations has attempted to recognise another state as its sovereign. This gives credence to Bobick's claim that external recognition has very little impact on the exercise of sovereignty.⁴² When the international community becomes involved in the affairs of a state by forceful entry, it is rejecting that state's sovereignty claim. Because of the primacy of the rule of non-intervention in international law,⁴³ forcible intrusion typically occurs after the people have effectively rejected the state's normative claim. So, although it is undeniably necessary for the discourse of sovereignty to be both internal and external, the value of the external discourse is contingent on the continued existence of the internal dialogue.

⁴¹ Joe Verhoeven, 'Non-intervention: "affaires intérieures" ou "vie privée"?', in Michel Virally (ed.), *Le droit international au service de la paix et du développement* (Pedone 1991), 493–500; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14 para. 202.

⁴² Michael Bobick, 'Sovereignty and the Vicissitudes of Recognition: Peoplehood and Performance in a De Facto State', (2017) 40(1) PoLAR 158

⁴³ Nicaragua, n41

A final thought on the elements of our definition is that as sovereignty is a claim made over, on behalf of, and limited to a particular polity, its manifestations will reflect the polity on whom and on whose behalf, sovereignty is asserted. Thus, the content of a sovereignty claim will be affected by the cultural character of the people who constitute it and the dictates of the geospatial territory they occupy. In this Part, we have digested Walker's definition of sovereignty and isolated the essential features of the concept. We can thus sum up sovereignty as: the state's normative claim of absolute and final authority that is accepted and complied with by the polity and the international community, and which thereby shapes the character of the political community. This is the understanding of the concept in the light of which the main discussions of this thesis will be framed.

Part 2- Three Objections Examined

One objection to our definition might be that states, even the most powerful ones, are rarely ever able to completely back their normative sovereignty claims with effectiveness. The use of resources in the heart of the Brazilian Amazon, for example, may not be entirely (or perhaps, even, at all, in practical terms) regulated by the state of Brazil though she claims jurisdiction over it. Tamanaha has also observed that the weak central state which cannot exert control over or provide goods in the more remote parts

of its territory is a common phenomenon in the developing world.⁴⁴ Does the requirement of absoluteness imply that in such countries, those remote parts do not belong to the state? Or that such states are not sovereign?

The objection is founded on a ‘descriptivist fallacy’ that expects the claims of sovereignty to be empirically exact,⁴⁵ compounded by a ‘fallacy of abstraction’ that attempts to assess sovereignty as a form of power against all other forms of power.⁴⁶ These errors lead to the conclusion that a definition of sovereignty that includes a claim to absolute and final power empties it of meaning because it cannot be matched to an objective reality. As Walker has argued, the argument assumes that to be an ultimate source of authority requires being also the singular source of authority so that the absence of proof of singular control over a part of the territory defeats any claim of sovereignty.

Walker draws attention to the illocutionary nature of sovereignty. It is a ‘speech act’ whose

capacity to make a difference to the world depends upon its
plausibility and its acceptance as a way of knowing and ordering

⁴⁴ Brian Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’, (2011) 3(1) *Hague J. Rule Law* 1, 2

⁴⁵ TE Aalberts & GW Werner, ‘Sovereignty Beyond Borders: Sovereignty, Self-Defense, and the Disciplining of States’ in Adler-Nissen & Gammeltoft-Hansen (eds) *Sovereignty Games* (Palgrave Macmillan 2008), 131

⁴⁶ Walker, n6, 6

the world, which in turn depends upon its status as an ‘*institutional* fact’—a fact whose authenticity and credibility depends upon the internalisation by key actors of a complex of rules and expectations which support and subscribe to the sovereign claim.⁴⁷

Thus, the element of absoluteness in our definition of sovereignty is a normative claim with the ability to make a practical impact on the political and legal life of the polity.⁴⁸ In other words, though a claim of absolute and final decision-making power requires a threshold measure of factual truth to it, it does not entail (nor aspire to) a perfect match between the scope claimed and the scope factually enjoyed.

The remotest parts of the weakest state remain part of the state to the extent that it is not completely and unwholly rebutted by a competing state staking a normative title that it can back with factual operational control. So that an occupied territory remains part of the state claiming sovereign jurisdiction over it, not the state merely exercising control. In Part I, we extricated the political dimension of sovereignty from this study and confined it to the legal dimension of the term. If this fact is borne in mind, the urge to assess a legal definition by a political yardstick will be easier to resist and the virtue in the normativity of Walker’s definition will become apparent.

⁴⁷ Ibid, 7

⁴⁸ Walker n15, 26

In my view, furthermore, the idea that the normativity of a sovereignty claim is being at any point in time partially untrue is in fact a strength, not a weakness of our definition. By making as yet untrue claims of absoluteness, the normative claim of sovereignty provides the state a mission to continually strive toward. It is this aspirational nuance in our definition that makes the common good -and not just in the utilitarian sense-, but also the individual good, a central focus of the sovereignty claim. There must therefore necessarily be a chasm between the state's normative claims and their effectiveness. Schmitt's sovereign state is more apt to become abusive, having factually subsumed all the power and authority in the polity with neither limits nor obligations on how to use it.⁴⁹ This is not unlike Ghana under the multiple military rulers in her past; an experience that should caution against a purely empirical conception of sovereignty.

A second objection might be taken to Walker's definition on the ground that it appears to envision a tidy hierarchy of norms culminating in an ultimate source of validity. In the modern post-global world, multiple power axes operate and interact in often overlapping, sometimes competing ways such that the power balance may not be permanently resolved in any one power's favour. Does a definition of sovereignty rooted in a Supreme Ordering Power, and therefore, requiring a permanent victor in the

⁴⁹ Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (George Schwab tr, UCP 2005)

domination struggles of the multiple power wielding legal orders of modernity offer any useful parameters for philosophic thought?

This criticism of our definition is not unlike the wider objection to the principle of sovereignty itself that Van Roemund has termed the Argument from Redundancy.⁵⁰ The core point of the argument (both to the principle and to our definition) is that as state power is no longer indivisible; a definition that unifies all authority in a Supreme Ordering Power is redundant. It is true that the Westphalian phase of sovereignty personified often by the king has passed irretrievably.⁵¹ Walker himself views the era of late sovereignty, as he calls it, one of heterarchically rather than hierarchically interacting legal orders.⁵² But it does not flow from that fact that an ultimate validating source is no longer required in states, such that a definition of sovereignty including one is deficient.

Legal orders must necessarily have finality.⁵³ The absence of an endpoint to the authority search can paralyse the state and the system. As Waldron has argued, in defense of separation of powers, sometimes it is better to have a final answer than the

⁵⁰ Bert Van Roemund, 'Sovereignty: Unpopular and Popular.' in Neil Walker (ed) *Sovereignty in Transition* (Hart 2003), 33–54.

⁵¹ Walker n6

⁵² Neil Walker, 'The Idea of Constitutional Pluralism (2002) *MLR* 65(3) 317; Neil Walker, 'Constitutional Pluralism Revisited' (2016) 22(3) *Eur Law J* 333.

⁵³ Van Roemund, n50.

best answer.⁵⁴ It is to prevent this circular and unhelpful search for authority that Kelson urges the supposition of the ‘historically first constitution’. Though his resolution is implausible, it underscores the importance of a final source of authority-or as our definition puts it- ‘the supreme ordering power.’ That the hierarchy is no longer easily discernible in the late sovereignty phase does not mean it is non-existent. As Walker has noted, the title of sovereign is never granted by states to nonstate entities, and indeed rarely even claimed by non-state entities, other than entities that themselves aspire to statehood.⁵⁵ There is a tangible difference between the validating source of a state legal order and that of all others. A definition of sovereignty that does not acknowledge that difference is insufficient and, simply, unrealistic. Thus, an objection to Walker’s inclusion of the supreme ordering power cannot stand.

A third objection to our definition might be taken by scholars who view sovereignty as descending into the internal plane from the external. Robert Jackson’s definition of sovereignty might be offered as an example of that viewpoint. According to Jackson state sovereignty is at core ‘the basic prohibition against foreign intervention which simultaneously imposes a duty of forbearance and confers a right of independence on all statesmen.’⁵⁶ From this perspective, the objection might be that Walker’s definition fails to give the exclusion of other states from internal affairs the primacy it deserves in understanding sovereignty.

⁵⁴ Jeremy Waldron, ‘Authority for Officials’ in Lukas Meyer & others, (eds) *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003)

⁵⁵ Walker n15, 27

⁵⁶ Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (CUP 1990)

But, as noted in Part I, the external dialogue is not by itself able to create a sovereign state. However much a state is propped up by external actors, it will not without internal compliance with its dictates be able to survive. This is what Walker means by the internalisation by key actors of a complex of rules and expectations which support and subscribe to the sovereign claim.⁵⁷ The external discourse of sovereignty is necessarily secondary to the internal discourse because sovereignty is staked first and foremost over and on behalf of a polity and then, in relation to the international community, as *against* other claimants (states).

Moreover, the exclusion of others is not achieved merely at the forbearance of others from invading but by a proactive resistance by the asserting state. Jackson's definition overlooks or at least under-appreciates the pivotal role the state's own claim to a normative right to exclude others plays in its sovereign status. Philpott's apt criticism of Krasner's work is that it does not pay attention to the constitutive rules of the nature of sovereignty.⁵⁷ I.e. that it is not only asserted; its assertion impacts and shapes the political community that the state asserts its sovereignty for and over. The sharp focus Walker's definition puts on this all-important role played by the state's normative claim is a particular strength of that definition.

⁵⁷ D Philpott, 'Usurping the Sovereignty of Sovereignty?' (2001) 53(2) World Politics 297, 299.

This examination of some of the concerns that might have been taken with Neil Walker's definition of sovereignty has not resulted in any significant erosion of its force. The definition highlights all the critical features of sovereignty and draws attention to its oft-overlooked dialogic nature. Importantly, it also underscores the central role that the normative aspect of the claim plays in its assertion. Yet it does not pretend that the factual aspect is irrelevant. The definition is therefore an able guide to the discussion of this thesis.

Conclusion

This chapter has been a focused theoretical discussion of the concept of sovereignty. Its purpose has been to arrive at a working definition of the concept to act as a framework upon which the central concerns of this thesis will be explored. In Part 1, I adopted Neil Walker's definition of sovereignty in setting out the conflict and theorising Ghana's state-tribe tension. The strength of Walker's definition is how well it captures the complex, multilevel, multi-actor, dynamic nature of sovereignty. It treats sovereignty as a discourse between the state, its people, and the international community around a normative claim which the state makes to them about its right to be the ultimate decider of obligations and abilities within its boundaries and the proof it offers of this claim. Its precision provides clear indices in the light of which a discussion of the sovereignty of a state can be meaningful.

In Part 2, I reflected on some of the possible deficiencies of Walker's definition. I examined, in particular, the objection to formulations of the concept that present a tidy, easily identifiable hierarchy of authority with the sovereign power at its top. I found that such a hierarchy had to necessarily exist in each legal order and while perhaps it might not be easily identified by the unschooled eye, it is invariably present and discernible upon rigorous study. I also rejected objections to the requirement of absoluteness to the normative claim in Walker's definition. I found that as a normative multi-temporal claim, a mismatch between its tenets and reality was both expected and acceptable-provided that there was an appreciable degree of factual veracity to the claims so made. Concluding therefore that the potential objections did not on close study reveal any damning defects in the definition, I accept Neil Walker's definition of sovereignty as the definition of my thesis's organising principle.

In the chapters that follow, the understandings of sovereignty achieved in this chapter act as underlying premises from which the thesis proceeds. In the rest of this Part of the thesis, they are the framework within which the constitutional configurations of the state and Asante are decoded, and the compass by which their inter-order friction is pinpointed. In the second Part of the thesis, this chapter's understandings guide and define the assessment of the potential solutions considered. The thorough digestion of the implications and critiques of the working definition of sovereignty undertaken herein thus stands the reader in good stead to engage with the substance of the thesis.

Chapter 3

The State of Ghana

Introduction

This chapter brings the insights of chapter 2 to understanding the constitutional configuration of the state of Ghana. By isolating those features of the state that are rooted in the ideal of sovereignty, this chapter puts the struggle the thesis seeks to theorise in sharp relief. From chapter 2, we know that sovereignty is a discursive expression of normative authority backed by an appreciable degree of effective control over the people and territory within the asserting entity's jurisdiction. We also know that this discourse is both internal and external.

In this chapter, I seek to establish the form and extent of this discursive claim in Ghana's small-c constitution. I study the text of the 1992 Constitution, a number of provisions in selected legislative acts and judicial pronouncements in some selected decisions, to draw out these assertions of sovereignty. I must note at the outset that this chapter does not engage in an exhaustive discussion of all the ways the 1992 Constitution expresses the state's sovereignty. Rather, I focus on those sovereignty expressions that feed the tension between the state and Asante thus increasing the danger of collision.

The chapter is in three parts. After a short historical study of Ghana's constitution, Part I focuses on drawing out the normative claim of sovereignty that the

small-c constitution makes- both generally and over customary law. In Part II, I provide an overview of the Supreme Court as the forum that deploys the judicial power of the state to assert and back these sovereignty claims. In Part III, I assess the effectiveness of the claims identified in Part I. Three important facts are established at the conclusion of the chapter: firstly, the state has a liberal democratic ethos; secondly, because it did not previously, it suffers a legitimacy deficit and, thirdly, though its claim to be the repository of sovereignty in Ghana is by and large established, there is a substantial chasm between its claim and the extent of its effectiveness.

Part 1: Sovereignty in the 1992 Constitution and its Antecedents.

1.1. Sovereignty Before 1992

The brief excursion into the pre-1992 constitutional history of Ghana in this section provides some contextual background to why the 1992 Constitution's state embraces popular sovereignty and gives the Supreme Court the powers it does. Although some aspects of sovereignty became increasingly visible in the course of time, there was no local, sovereign state in Ghana before Republic Day in 1960. All the pre-independence 'Constitutions' were, in fact, Orders-in Council,¹ and, the 1954 one excepted, they all did no more than increase African participation in non-binding, powerless, advisory

¹ 1916, 1925, 1946, 1950 and 1954

capacities.² All decisions that amounted to sovereign acts were made from the Colonial Office in England.³

In 1954, a new ‘constitution’ was promulgated by the Colonial Office which granted the Gold Coast ‘internal self-government’. This meant that the Cabinet of ministers appointed by the locally elected Prime Minister became the executive.⁴ But its power was not absolute. It was subject to the Governor’s approval in all matters; and excluded altogether in those matters that amounted to an assertion of sovereignty, i.e., internal and external defence, and foreign relations.⁵ The Legislative Assembly rose from merely advisory but fell short of holding actual legislative power.⁶ During the period of internal self-government, acts of state power could be done locally but at the sufferance of the Crown. Neither locals nor Crown, nor any other state was under the illusion that there was a sovereign state on the territory.

The Independence Constitution of 1957 was an unusual constitutional creature in two ways. First, it was an Order-in-Council, but it was drafted largely in the colony through extensive consultation with the government and opposition parties.⁷ Thus, its claim to legitimate authority was significantly stronger than the externality of its legal

² 1954 ‘Constitution’, §§4-8 granted executive power to the locally elected government.

³ Or by its representative with Westminster’s ex post facto ratification. Eg Frederick Hodgson’s unwise demand to sit on Asante’s Golden Stool which precipitated the 1901 Yaa Asantewa War of. Commons Sitting of Monday, 18th March 1901. 20th Century House of Commons Hansard Sessional Papers, Fourth Series, 91, 215-364

⁴ Constitution 1954, §4

⁵ Ibid, §5, & Schedule II

⁶ Ibid, §§43-49

⁷ FAR Bennion, *The Constitutional Law of Ghana*, (Butterworths 1962), 56-73

source of power might suggest. Nevertheless, it could hardly be called a document witnessing a sovereign state. For although it provided for nearly complete internal authority over citizens - i.e. *de facto* authority- the queen was still head of state and the Governor-General still assented to every bill to render it law. Granted, the Colonial Office developed a convention of not interfering with the internal authority of the government. Even so, the fact remained that the Governor-General retained a *de jure* veto over their acts.

The second unusual thing about the 1957 Constitution is that it empowered Ghana to present herself both normatively and effectively as sovereign to other states; i.e. she asserted international sovereignty. But, as noted in the previous chapter, a sovereign state must make and substantiate its normative claims both internally and externally; neither plane is optional. For that reason, though Ghana between 1957-60 dealt with other states entirely as a self-referencing state, its internal claims of authority were neither total nor final and so it lacked sovereignty.

The promulgation of the 1960 Republican Constitution was deliberately fashioned to be a Kelsenian revolution in order to firmly and visibly make Ghana the locus of her own sovereignty. In Kelsen's theory of revolutions, a legal order survives all changes made to its configuration and operation unless the change is outside of its existing rules of constitutional change. In that case, a new *grundnorm* is established. The old legal order is ruptured by the violence of the unexpected change; which then becomes the basis of the new legal order it has established.⁸ The Nkrumah government

⁸ Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, (trs. Bonnie Litschewski Paulson & Stanley Paulson, OUP 1997)

felt that there was a conceptual misalignment between the overwhelming local electoral endorsement that had brought it to power and their right to govern being rooted in an Act of Westminster. It was decided therefore that the manner in which the transition from dominion to sovereign state was handled should not be in any way construable as having been done with the permission of Westminster⁹ as that would not amount to a normative claim of total and final authority.

That view is demonstrative of how the concept of popular sovereignty is an explicatory model of state sovereignty. Though a state may be sovereign without possessing a sovereign people, the reverse is impossible. A sovereign people will not be content to live in a non-sovereign state; for the assertion of an entitlement to a state is a defining aspect of a sovereign people. The Republican Constitution served to conceptually make Ghana's independence irreversible.¹⁰ Legally, it was probably unnecessary.¹¹ As Westminster's reassertion of Rhodesia's colony status after the UDI showed only two years later,¹² legislative revocation of a fully formed state's independence by another is unlikely to succeed. Between 1960 and 1992, Ghana had

⁹ Kenneth Robinson 'Constitutional Autochthony in Ghana', (1961) 1(1) Commonwealth & Comparative Politics, 41-55

¹⁰ Not only did the Constitution end the Queen's authority in Ghana, even the referendum adopting it was done under the auspices of the Constituent Assembly rather than the Governor-General as the 1957 Constitution had required. Still, Ghana's revolutionary republic was not as unilaterally achieved as was publicly presented. Even the drafter, Francis Bennion, was seconded to Ghana from the Westminster Parliamentary Service.

¹¹ CEK Kumado, 'The Degree of Our Commitment to Our National Motto "Freedom and Justice" Since Independence: An Assessment' in Kwame Gyekye (ed.) *Ghana@50 Anniversary Lectures* (GoG 2008),87

¹² JM Eekelaar, 'Splitting the Grundnorm', (1967) 30(2) MLR 156

five short-lived written Constitutions¹³ and six military governments.¹⁴ The absence of popular sovereignty within the country during the cumulatively lengthy military regimes did not affect the existence or scope of state sovereignty either normatively or effectively, internally or externally. It showed mainly in the heavy-handed way in which the state dealt with citizens.

1. 2. Sovereignty in the 1992 Constitution

The 1992 Constitution ended the twelve-year Provisional National Defence Council (PNDC) dictatorship under the leadership of Jerry Rawlings. It was the longest-lasting and, (perhaps as a result) possibly the most damaging of the authoritarian regimes. The years of unfettered power- often brutally exercised- created in Ghana what came to be known as a culture of silence.¹⁵ International pressure and increasingly uncontrollable internal clamouring for self-government forced Rawlings to grudgingly agree to a referendum on whether to return to constitutional rule in 1991. The tension-fraught process eventually culminated in a return to democratic governance and the 1992 Constitution.¹⁶

¹³ 1960, 1964, 1969, 1979, 1992

¹⁴ NLC(1966-69), NRC (1972), SMC I (1975-78), SMC II (1978-79) AFRC (1979), and PNDC (1979-1992)

¹⁵ Albert Adu Boahen, 'The Ghanaian Sphinx: Reflections on the Contemporary History of Ghana, 1972-1987, GAAS 1989)

¹⁶ Richard Jeffries & Clare Thomas, 'The Ghanaian Elections of 1992', (1993) 92 (368) African Affairs, 331, 335

The process by which the Constitution was crafted was heavily manipulated by the Rawlings government.¹⁷ The decision to use a consultative rather than a constituent assembly with promulgating power was also severely criticised. The Bar even boycotted the process.¹⁸ PNDCL253 under which the assembly was set up, not only reserved to the PNDC the power to insert any clause it chose into the final draft; its article 14(3), expressly denied immunity from ‘any action or proceedings...in respect of anything said or done by [a member of the Assembly] against the Head of State and Chairman of Council or any member of the Council or a PNDC Secretary’, causing much doubt that the Consultative Assembly would be capable of free and candid deliberations.¹⁹

As a result, it has been argued that the 1992 Constitution cannot properly be called the will of the people, nor can they have been its constituent power.²⁰ This view is misconceived. While the facts above cannot be debated, the Constitution could not have come into force without the overwhelming approval it received at referendum from the people. A 92% vote in support of a Constitution is no casual endorsement. A better view is to see the endorsement as relocating the authority of the document in the people. So that, whoever assented to Constitution thereafter, did so as their authorised

¹⁷ Bluwey calls it the PNDC’s ‘preparation to succeed self’. Gilbert Bluwey, ‘Obstacles to an Orderly Transition to Constitutional Rule Under The PNDC’, in Kwame Ninsin & Francis Drah (eds.) *Ghana's Transition to Constitutional Rule* (GUP 1991)

¹⁸ WK Yayoh, ‘Resurgence of Multi-Party Rule in Ghana, 1990-2004: A Historical Review.’ (2006) 10 THSG 125, 131-134

¹⁹ E. Gyimah-Boadi labelled it a “grant” of the PNDC’, E Gyimah-Boadi, ‘Notes on Ghana's Current Transition to Constitutional Rule.’ (1991) 38(4) *Africa Today* 5, 16

²⁰ Joseph Aryee, ‘Ghana’s Return to Constitutional Rule Under the Provisional National Defence Council (PNDC)’ (1996) 29 (4) *Verfassung und Recht in Übersee* 434

agent. The PNDC was therefore the source of the preliminary processes that resulted in the Constitution, but not the source of the Constitution itself. Had the vote returned a 75% rejection, it is hard to see how the PNDC, by its will or violence alone, could have compelled candidates to campaign for votes or the people to thumbprint correctly or even at all. The Constitution's claim to embody popular sovereignty is therefore not misplaced.

Moreover, with the ushering into force of the Constitution came a palpable change in the attitude of civil society groups, the media and the general public. Acts of the once-feared executive became the subject matter of radio talk shows and Supreme Court litigation. As a civilian president, Rawlings complained repeatedly that the Constitution constricted his action,²¹ even though it creates an overly powerful executive;²² and the legislature was at the time controlled by his party.²³ This suggests that the 1992 Constitution was not a merely formal change.²⁴ It brought into being a demonstrable difference in Ghana's political and constitutional organisation; and the people, even if politically unsophisticated from attrition, became the force behind its operation.

²¹ E Gyimah-Boadi, 'Ghana's Uncertain Political Opening,' (1994) 5(2) *Democracy* 75, 80.

²² HK Premeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa', (2008) 35(4) *Hastings Const LQ* 761.

²³ An opposition boycott on grounds of rigging in the presidential elections led to a nearly one-party Parliament. Only eleven members were not from his party. NPP, *Stolen Verdict* (NPP 1993).

²⁴ E Gyimah-Boadi, n21, 77 ff.

As far as sovereignty is concerned then, the two main innovations of the 1992 Constitution were firstly that it provided a new justificatory force for the power state organs exerted over the Ghanaian polity- by then restless and disgruntled with their state. Secondly, it redistributed the state power in a manner to which neither its officers nor its citizens were accustomed. Democratic government, in which citizens have specific rights and the state's power is circumscribed was a complete reorganisation of the Ghanaian polity itself and therefore of the Ghanaian state arising therefrom. That it has lasted nearly thirty years- the longest of any form of government post-colonial Ghana has known- indicates an acceptance of the distribution of power it sanctions and the justification it offers for the sovereignty of the state.

1.3. Identifying Normative Claims Within the Text of the 1992 Constitution.

As noted in the previous chapter, sovereignty requires, firstly, a normative claim that the entity asserting it is the final and supreme authority over its polity; and secondly, a measure of effectiveness in the normative claim. The 1992 Constitution makes claims of both state and popular sovereignty in several parts of the text: primarily in the Preamble and in chapters 1-4. In identifying 'we the people of Ghana', the Preamble presupposes a polity and claims further that its people are sovereign. The people are the collective self; the constituent power behind the Constitution and what justifies its sacrosanct status in Ghanaian society.

These claims are reiterated by the declaration in Article 1 that the sovereignty of the state ‘resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.’ The emphasis on popular sovereignty as the basis of the Constitution’s authority is in acknowledgment of the state’s abusive history and is therefore a key component of the sovereignty claim. Article 1 then identifies the Constitution’s purpose as being to delineate and regulate the use of the constituent power’s sovereignty and pronounces itself the limitation on all authority within the territory. Article 11 lists the sources of law in Ghana, starting with the Constitution, and ending with common law as the lowest source. A large portion of the Constitution allocates power and responsibility to facilitate the state’s operation. As the thesis focuses on judicial power, I shall not explore these arrangements except to note that this power allocation is an act of sovereignty. For as we noted in Part I, the distribution of power between institutions is a necessary implication of sovereignty.

The normative claim to final and total authority in a sovereignty claim is not made only through general declarations of supremacy or in the mechanics of power distribution in the Constitution. Being, according to our definition, a claim to sustain the identity, and to continue to provide the legal reasons for action of that polity’s members, the normative claim must be expressed through specific rights and duties on members. Rights are an important- indeed required- aspect of the itemisation of the normative claim. As Samantha Besson notes, ‘State sovereignty cannot be dissociated from the protection of the political equality and human rights of the individuals constituting that State and cannot *per se* be regarded as incompatible with the values it

is meant to help pursue.’²⁵ Popular sovereignty in a state implies, at the very least, certain process rights: the rights to vote and to stand for election, for example. A people claiming to be the source of their state’s authority must, then, necessarily put limits on how that state may interact with them individually. So that where popular sovereignty is claimed, rights are held in the first place, as against the state.²⁶

Chapter 5 of the Constitution, which contains the ‘Fundamental Human Rights and Freedoms (FHRFs)’ is of special interest to this thesis. These FHRFs are the clearest instantiation of the normative claims being internally itemised. Though by the very nature of a Constitution, its every provision either claims a set of facts to exist or commands them into being; and therefore, all constitutional provisions are concrete claims of sovereignty, the FHRFs are in a special category. They are the only part of the Constitution, that individuates all the members of the polity, thus staking the normative sovereignty claim simultaneously over groups of persons and over single members as they interact with each other.

From a state sovereignty perspective, the FRHFs represent the state’s claim to create and sustain a liberal society. From the perspective of popular sovereignty, they articulate a relationship between citizen and state in which the state’s extensive powers cannot be used in the named ways and must be deployed to back those members who

²⁵ Samantha Besson, ‘Sovereignty’ in Max Planck Encyclopedia of Public International Law [MPEPIL] 2011, Oxford Public International Law OUP, 2015), para 133 <<http://opil.ouplaw.com>>

²⁶ For discussion of the development of rights as held against the state in the common law tradition, see Janet Mclean, *Searching for the State in British Legal Thought* (CUP 2012) chs7&9

act in ways protected by the named rights. They therefore represent, for a state leaving behind an abusive history, a critical prong of its new identity. Thus, acts that reject or violate these rights are a threat to its supremacy that it does not take lightly. As will be fully explored in chapter 5, the state's need to decide what rights exist and what they mean are a major factor in the tension in its interactions with Asante.

The FHRFs can be broadly grouped into five categories. There are corporeal rights: ie rights respecting the physical person of the citizen. They include the right to life,²⁷ liberty,²⁸ freedom and of movement.²⁹ The second category of rights, I term lifestyle rights. They include a prohibition on slavery and forced labour;³⁰ a right to dignity³¹ and culture;³² the freedom of worship;³³ and the prohibition on injurious and dehumanising customs.³⁴ Quashigah criticises³⁵ the framing of that provision as amounting to a resuscitation of the repugnance test.³⁶ Be that as it may, these provisions

²⁷ Article 13

²⁸ Article 14

²⁹ Article 21(g)

³⁰ Article 16

³¹ Article 15

³² Article 26

³³ Article 21(c)

³⁴ Article 26(c)

³⁵ Kofi Quashigah, 'Justice in the Traditional African Society within the Modern Constitutional Set-up', (2016) 7(1) *Jurisprudence* 93, 100

³⁶ Refers to a section 19 in the Supreme Court Ordinance of 1876, which permitted the courts of colonial authority to enforce customs that were not 'repugnant to natural justice, equity and good conscience'.

assert the state's right and power to eliminate pre-existing norms that contradict its edicts.

The third category of rights are economic rights. They include the free choice of commercial activity³⁷ property³⁸ and spousal rights³⁹. Political rights form the fourth group and consist of the rights to: form and join political parties;⁴⁰ vote;⁴¹ resist government overthrows⁴²; and the right not to be subjected to a 'common programme or a set of objectives of a religious or political nature.'⁴³ These rights underscore the normative claim of popular sovereignty. Indeed, the case law on the political rights portray a very serious attitude in the courts towards their enjoyment.⁴⁴

Finally, there are rights governing a citizen's interactions with state institutions. They include extensively detailed fair trial rights,⁴⁵ workers',⁴⁶ children,⁴⁷ mothers',⁴⁸

³⁷

³⁸ Article 18

³⁹ Article 22

⁴⁰ Articles 21(3), & 55

⁴¹ Article 42

⁴² Article 3

⁴³ Article 56

⁴⁴ *Tehn-Addy v Electoral Commission [1996-1997] SCGLR 589; Apaloo v EC [2001-2002] 2 GLR 372; Abu Ramadan v EC [2013-2014] 2 SCGLR 1654*

⁴⁵ Article 19

⁴⁶ Article 24

⁴⁷ Article 28

⁴⁸ Article 27

and disabled persons'⁴⁹ rights. This category of rights are agenda-setting rights that empower the state to take specific actions toward the citizen's welfare. For instance, article 28 which sets out a number of children's rights begins with the statement that 'Parliament shall enact such laws as are necessary to ensure that...' This is what Barber terms positive constitutionalism.⁵⁰ The 1992 Constitution's internal sovereignty does not just limit the state; it also empowers it to act.

The total, and final nature of the power asserted in a normative sovereignty claim allows the supreme ordering power to 'establish and sustain the identity and status of the particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity'.⁵¹ The categories of rights discussed above paint a picture of a liberal society. It is not relevant to a state's normative claim that what it establishes or prohibits by way of rights be in the nature of the people to expect or desire. Indeed, past iterations of Ghana's small-c constitution unambiguously discount any such contention in respect of Ghanaian society. Rather, the FHRFs are part of the identity the Constitution is purporting to establish, and their actual enjoyment is proof that the Constitution is the 'continuing source and vehicle of ultimate authority for the juridical order of that polity'. Thus, the provision of rights as articulated by the Constitution is an important tool in the state's sovereignty arsenal. Its

⁴⁹ Article 29

⁵⁰ NW Barber, 'Constitutionalism: Negative and Positive' (2015) 38 Dublin ULJ 249

⁵¹ Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003).

combative stance towards challengers in this space is both unsurprising and understandable.

1.4. Normative Claims of Sovereignty over Asante and Customary Judicial Power

Besides the general normative claims over the people and territory of Ghana, the state also makes specific normative claims over the role and place of customary law in citizens' lives. As noted above, Common Law is the last and lowest source of law acknowledged in the Constitution. It is defined in Article 11 as received (ie English) common law,⁵² equity and finally, 'the rules of customary law, including those determined by the Superior Court of Judicature'. By this, the Constitution makes a normative claim of control over customary law.

In article 267, the Constitution asserts authority over customary law by assuming control of stool lands.⁵³ Although clause 1 of the article proclaims that stool lands belong to the stool by virtue of and in accordance with customary law; in the subsequent clauses, it establishes an 'Office of the Administrator of stool lands' through

⁵² Until 1874, when the English law ceased to be directly applicable to the Gold Coast Colony. §83, Gold Coast Supreme Court Ordinance 1876. Westminster still held legislative power over Ghana, but it then had to make law expressly for her. For discussion on the different categories of English law that applied in Ghana even after independence, see Gordon Woodman, 'British Legislation as a Source of Ghanaian Law: From Colonialism to Technical Aid'(1974) 7(1) *Verfassung Und Recht in Übersee* 19

⁵³ The symbol of constitutional authority is 'the stool' in southern Ghana, 'the skin' in northern Ghana.

which stool land revenue is administered.⁵⁴ It also gives the Regional Lands Commission, which manages state lands, a veto over any disposition or development of stool land, subject to the High Court's appellate jurisdiction.⁵⁵ Clause 5 imposes an absolute prohibition on the grant of a freehold interest in any stool land.

Assets of a stool/skin are public lands in customary law and every tribe has clear rules what a chief may or may not do with such assets.⁵⁶ These rules are not mere practices or customs. They are so fundamental to how the polity runs that they are constitutional in nature; absolutely mandatory; and recognised as such by chief and people alike. The redefinition of those rules within the Constitution's own self-determined parameters is an unmistakable act of dominion over customary law and a strong normative claim to internal and external sovereignty by the 1992 Constitution.

Chapter 21 which 'guarantees' chieftaincy- the indigenous institutions of authority- could be read as enshrining a constitutional admission of the autonomy of indigenous political systems and therefore of the customary laws that create them; in effect an admission of incomplete sovereignty in the state. But that view is inaccurate. Granted, the Constitution in that chapter uses the expression 'in accordance with [...] customary law and usage', in reference to those institutions and their rules of succession

⁵⁴ Article 267(2),(6), &(8)

⁵⁵ Article 267 (3),(4).

⁵⁶For a discussion on stool property and its incidents, see Ebenezer Acquaye, 'The Administration and Development of Stool Land in Ghana' (1969) I RGL 174 (1969). For a discussion of current stool land administration. Kasim Kasanga, 'Land Administration Reforms and Social Differentiation: A Case Study of Ghana's Lands Commission', (2001) 32(1) IDS Bulletin.

to office.⁵⁷ However, a holistic read of the chapter promptly reveals how little the Constitution concedes to traditional authority and therefore customary law. Notable among its subordination provisions is the debarring of persons convicted for certain crimes under state law from occupying chiefly office.⁵⁸ By raising the state's criminal statute above Asante's, the Constitution reorganises Asante's constitutional rules of eligibility to the office of chief.⁵⁹ Some of the acts that could trigger this exclusionary clause would actually be acts of constitutional heroism in the legal order of Asante (for example, secession attempts or a refusal to pay state taxes on stool revenue). In so doing, article 275 interferes with the enstoolment/enskinment processes it professes not meddle with and thus asserts normative dominance over them.

Crucially and usually overlooked in discussions on state-chief relations is the creation of the National House of Chiefs (hereafter NHoC) and the Regional Houses of Chiefs (hereafter RHoCs); and the creation of a judicial committee within them to resolve chieftaincy succession disputes. These fora are entirely the creation of the state and completely non-existent at custom. In the result, a committee made up largely- in some cases even exclusively- of traditional rulers alien to a tribal polity in which the dispute has occurred, now pronounces definitively on the constitutional rules of succession to office of that tribal group. This is as openly a normative claim to total, final, identity and character-shaping authority as there could be.

⁵⁷ Articles 270 & 277

⁵⁸ Article 275

⁵⁹ Akrofi, who was enstooled chief of Larteh in 1885 was an escaped prisoner from a British Fort for whose return the British government had offered a reward. See David Brokensha, 'Chief Akrofi of Larteh, 1885-1900', (1964) 7 *THSG* 12. By contrast with the 1992 state, the colonial government could not refuse, despite its misgivings refuse to recognise him as chief.

Finally, it must not be forgotten that the Constitution's claim to guarantee the FHRFs is a normative claim over customary law. For it purports to confer onto all citizens of the state rights they may not possess in customary law and take away others that they do possess. Where the content of a customary law right coincides with a chapter 5 provision, the Constitution is, pace Kelsen,⁶⁰ rerouting the validity of that right through itself. Thus, the position of the Constitution and therefore of the state towards customary law is an uncompromising claim of subordination. The problems occasioned by such a strong normative claim in state-Asante relations will be discussed in chapter 5. For now, it suffices to note how entrenched and unhesitant the state's normative claim to supremacy and therefore sovereignty is.

1.4. Normative Claims in Other Legislation.

As noted in the previous chapter, democratic constitutions invest in a tripartite agent to wield its power and assert its sovereignty. The three departments of the state being co-equals, their individual acts of sovereignty are cumulative to the state. The power to legislate and state sovereignty are therefore indivisibly linked. The 1992 Constitution, in this vein vests its legislative power in an elected Parliament⁶¹ and proscribes its use beyond the parameters chapter 10 assigns. All legislation is in some measure an assertion of a claim to determine and shape the identity of the people by limiting their

⁶⁰ Hans Kelsen, *General Theory of Law & State* (Routledge 2017), 117

⁶¹ Article 93(2)

freedom to act in certain ways or empowering them to act in others. Therefore, all acts of Parliament are, at core, iterations, and reiterations of the state's normative claim to sovereignty under the 1992 Constitution.

This is especially so since the statute law revision exercise over the last two decades has changed all statute pre-dating the 1992 Constitution from being within its ambit by reception to being expressly enacted under its authority. Nevertheless, this section will focus on a number of legislations selected for how directly they seek to shape the practices and therefore identity of the people. Criminalisation of longstanding practices is a particularly strong normative claim of supremacy, as are legislative proscriptions of longstanding practices even when they do not carry penal sanctions. I therefore focus this discussion on sections 49A, 88A and 314 of **Criminal Offences Act 1960 (Act 29)**. I also examine the **Intestate Succession Law 1985 (PNDCL111)** and the **Head of Family (Accountability) Law (PNDCL114)** which without criminal sanctions change established customary practices. Finally, I discuss how the state's legislature has dealt with traditional judicial power in the **Alternative Dispute Resolution Act 2010 (Act 798)**.

1.4.1. Sanction-Backed Normative Claims Over Customary Law

Widows are very harshly treated in many local tribal cultures. The purpose is apparently to prove their innocence in the death of their husband.⁶² Among the Ga in southern

⁶² NCCE, *Cultural Practices Affecting Women's Rights in Ghana* (NCCE, 2004)

Ghana, for example, the widow may be made to spend the night before burial with the corpse. After his burial, she is confined for seven days during which she fasts compulsorily. The confinement ends with her taking a ‘separation bath’ on the beach with her husband’s ghost.⁶³ Section 88A of the Criminal Offences Act 1960 makes it a criminal offence to subject a widow to any such inhumane rites.

Within certain communities in northern Ghana, Female Genital Mutilation (FGM) is still a rite of passage. Section 49A renders participation in FGM a second-degree felony for all except the victim. Among the forms of modern-day slavery Ghana battles with is *Trokosi*, a ritual enslavement of females for the sins of their kin among the Ewe.⁶⁴ The practice is now a second-degree felony under section 314. These statutes proceed directly from the FHRF protection against torture, dehumanising treatment and injurious cultural practices. The legislature in enacting them is reaffirming the normative claim made in chapter 5 of the Constitution that it shapes the character and identity of Ghana as a polity.

⁶³ Michael Martey Tei-Ahontu, ‘Widowhood Rites in the Ga Traditional Area of Accra-Ghana, a Review of Traditional Practices against Human Rights’ (Master’s thesis, Norwegian University of Life Science 2008).

⁶⁴ For a documentary discussing the practice, see <https://www.bbc.co.uk/news/av/world-africa-44089926/my-stolen-childhood-investigating-ghana-s-practice-of-trokosi>; Sandra E. Greene, ‘Modern “Trokosi” and the 1807 Abolition in Ghana: Connecting Past and Present’ (2009) 66(4) *William Mary Q* 959.

1.4.2. Normative Claims Over Customary Law Without Sanctions

The Intestate Succession Law PNDCL111 completely reorders how intestacy is handled in Ghana. Tribal citizenship is determined in many tribes patrilineally. The Akan tribes who together are the largest ethnic group in the country are matrilineal in succession affairs. This has heavy implications for the children of a deceased depending on their own tribal citizenship. In both cases, widows are entirely ineligible to succeed to their husband's estate. PNDCL111 allocates to widows and children specific shares in the estate of an intestate, regardless of their eligibility in the deceased's community.

The **Head of Family Accountability Law** makes the head of a family amenable to a call for accounts on his stewardship of family property by a junior member, contrary to the long-standing cross-tribal cultural norm that a senior cannot be asked to explain himself to a junior. By these laws, the state sets out to reach into the customary law orders and reorganise their rules about the entitlements of subjects (here widows and junior family members respectively) without permission or participation by those customary law systems which now have to uphold them. In so doing, the state has made a normative claim both that it is the source and continuing vehicle of authority and that tribal polities who created the now amended laws are not.

Beyond just prohibiting customs, Parliament has sought to regulate proceedings in the chiefs' palaces by legislation and indeed to lower that forum in status and power. For instance, the **Alternative Dispute Resolution Act 2010 (Act 798)** defines a

customary arbitrator as any person chosen by one party and accepted by the other.⁶⁵ This raises even family-settled disputes to equal standing with proceedings initiated by oath; including those by the *ntamkese* of Asantehene.⁶⁶ The requirement of acceptance by the other party renders the jurisdiction of the customary tribunal purely by consent.⁶⁷ Again, this is intended to limit the judicial activity of traditional authority, for it permits a subject to refuse to have a matter adjudicated by the chief and his Council.

Such legislative activity is seeking to reorder the traditional constitutional understandings. So, although the legislation may not itself qualify as constitutional; its interaction with Asante customary law effectively renders it one. Its provisions –and especially those that run counter to Asante’s ethos- are making normative claims of supremacy for the state. In all these legislative acts, it is easy to discern Parliament’s belief that the state, is the supreme ordering power of Ghana and that rules of customary law are valid only with its approval. These normative claims commit the state to interfering with Asante law; putting the two entities on the path to conflict.

⁶⁵ §92

⁶⁶ Kofi Agyekum, ‘Ntam 'Reminiscential Oath' Taboo in Akan’ (2004) 33(3) *Language in Society* 317. Originally, the penalty for losing an action began in this way was death.

⁶⁷ §92, 89(1).

Part 2- State Judicial Power as An Expression and Agent of State Sovereignty

Judicial power is an especially important device in the toolkit of a state for expressing its sovereignty. This is because the judicial power is what resolves disputes on the character-determining rules and what they implicate. Its attitude to and relationship with the Constitution determines in real terms the Constitution's place in the legal order. Its work is the most forceful assertion of the Constitution's normative claims. This section examines how the 1992 Constitution uses judicial authority to express and assert its normative sovereignty claims. I highlight the duties and powers of the Supreme Court in its role as a constitutional court; and show how these functions are an expression of sovereignty.

One striking difference between the classicist perceptions of sovereignty such as Schmitt's and the modern democratic view of it is that the former vests the expression of the sovereignty of the state in a single person or office.⁶⁸ By contrast, modern democratic theory distributes the state's power and therefore its expression of sovereignty among the three arms of government. As a democratic constitution, the 1992 Constitution does not contain one who can decide the exception.⁶⁹ Rather, it creates a tripartite agent through whom the state's sovereignty is asserted: the executive, legislature and judiciary. The focus of this thesis being judicial power, the discussion in this section will be limited to the judiciary as an agent of sovereignty.

⁶⁸ Schmitt, n59

⁶⁹ Ibid

The judicial power of the state of Ghana is vested in a judiciary insulated from institutional interference by other branches,⁷⁰ and provided with personal safety⁷¹ and professional immunity⁷² guarantees. In this way, the 1992 Constitution furnishes its Courts with both institutional and decisional independence;⁷³ something that they did not know under the many authoritarian governments in our past.⁷⁴ It is a two-tiered institution comprising the ‘Superior Courts of Judicature’, and ‘Lower Courts’. The jurisdiction, powers of and eligibility to the Superior Courts are fully specified in the Constitution⁷⁵ and reproduced verbatim in the Courts Act.⁷⁶ Those details are, with regards, to the Lower Courts left to the discretion of Parliament.⁷⁷ As a common law jurisdiction, Ghanaian courts observe the principle of *stare decisis*. Decisions of the Superior Courts are binding precedent on all courts and quasi-judicial bodies below them.⁷⁸

⁷⁰ Article 107(a) denies Parliament the power to pass laws that interfere with judicial decisions; security of tenure in article 146 prevents executive manipulation and since 2003, the judiciary has been allowed to retain fifteen percent of court-generated revenue, §3 Judiciary (Retention of revenue) Act 2003 (Act 661)

⁷¹ Article 127

⁷² Judges have immunity for acts and utterances in their professional capacity Articles 126 (4) and 127 (1), (2), (3)

⁷³ Ernest Owusu-Dapaa, ‘An Exposition and Critique of Judicial Independence Under Ghana’s 1992 Constitution,’ (2011) 37(3) Commonwealth Law Bulletin 531.

⁷⁴ Under the 1960 Constitution, judges held their office at the President’s pleasure (art. 44&45. 1960); Acheampong abolished the Supreme Court; the clear evidence that the PNDC government was involved in the mysterious shooting of three High Court judges who had reversed decisions made by the first Rawlings Junta’s kangaroo courts. Jacob Yidana, *Who Killed the Judges?* (Bismi 2002)

⁷⁵ Article 142, the exception being the regional tribunals.

⁷⁶ Part I, Courts Act 1993, (Act 459)

⁷⁷ Article 126(1)b

⁷⁸ Articles 129(3), 136(5) *stare decisis* operates to clothe decisions of the High court with binding force on the lower courts.

At the apex of the judicial structure is the Supreme Court, which is both a final appellate and a constitutional court. This court is appointed by article 2 to ‘interpret and enforce’ the Constitution, including over the executive and the legislature. Supreme Court oversight extends also to the standalone institutions which the Constitution labels as ‘independent’ and not ‘subject to any person’s control or direction’. Article 2 is the (perhaps overly sharp) teeth of the declaration of constitutional supremacy in Article 1. Without the power to compel all actors within the polity to comply with the dictates of the Constitution, it could not rightly claim to be the supreme ordering power or to wield final and total authority. Thus, while the executive and legislature each assert the state’s sovereignty as enshrined in the Constitution, the judicial power ensures that the acts of these agents do not position them as contenders against the Constitution for the role of supreme ordering power.

Again, because the polity is distinct from its individual component members, conflict between the will of the polity, expressed as an act of the constituent power, and the present desires of the present members of ‘the people’ for the time being⁷⁹ are inevitable. Article 2 enables the collective self’s will to prevail over the individual member’s will. The Supreme Court thus possesses extensive judicial review powers that are not constrained by the doctrine of the political question.⁸⁰ Neither are they affected by the effluxion of time,⁸¹ nor the doctrines of estoppel.⁸² They also cannot be

⁷⁹ ‘The people’ refers to those before, here and beyond. So, the persons making up any people at a given time are no more than a temporary personification of that people. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Harvard UP, 2001)

⁸⁰ 31st December case, 66

⁸¹ *Occupy Ghana v AG (unreported) SC decision 14/06/2017*.

⁸² *NPP v EC [1993-94] 1 GLR 124*

ousted by legislation.⁸³ The copious body of case law that has been produced in the three decades of the 1992 Constitution's life attests to the sense of legitimacy the normative claims enjoy internally. Additionally, article 2(4) creates the offence of high crime which is committed by disregarding the orders of the Supreme Court on a matter of constitutional interpretation or enforcement. The stiff punishments it carries⁸⁴ is a firm statement of authority.

Following Article 129(2), the Supreme Court is not bound to follow the decisions of any other court. Although the article does not expressly mention any specific source, it is believed that this provision is directed at foreign jurisprudence because Ghana used to be bound by decisions of the West African Court of Appeal and the Privy Council. Date-Bah calls it 'a kind of judicial independence from English jurisprudence'.⁸⁵ Even if Date-Bah's reason is apocryphal, the effect of the provision is inescapable. It is a normative claim of final and absolute judicial authority over the polity of Ghana.

All the other courts and, in particular, the High and Lower Courts frequently encounter cases of cultural practice in conflict with state-sanctioned practice. Where no Supreme Court precedents exist, the court is bound to stay its proceedings; refer the question of law raised to the Supreme Court and apply that court's decision in its

⁸³ *Sam (No 2) v AG [2000] SCGLR 305*

⁸⁴ Impeachment in the case of the President and Vice-President, for all others a ten-year ban from public office and a custodial sentence of up to ten years.

⁸⁵ Samuel Date-Bah, *Reflections on the Supreme Court of Ghana* (Wildy, Simmonds & Hill 2015), 22

judgment. The Supreme Court is thus the forum in which all judicial assertion of the state's sovereignty is reposed. For that reason, the case law focus in this study is limited to the jurisprudence of the Supreme Court.

Part 3: Assessing the Effectiveness of The State's Normative Claims.

This Part studies the small-c constitution, primarily from a judicial point of view, to determine whether the measure of effectiveness required to buttress the normative claim and validate the Constitution's claims to sovereignty exists. While ultimately it concludes that the state, acting under this Constitution is by and large effective in its control over Ghana; and thus, its sovereignty cannot be doubted; it acknowledges a significant gap between the normative claims *per se* and the degree of observable effectiveness.

3.1 Internal Effectiveness

The first note of internal effectiveness can be detected in the longevity this Constitution has enjoyed. At nearly three decades old, it has lasted the longest of any governance configuration since independence and this suggests a certain level of legitimacy in the eyes of the people. The fervent, ubiquitous pleas for peace that have accompanied

elections in this Fourth Republic are a stark contrast to the jubilation⁸⁶ with which the fall of each of the much shorter-lived past postcolonial constitutional arrangements was greeted. In assessing whether the minimum thresholds of effectiveness are attained by the state, this must not be overlooked.

The (perhaps overly) robust mechanism of judicial review established in article 2 has concretised the normative claim that the Constitution prevails in conflict with any act or authority. Whatever the flaws or democratic deficit of judicial review, it is far more able to stimulate compliance with the constitutional text than the inherent value of the document is able to achieve. At least, that has been the Ghanaian experience.⁸⁷ The court has to date not convicted anyone of high crime. Nonetheless, the currently perfect compliance rate with the article 2 orders of the Supreme Court implies its effectiveness. Indeed, many of the orders made by the court caused much inconvenience to their addressees; sometimes inciting resentment. In the *31st December case*, the courts invalidated the observance with public funds of the anniversary of the PNDC and AFRC coups.⁸⁸ In *NPP v IGP*,⁸⁹ it stopped the executive stifling dissent by refusing an assembly permit to all gatherings perceived as anti-government. In the

⁸⁶ Kwame Nkrumah, 'A Letter of Consolation to Dr. Kofi A. Busia: On the Coup in Ghana' (1972) 3(9) Black Scholar 23.

⁸⁷ Article 13 of the 1960 Constitution contained many of the freedoms that are contained in article 21 of 1992. But it did not obligate the President to observe them, it merely encouraged him to. The many unexplained preventive detentions and other human rights abuses for which the First Republic is remembered has taught that in Ghana, the Constitution must be enforceable by the courts.

⁸⁸ *NPP v AG [1993-94] 2 GLR 35*

⁸⁹ *(1993-94) 2 GLR 459*

District Assemblies case,⁹⁰ it cancelled local government elections a week to the day for non-compliance with article 296(c).

There is a large body of case law in which the Supreme Court has compelled state institutions to reverse acts or abandon policies on which they had taken entrenched positions, sometimes, to their embarrassment. These institutions include the National Media Commission,⁹¹ the Electoral Commission,⁹² State media⁹³ and the Commission on Human and Administrative Justice (CHRAJ).⁹⁴ The judicial review powers of the court have also been used to ensure that the executive⁹⁵ and legislative⁹⁶ arms of government stay within the constitutional boundaries of their power. Even the judicial arm itself has been challenged before the court.⁹⁷ Clearly, it is because the state's sovereignty claims are effective; rather than that the court's orders were easy to comply with, that the court has not had occasion to use its article 2(4) powers.

⁹⁰ *Mensah v EC* [2015] GHSC 10

⁹¹ *GIBA v A-G* (unreported, decided 03/11/2017)

⁹² *Tehn-Addy v Electoral Commission* [1996-1997] SCGLR 589; *Apaloo v EC* [2001-2002] 2 GLR 372;; *Ahumah-Ocansey v Electoral Commission* [2010] SCGLR 575; *Abu Ramadan v EC* [2013-2014] 2 SCGLR 1654

⁹³ *NPP v GBC* [1993-94] 2 GLR 354

⁹⁴ *Ex parte CHRAJ (Richard Anane Interested Party 2007-2008)* SCGLR 213

⁹⁵ *Banful v the A-G* [2017] GHASC 21; *GBA v A-G* [2016] GHASC 43

⁹⁶ *JH Mensah v AG* [1996-97] SCGLR 320

⁹⁷ *GBA v A-G (Abban case)* [2003-2004] SCGLR 250

3.2. Effectiveness of Externally Asserted Normative Claims.

The external normative claim a state makes is that other states do not exercise coercive force over it. As noted earlier, this claim is made to other states and also to its own. If effective, other states deal with the first state (and not another) in respect of affairs of that first state. They refrain from interfering in the internal affairs of that state. The people also accept it as the authority to represent them to other states and to attend to the polity internally. Thus, the effectiveness of Ghana's externally asserted normative claim signals the existence and degree of Ghana's international sovereignty. The Supreme Court has been the locus of some of the more contentious assertions of Ghana's normative claims to external sovereignty. This section looks at some key cases in which the judiciary asserted normative sovereignty claims externally for the state.

In 2017, the African Court for Human and Peoples' Rights (ACHPR) ordered a stay of proceedings in the Supreme Court of Ghana pending its hearing of a complaint brought to it by a Ghanaian citizen. The Supreme Court not only disregarded the stay order, it declared that the judicial power of Ghana was vested only in the Ghanaian judiciary of which it was the head and that it shared its jurisdiction with no other and would not be instructed by any.⁹⁸ The Court explained that while Ghana's participation in the ACHPR's treaty, gave the ACHPR jurisdiction to sanction the country as represented by the executive for non-compliance with its decisions, the treaty did not take away from Ghana's sovereignty. As such, her sovereign powers could not be

⁹⁸ *Amidu v. A-G, Waterville Holdings (BVI), Woyome* (SC, November 28, 2017)

undermined by it. The fact that the Chief Justice who delivered the decision was, until 2014, President of the ACHPR underscores how consciously the normative claim of state sovereignty was made by the Supreme Court in that case.

The *Woyome* decision is a natural extension of the court's previous decisions on judgments from Regional Courts.⁹⁹ Earlier decisions had turned on non-domestication of ratified treaties by executing legislation. In all instances, the court held that Ghana's sovereignty did not allow them to give effect to the regional court's decisions. The domestic courts have consistently made a normative claim of total and final internal authority for the state in interactions with external forces.

3.3. Effectiveness Over Customary Law and Asante

In *Adjei-Ampofo v AG*,¹⁰⁰ the appellant had been convicted of the offence of not attending a chief's summons. In overturning the conviction, the Supreme Court held that the 1992 Constitution granted citizens the freedom of association and that the chief's palace was not an official judicial forum that could compel attendance. A refusal to answer the chief's summons was an exercise in one's freedom of association and could not constitute a crime. It therefore struck down the offence-creating section. The court here drew a distinction between itself as state judicial power, with the authority

⁹⁹*In the Matter of Chude Mba v. The Republic of Ghana* (HC Ghana, 2016); *Ex Parte A-G (NML Capital Ltd & Republic of Argentina Interested Parties)*

¹⁰⁰ [2011] 2 SCGLR 1104]

to compel behaviour choices on the one hand, and traditional authorities as purely participatory, non-judicial fora which work only on voluntary basis; thus asserting its supremacy over customary law.

In *Saakyi Mami v Dede Paulina*,¹⁰¹ the Court stated, through Brobbey JSC, that it cannot overrule customary law rules for being sub-optimal. But it can and is obliged to invalidate them if they are incompatible with the Constitution. So, even in declining to assume the power to optimise customary law, Brobbey JSC made a normative claim for the state that the highest authority in the land is the Constitution and all customary law rules are subordinate to it.

The sheer volume of chieftaincy disputes before the state courts is a testimony to the effectiveness of the state's normative claim to shape customary law. Some very important chieftaincies (Bimbilla¹⁰² for example) are involved in some of these cases. The leadership of the tribes find legitimacy and finality in the Supreme Court and therefore resort to the state to settle their own disputes. At the start of the Constitution's life, Kwadwo Afari-Gyan observed that the appellate jurisdiction of the Supreme Court over the NHoC was not problematic because the chiefs needed only to handle their affairs well and the state would not be able to interfere with them.¹⁰³ The chiefs have not been able to so handle themselves as to reject state supervision. Indeed, in 2018, the

¹⁰¹ [2005–2006] SCGLR 1116, 1124

¹⁰² *Dawuni v Dasana*(SC,23May2018);

¹⁰³ Kwadwo Afari- Gyan, *The Ghanaian Constitution: An Introduction*. (Friedrich Ebert Foundation 1998)

court ordered the NHoC to re-enter the name of a chief it had struck off its roll without a hearing.¹⁰⁴

In *Huago v Djangmah II*,¹⁰⁵ the Supreme Court was faced with an appeal from the decision of the Greater Accra Regional House of chiefs. After holding that an Akan custom met the test of general applicability enunciated by the courts, it applied that custom to a Ningo matter because no Ningo precedent existed. The court upheld the House of Chiefs decision, noting that the Court has a duty to promote a uniform body of customary law across the country as far as practicable. That a test created by the courts was relied on by a customary law forum to import customary law from another tribe is evidence of some effectiveness of the state's normative judicial claims over customary law.

3.4. Gaps in the Effectiveness of The Normative Claim

In respect of Ghana's international sovereignty, there is little wanting. Ghana effectively expresses her control over her polity and excludes other entities from directly engaging with her citizens as a final or total authority. The picture internally is not quite the same. One sign that Ghana has does not live up to all its normative claims in fact is the number of courts she has. At the end of the 2017-2018 legal year, there

¹⁰⁴ *Ex parte Ebusuapanyin Yamoah II* (unreported, decided 25 July 2018)

¹⁰⁵ [1997-98] I GLR 300, 304-5

were 379 courts in operation in a country¹⁰⁶ of close to 30 million people.¹⁰⁷ This means that in many parts of the territory, use of the courts entails long travel that may be too costly and/or time-consuming to be worth it. The ability of the courts to regulate and shape conduct in the outer areas of its territory is therefore not fully effective.

Another gap that can be deduced in Ghana's effectiveness is in the lack of case law on FGM, widowhood rites and *Trokosi*. Though these practices have all been banned for over a decade now, there is not even a single instance of a prosecution of these offences on record. It is impractical to expect that an entrenched practice will disappear overnight with the passing of a legislation. The American Prohibition provides a forceful reminder of the limitations of legislation in controlling conduct. That all these practices still exist in the country is beyond doubt. The lack of case law is a reflection of the absence of police stations, and other state agents to implement the prohibitions. This, again, demonstrates that Ghana's effectiveness is not complete as far as sovereign control is concerned.

Augustina Akoto's study of the on-the-ground application of the Intestate Succession Law in two communities -one northern, the other southern- reveals that although there is substantial reliance on the law, it has not become the basic law of intestacy in rural communities as it should be.¹⁰⁸ In both matrilineal and patrilineal communities, estates

¹⁰⁶ Judicial Service Annual Report 2017-2018, 43

¹⁰⁷ GSS, *2010 Population and Housing Census Report: Population Projections/Prospects*. (GSS, 2014)

¹⁰⁸ Augustina Akoto, 'Why Don't They Change? Law Reform, Tradition and Widows' Rights in Ghana.' (2013) 21 (3) *Feminist Legal Studies* 263.

are devolved according to customary law even within demographics that are aware of the law and in favour of it theoretically. The state's normative claims over Asante are clearly not ineffective. But it is also obvious that the state is harder put to prove those claims when it collides headlong with traditional authority. At the same time the copious body of case law on FHRFs suggests that there is definitely bite behind Ghana's normative sovereignty bark.

Conclusion

This chapter has sought to describe how Ghana articulates its sovereignty. I studied the text of the 1992 Constitution, some legislation aimed at reforming cultural practices, and a selection of judicial decisions to identify the normative claims of sovereignty therein. In Part II, I constructed a picture of the machinery through which the judicial aspect of the sovereignty claims is exercised. I highlighted the role of the Supreme Court as a constitutional court and the powers at its disposal. A consideration of recent events and case law in Part III yielded a number of conclusions. Firstly, Ghana's externally asserted normative claims are broadly effective. But internally, there is a dichotomy between the normative claims the state makes and their effectiveness. It is clear that the state itself is aware of the distance between its strong normative claims and their factual accuracy. It is perhaps this awareness that has informed its combative stance towards Asante and stoked the sovereignty-related tensions to the near boiling point at which it now is.

Chapter 4

Asante

Introduction

In this chapter, I describe the forest tribe of Asante (pronounced ə'santi) which has been, and continues to be, such a force in the politics, economy, law, and culture of the whole of what is now Ghana. I set out the key facets of its constitutional makeup and identify those traits of its constitution that harken back to a sovereign, precolonial Asante. At the end of the chapter, the constitutional ideology, configuration, and ethos of the Asante polity should be evident. The 1992 Constitution itself declares, as legitimate, all that is authentically Asante that is also not in conflict with its tenets. But the vast differences in constitution between the two entities mean that an understanding of one does not imply an understanding of the other; not least because the state's Constitution is a written document and Asante's is not. This chapter therefore aims to set out clearly the constitutional substructure of Asante in order to make a discussion of state-tribe relations meaningful.

The chapter is a descriptive one. Part 1 explains the polity's configuration. It begins with a brief historical account of the constitutive events of Asante's past. I then explain the key constitutional features of the polity's governance framework. In the third section, I describe some vital constitutional symbols and rituals, dwelling on their role in Asante's constitutional ethos and formation. After this, I outline the main leadership offices that are constitutional in character. The two subsequent sections detail the rules of succession to chiefly office and the powers and functions of chiefs in Asante. In Part II, I throw a spotlight on Asante's judicial system. I conclude by drawing together the various threads set out in the chapter to reveal

Asante's constitutional ideology and show how that ideology manifests in the rights, obligations, and methods of the members of the polity.

Part 1- Asanteman: An Overview.

1.1. History

The historical account given here of Asante origins is not intended to be exhaustive. It is limited to facts that relate directly to Asante's political and constitutional configuration and seeks to assist the reader understand the structure of power within the polity. Although Asante has been through at least two periods of complete and total reconstitution (i.e. colonialization; incorporation into the state of Ghana); its current self retains striking similarities to its former self. This is primarily because its *raison d'être* was formalised and entrenched by an administrative structure that manifests and mirrors the polity's constitution in a very literal way. Some account of its origins is thus necessary for any study of its current constitution to be insightful.

Asante is an Akan tribe that occupies much of central Ghana. It is not to be confused with 'Ashanti', which is merely an administrative unit created by the state. Even during the colonial period when the unit was first created, its boundaries did not coincide perfectly with the territorial perimeter of the polity. A further division of that unit during the First Republic

has shrunk Ashanti even further;¹ rendering it difficult for the stranger to understand Asante's place and role in the constitutional history of Ghana based solely on modern maps.

At the height of its power and prior to British colonisation, Asante controlled territory stretching northwards of its capital-Kumasi- up towards Burkina Faso, eastwards into northwestern Togo, westwards, well into Cote d'Ivoire; and southwards up to the coast of Ghana.²

Map 1 below indicates present day Ghana with Ashanti shaded, while map 2 denotes pre-colonial Asante

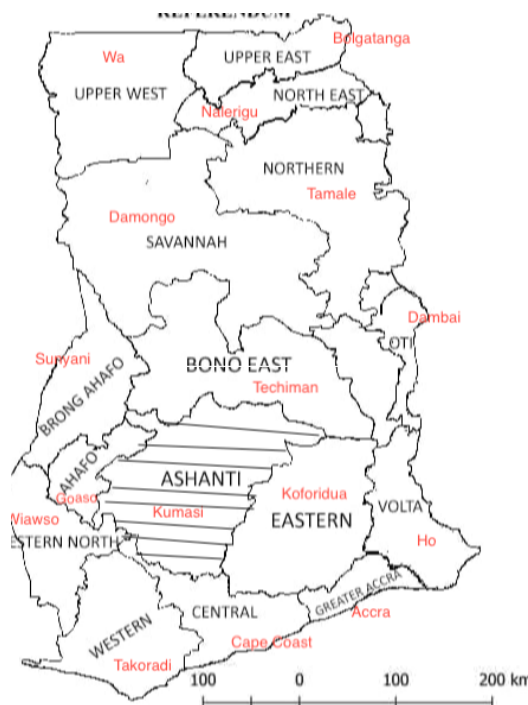


Figure 1: Ghana, administrative units since 2018.

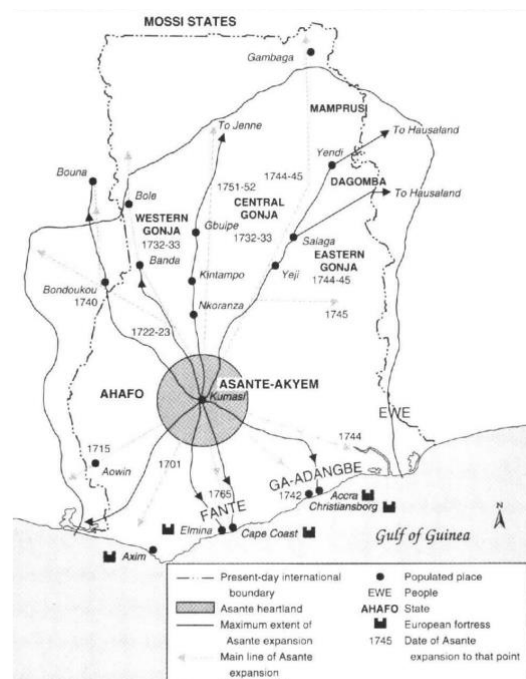


Figure 2 Asante circa 1800
Source: Laverle Berry (ed), *Ghana: A Country Study* (3rd edn, Library of Congress 1995), 10

¹ It was intended -though it did not succeed- to break up Asante by the creation of an equal in a House of Chiefs from among its subordinates and lesser rivals.

² Ivor Wilks, 'On Mentally Mapping Greater Asante: A Study of Time and Motion' (1992) 33(2) JAH 175, 175

For the avoidance of ambiguity, this chapter when referring to Asante as a polity will use the term *Asanteman* (the Asante nation), which is what the polity is called in Twi (pronounced chwee); its native tongue. To refer to its individual members, I use the Twi word, *Asantefoɔ* (sing. *Asanteni*).

Formed from a core group of five clans, under the leadership of *Dyoko*; the royal clan, Asante civilisation rose as a political power in the late seventeenth century³. Until then, the separate clan-townships, had been under the domination of Denkyera. In 1698, the oppressive regime of Ntim Gyakari, overstepped its bounds with a particularly onerous tribute demand. Osei Tutu, chief of Kwaman, capitalised on it to create common cause with some other townships in the region to throw off Denkyera rule. The union named itself ‘Asante’. The name supposedly derives from Ntim Gyakari’s contemptuous dismissal of the union as fragile, being formed purely for war’s sake (*ɔsa nti*)⁴ i.e., lacking deeper loyalty, structure or cohesion; and therefore, incapable of threatening him.

It is instructive that while Gyakari’s label for the union referred to war in the singular (*ɔsa*)- showing that he contemplated only their impending war-; the name the union adopted for itself uses the plural (*asa*); clearly articulating and embracing a martial constitutional identity. Even after the loss of military autonomy, that militant premise of the polity has never wavered and permeates its culture still.

³ TC McCaskie, ‘Denkyira in the Making of Asante c.1660–1720’ (2007) 48(1) JAH 1

⁴ Ivor Wilks, *Forests of Gold: Essays on the Akan and the Kingdom of Asante* (OhUP 1993)

Though Gyakari was proved decisively wrong about the union's military prospects; he was right about its make-up and cohesion challenges. Post- independence Asante was not very clear on its constitutional structure; the role of their military leader in their peacetime life; the rights or status and even obligations of the constituent estates of the union; or those of the hordes of Denkyira defectors whose transfer of allegiance crippled the Denkyira army and gave Asante the upper hand⁵.

But, with Okomfo Anokye, his chief priest's support, Osei Tutu's continued position as their ultimate leader was justified in myth, ritual and supposed divine revelations. He became the first, and remains the most revered, *Asantehene*. Many details of how the union would proceed were either left to be decided as and when necessary or were deliberately left open to multiple interpretations. In this way, it circumvented the challenges Gyakari had sneered at and survived the loss of its immediate reason for existence.

Nevertheless, *Asanteman* has never been the constitutionally and contentedly, unified polity that leading native Asante historians like Adu-Boahen like to project⁶. While there were certainly long periods of minimal constitutional and political contestation in pre-Ghana Asanteman's history,⁷ contest and contestation were more commonly the means by which the

⁵ Otumfuo, Nana Agyeman Prempeh I, 'The History of Ashanti Kings and the Whole Country Itself' and Other Writings in A. Adu Boahen and others (eds) *Otumfuo, Nana Agyeman Prempeh I, 'The History of Ashanti Kings and the Whole Country Itself' and Other Writings* (OUP 2003).

⁶ TC McCaskie, 'Ahyiamu- A Place of Meeting': An Essay on Process and Event in the History of the Asante State' (1983) 25(2) JAH 169.

⁷ Notably in the reigns of Osei Tutu 1804-1824 and Kwaku Dua Panin (1834 – 1867)

Union's form and internal structure were defined.⁸ As early as the reign of Opoku Ware (1720-1750), for instance, the position of *Anantahene* was created to head a team charged with the protection of *Asantehene* in the event of an attack by *Akwamu* and *Konti* divisions.⁹ With its jurisdictional and military wings clipped by the state, Asanteman has turned its constitutional and political energies towards internal cohesion and definition and done so with remarkable success.

The union absorbed numerous other groups; forbidding them on pain of death to speak of their pre-conquest origins.¹⁰ Later vassals ((eg Dagomba (circa 1772), Krachi (1774)) were neither culturally nor constitutionally incorporated. Instead, they were left independent, subject to good behaviour and the payment of annual taxes.¹¹ In 1884, a succession struggle escalated into a debilitating civil war.¹² Immediately on its heels came the 1896 attack by British forces. Asante defeat led to the exile of Asantehene, Prempreh Agyeman, with many of his important political officers. In 1901, following Asanteman's defeat in the last Anglo-Ashanti war, Britain assumed direct control of Asante affairs until 1957 when it was given its independence as part of Ghana.

⁸ Kwame Arhin, "Asante Military Institutions," (1980) 7(1) JAS 22, 25.

⁹ Ibid, 25.

¹⁰ As part of their enstoolment ceremony before being permitted to take the oath, all Asante chiefs at all level must commit to not engaging in *asekyere*, etymological references of his subjects. RS Rattray, *Ashanti Law and Constitution*, (Clarendon, 1929); George Hagan, *The Golden Stool and the Oaths to the King of Ashanti*, (1968) 4(3) Research Review 1

¹¹ Kwame Arhin, 'The Structure of Greater Ashanti (1700-1824)' (1967) 8(1) 65

¹² Agnes Akosua Aidoo, 'The Asante Succession Crisis 1883-1888' (1972) 13(2) THSG 163

Attempts by the colonial office to completely reorganise Asante through the dissolution of Asanteman and the exile of its leaders were unsuccessful, in practice, though not in law. The decentralised nature of the polity meant that the absence of Asantehene and lead officers did not result in a total power vacuum. Britain's two decades as the only central authority in Asante, were, to its exasperation, and, in spite of an expressed contrary intention and preference, monopolised by chieftaincy disputes;¹³ as estate after estate rebelled against successive leaders approved of by the colonial government. Eventually, Asanteman was restored in 1935¹⁴ and Ashanti's administration proved less consuming -if still delicate- thereafter.

1.2. The Hand of Asante's Past on The Ethos of Its Present.

The historical account in this section has focused on what I consider the most important facts in Asanteman's history constitutionally speaking. The first is that Asanteman originated as a military union formed of ethnically related, but culturally and legally independent peoples. The value-add provided by the union was clearly articulated from inception and is retained forefront in its method.

The distinctness of the component units accounts for the contestation so frequent in its history. Each episode of friction resulted in a reconstitution of the polity with amended values

¹³ David Henige, 'Akan Stool Succession Under Colonial Rule-Continuity or Change?' (1975) 16(2) JAH 285

¹⁴ ITA Wallace-Johnson, 'Full and Illustrated Report of the Proceedings of the Restoration of the Ashanti Confederacy, January 31-February 4, 1935'

and a renewal of membership. This conscious engagement of members with the polity *qua* polity has given Asanteman the resilience that has enabled it to retain its original form despite the trauma it has suffered. For instance, when, in the 19th century wealthy commoners fled Asante in their numbers to avoid *awunyaade*- the exceptionally high death duties and other taxes,¹⁵ the official position that an Asanteni acquired wealth for his use in his lifetime and for Asantehene after his death was abandoned.¹⁶ The greater property rights granted commoners renewed their interest and participation in Asanteman and, changing the constitution, also renewed their subscription to the polity. The Asanteman constitution that emerged from that struggle is paradoxically a communitarian ethic that simultaneously endorses individual wealth acquisition.

The second fact this brief history dwells on is the role of religion in Asanteman's birth, survival, and structure. Asanteman's constitutional structure is embedded in and justified by religious rhetoric. Rooting the continuance of the union and its power distribution in Asante religion enabled them to survive beyond the independence war for which they were created. It also empowered those institutional arrangements to transcend the macrostructure and become personal endorsements of each member's religious beliefs and choices. Thus, Asante customary law has historically been complied with for personal religious reasons rather than fear of penal sanctions; even when draconian ones existed.

¹⁵ 1/3rd to half the value of the estate. Gareth Austin, "No Elders Were Present': Commoners and Private Ownership in Asante,' 1807-96." (1996) 37(1) JAH 1, 21

¹⁶ For a fuller discussion of that constitutional moment in Asante, see Kwame Arhin, 'Some Asante Views of Colonial Rule: As Seen in the Controversy Relating to Death Duties.' (1974) 15(1) THSG 63.

1.3. Political and Constitutional configuration of Asanteman

A comprehensive review of the entire state machinery of Asanteman is not relevant for the purposes of this thesis and is therefore beyond the scope of this chapter. This section centres on the distribution of power in Asanteman. Where useful, I comment on changes in that structure over the course of time. But the focus of the section is always the current constitution of Asanteman.

To outward appearances, Asanteman is a monarchy of the western sort. Asantehene; the king, is an absolute ruler whose administration is composed of various levels of aristocrats; under whom Asante peasants are organised and through whom they are ruled. This picture is misleading; perhaps deliberately so. The grandeur expected of Asantehene, coupled with the use of ‘ɔhene (king)¹⁷ in his title, and the rhetoric of divine right to rule give, and indeed are intended to give, the impression that it is a kingdom with an autocratic leader.

In fact, the true holder of power in Asanteman is the *Asanteman Nhyiamu* (The Asanteman Council). This is the oligarchic council of the ‘*amanhene*’, which makes all decisions affecting the Union itself. A confederacy rather than a monarchy, Asanteman is composed of multiple autonomous political entities, known as *aman* [sing. *ɔman*] headed each by an *ɔmanhene*. The term *ɔman* translates from the Twi as ‘nation’ or ‘state’. Every unit that

¹⁷ Twi does not have different words connoting the rank of an officeholder. It is used for all levels of authority in the political hierarchy. It is what or where one is ɔhene of that shows one’s rank. This was a source of great confusion for early European missions in Ghana who sought to understand the hierarchies of authority by constructing a list of titles.

did not have an overlord was an *oman*. It is indicative of the polity's constitutional structure that Asantehene's palace and the seat of government in Asanteman is named *Manhyia* (the nations' meeting place¹⁸).

The *aman* are grouped and ordered by division (*fekuo*); the head of which is a particular *omanhene*. Although the position of Divisional Head does not rotate and is hereditary, it is not an overlord position. It is more of a coordinator role.¹⁹ All the senior *amanhene* hold some coordinating or administrative role within their division. Asanteman is composed of the following divisions: *Akwamu* (reconnaissance) *Adonten-* (front guard), *Benkum* (left flank), *Nifa* (right flank), *Konti* (main guard), *Kyidom* (rear guard) *Gyaase* (home office), and *Oyoko* (Royal Clan).²⁰ As trade brought new needs, divisions were repurposed for tasks logically related to them. For example, following the establishment of trade relations with European forts on the coast, the sword bearers of *Gyaase* division were repurposed into a trade and diplomatic courier service;²¹ a role they maintain in Asanteman today.²²

Within each *oman*, there exists a structure similar to that of the larger polity. Below each *omanhene* are the divisional heads of that *oman*. The hierarchy continues downward in

¹⁸ I am indebted to Justice HJAN Mensa-Bonsu for drawing my attention to the meaning of the Manhyia.

¹⁹ Arhin, n8, 25.

²⁰ Emmanuel Terray, 'Contribution à Une Étude De L'armée Asante', (1976) 16 (61/62) Cahiers D'Études Africaines 297, 303

²¹ Wilks, n2, 175

²² A messenger's proof that he is on official business is the sword of the chief he serves. Each chief has multiple swords with specific meanings and communication expertise, for want of a better word. Each sword is serviced and held by a particular family, which then becomes the department that runs errands related to the sword's field. Naturally, there's a chief of each sword line and it is a hereditary role. Kwasi Ampene & Nana Kwadwo Nyantakyi III, *Engaging Modernity: Asante in the Twenty-First Century* (MUP 2016)

an intricate and non-linear system of authority and allegiance that ends with the 'Odikro'-village head.²³ A council of elders, exists at every rung of the political machinery. At the village level, the council is composed of the heads of principal families. At the higher echelons of Asanteman government, it is the forum of principal towns' leaders.²⁴ In this way, *Asantehene* could be kept in tune with popular sentiment and reach his ordinary subjects.

Allegiance in Asante is personal.²⁵ Not even by emigration can a person change their overlord. In precolonial Asanteman, any attempt to change allegiance was punishable by death as treason. Even a threat to withdraw allegiance was treason.²⁶ However, chiefs could pawn whole settlements to settle debts, or they could be confiscated by *Asantehene* and redistributed.²⁷ Only in that case could allegiance change.²⁸ It is not clear when, if ever, chiefs lost that power. But as the state and its Constitution have taken away from *Asantehene* and his chiefs the power to back such a decision with force, it is debatable whether they continue to possess it.

²³ TC McCaskie, 'Office, Land and Subjects in the History of the Manwere Fekuo of Kumase: an Essay in the Political Economy of the Asante State' (1980) 21 JAH 189, 190-1.

²⁴ Robert Addo-Fening 'Chieftaincy, Colonialism and the Atrophy of Traditional Governance in Ghana' in Lauer & Anyidoho (eds) *Reclaiming the Human Sciences and Humanities Through African Perspectives 2* (Sub-Saharan 2012).

²⁵ *Apenquah's case* [1903] 2 FLR 4; JE Casely-Hayford, *Gold Coast Native Institutions*, (Cass, 1970), 24.

²⁶ Possibly because of the role Denkyera defectors played in Asante victory in the battle of Feyiase.

²⁷ TC McCaskie 'The Life and Afterlife of Yaa Asantewaa' (2007) 77(2) Africa 151.

²⁸ even then, not always. Obedience could be owed to a different stool than allegiance. So even after a sale, allegiances could remain unaltered. Arhin, n2.

Power is perceived in Asante as radiating from the centre in concentric circles.²⁹ So that although Asantehene can very quickly and easily communicate throughout his polity, executive power is very much decentralised; with whole lineages assigned to specific tasks.³⁰ This way of defining power has made Asanteman a very deeply entrenched political entity. This is because in such a conception of power, the centre is fixed permanently. But the rippling waves emanating therefrom generate so many radiuses to that centre that no space within the perimeter of the widest circle is overlooked; each smaller circle has an independent line of access and accountability to the centre. In other words, so many powerholders are involved in the wielding of the power that flows from the centre that the centre's pre-eminence and sustenance are assured. The polity which creates that centre is also, consequently, assured. The strength of Asante as a tribal bloc within republican Ghana can be, at least partly, ascribed to the decentralised power distribution setup.

1.4. The Impact of Decentralisation on Identity for the Asanteni

State monopoly on armed forces has erased the military character of Asanteman's institutions. But, as they had been turned into administrative and bureaucratic structures long before the intrusion of the state, the absence of war has not eroded the resonance of a battle formation within a non-militarised, post-colonial Asanteman. The division to which one belongs is either known or easily ascertainable to the present-day Asanteni, although no duties arise therefrom. The devolution of power from the *Asanteman Nhyiammu* via Asantehene, through the many

²⁹ Wilks n2, 182

³⁰ Ibid, 175

levels of chiefs to the village councils and village heads offers opportunity for political participation to many varying types of Asanteni, ranging from the most to the least elite, the wealthiest to the poorest. In this way, the ideology of Asanteman is shared across the breadth of the polity.

1.5. Asante Constitutional Symbols and Rituals

In understanding *Asanteman's* pre-colonial sovereignty and its post-colonial remnants, it is important to consider how constitutional commonality (ie citizenship) was and continues to be reinforced in Asanteman politics. This section explores Kumasi, the Golden Stool and oaths as the main constitutional symbols of *Asanteman*. It examines their role in the resilience of the polity in the aftermath of colonialism and the birth of the nation-state. Some well-known symbols of Asanteman, though of great cultural or ceremonial significance, are not or are no longer of constitutional significance.³¹ Other symbols play a legalising role in a key constitutional moment. But, not forming part of the public visuals of the constitution, they do not impact the state-tribe struggle for the Asanteni-Ghanaian's loyalties. The *Busummuru* sword is a prime example of such a constitutional symbol. It is only with the *Busummuru* that Asantehene himself may be sworn into office. However, that ceremony is held *in camera* and, when thereafter, the king sits in state, the *Busumuru* is covered to protect it from women's eyes.³² As a result, it is a constitutional tool and an important one for Asanteman. But it is not

³¹ Golden elephant's tail, sword of final message, Odwira festival. Ivor Wilks 'The Golden Stool and the Elephant Tail: An essay on wealth in Asante' (1979)2 *Research in Economic Anthropology* 1; FK Adams, *Odwira and the Gospel: A Study of the Asante Odwira Festival and Its Significance for Christianity in Ghana* (Wipf & Stock 2011)

³² Ampene & Nyantakyi III, n21

a constitutional symbol of the larger polity for its members. Thus, the *Busumuru* Sword, and symbols like it, will not feature in this section.

1.5.1. Kumasi

Asanteman's capital is and has always been Kumasi; even when it would have proved wiser to move it.³³ Originally Kwaman, Osei Tutu's own domain, its choice as the confederate capital is enshrined in constitutional folklore and religious myth orchestrated by Asante's most famous high priest Okomfo Anokye.³⁴ Anokye planted Kuma trees in three locations amidst many rituals asking for signs of a divine choice. The Kuma tree at Kwaman, unsurprisingly, flourished. It was renamed Kumase i.e. under the Kuma tree.

1.5.1.2. The Symbolism of Kumasi's Role in Translating Asanteman into the Identity of Asantefo

The entanglement of divinity with Kumasi's status has entrenched Kumasi (and all it stands for) into the constitutional psyche of Asanteman, creating a relationship between Kumasi and each *Asanteni*. In this way, the centralisation of political power in Asanteman was consolidated into a single irreplaceable point- Kumasihene *ergo* Asantehene. Without rendering the centre of Asanteman so incontestable, the highly decentralised nature of power within the polity would have offered opportunity for strong or wealthy amanhene to attempt to reorient the polity

³³ Wilks, n4

³⁴ Kwame Arhin & Kwadwo Afari-Gyan, (eds) *The City of Kumasi Handbook* (IAS 1992), 5

around their own estates. This constant moving around of the centre would have affected both the cohesion and the resonance of the union. Constitutions must be stable, admitting of change but none too easily. Kumasi's metaphysical sanctity plays a stabilising role that acts as both a check on the internal autonomy of the *aman* and a lid on the instability inherent in the elected nature of chiefly offices. Accra's status as the nation-state's capital, lacks any legitimising, constitutive narrative and therefore does not have the same resonance for all citizens as Kumasi does for Asantefo.

1.5.2. The Golden Stool

Asante executive offices are represented by stools. Thus, an Asante chief or queen mother is 'enstooled' on taking office and 'destooled' when deposed. The stools are believed to contain the spirits of the ancestors of the people who are its subjects.³⁵ *Sika Dwa Kofi*- the Golden Stool, is the only exception. Believed to hold the soul of Asanteman itself, it is seen as the visual symbol of Asanteman's sovereignty. For that reason, it is never sat upon. Even at his installation, Asantehene is suspended over, rather than seated on it.³⁶

1.5.2.1. The Symbolism of the Golden Stool for Asantefo

Shrouded in metaphysical mystery, the Golden Stool was allegedly called down from heaven in a cloud of smoke by Okomfo Anokye. Anokye is said to have made the *amanhene* bury all

³⁵ Catherine Meredith Hale, *Asante Stools and the Matrilineage* (PhD Thesis, Harvard University, 2013)

³⁶ This is so important that Hodgson's ill-conceived demand to sit on the Golden Stool precipitated the last Anglo-Ashanti War of 1901. Ivor Wilks, 'Asante Nationhood and colonial administrators, 1896-1935' in C Lentz & P Nugent (eds) *Ethnicity in Ghana: the limits of invention* (Macmillan, 2000)

their pre-Asante regalia in a river³⁷ before entering into a trance to summon the Golden Stool. It supposedly hovered above³⁸ or fell into³⁹ Osei Tutu's lap signifying God's approval of him as *Asantehene*. Anokye warned that because the soul of Asanteman had been placed in the stool by God, its loss or destruction would signify the end of this people.⁴⁰ Anokye then made a potion to which he added the hair and nail clippings of the royals of all the *aman* and painted the stool with it.⁴¹ He issued care instructions so arduous that it naturally bred awe and caution in the treatment of the stool.⁴²

In so doing, Anokye bound up the metaphysical fortunes of all parts of the union one with the other. This uniting force has been singularly successful. Though contestation of *Sika Dwa Kofi's* occupation has persisted (even after the civil war), the self-identification of citizens of constituent *aman* as Asantefoɔ has never wavered. In 1921, when some Akyem men desecrated the Golden stool, the shock and desolation that shook Asanteman persuaded the colonial government that Asante loyalties were not so entangled in the person of the stool occupant as to make it dangerous for Prempeh to return home.⁴³ The fact that several *aman* within the union rebelled, some several times, but within a number of years returned willingly to pledge allegiance to Asantehene has led some scholars to conclude that the Golden Stool

³⁷ Alex Kyerematen, 'The Royal Stools of Ashanti,' (1969) 39(1) Africa 1, 3

³⁸ Ibid Royal Stools 1, 3

³⁹ TC McCaskie, 'Komfo Anokye of Asante: Meaning, History and Philosophy in an African Society', (1986) 27(2) JAH 315

⁴⁰ McCaskie, n38... 'Komfo Anokye .

⁴¹ Kyerematen, n36 'The Royal Stools

⁴² It must never touch the bare earth and must be placed on a coarse blanket of camel hair or the skin of an elephant that had fallen face downwards when killed. Camels do not inhabit the forest habitat of Asante. Kyerematen, n36 'The Royal Stools

⁴³ RS Rattray, Ashanti Law and Constitution (Clarendon Press, 1929)

evoked sentiment and loyalty in Asantefoo that has done much to sustain the confederacy and its hold over its subjects.⁴⁴

The Golden Stool is today the most revered symbol of traditional leadership in Ghana; its occupant commanding a wider sphere of influence in national affairs than any other traditional leader in Ghana, perhaps the sub-region.⁴⁵ As Kyerematen has said, it provides a tangible focus for and of patriotic sentiments.⁴⁶ Because the religious premise of its existence has put its continued validity beyond questioning, it has been able to present the image of a strong, grand, justified and authentic office uniting and directing a wide polity to navigate the less trusted polity of the state.

1.5.3. Oaths

Oaths, called *ntam* in Twi, hold ceremonial, constitutional and legal relevance in Asanteman. In precolonial Asanteman, the general of every military mission swore an oath to deliver their specific target. If he failed, he would commit honourable suicide on the field of battle.⁴⁷ That function of oaths no longer exists in a non-militarised Asanteman within a nation-state. But the other three remain. Each chief whose stool is blackened⁴⁸, has his own *ntam*⁴⁹. *Asantehemaa*,

⁴⁴ William Tordoff 'The Ashanti Confederacy (1962) 3(3) JAH 399, 417; Rattray n42 175-8

⁴⁵ Certainly, Asantehene is the only traditional leader to have dealt with and secured funding from the world bank in his own name, not as a nation-state emissary, for development in his territory.

⁴⁶ Kyerematen, n36, 1

⁴⁷ Arhin, (n8), 25

⁴⁸ The stools of exceptional leaders are blackened when they die and added to the official stools of their unit. Generally only aman have blackened stools. Catherine Hale, *Asante Stools and the Matrilineage* (PhD thesis, Harvard University 2013), 6

⁴⁹ Henrietta JAN Mensa-Bonsu, 'The Place of Oaths in the Constitutional Set up of Ashanti' (1989) 4 *Law & Anthropology* 259, 269

the queenmother is the only female powerholder with a personal *ntam*.⁵⁰ Asante oaths commemorate great public calamities and are therefore ordinarily taboo topics.⁵¹ Their use signifies a very momentous matter.

Constitutionally, oaths serve as a visual reinforcement of the territorial boundaries of Asanteman and therefore of citizenship. It reaffirms the constitutional order and ethos of the polity and also reconstitutes the polity by active renewal of the social contract. The enstoolment process of a new Asantehene happens over the course of a few days. But its most important (in the sense of having legal implications) events are the Asantehene-elect's swearing of the Great Oath and the ceremonial 'seating' on the Golden Stool. The former is a prerequisite for the latter. As noted earlier, this is a private ceremony witnessed only by certain chiefs, priests, linguists and other functionaries.⁵²

Once officially enstooled, Asantehene receives the oath of allegiance from all the *amanhene*. Their subordinate chiefs in turn swear fealty to them and their subordinates to them until every powerholder within the union has sworn a new oath of loyalty to their overlord. In this way, every new Asantehene receives an enforceable oath of allegiance throughout the territory. An act of disobedience to Asantehene is treated not as an act that directly violates the Golden Stool but as a violation of one's oath to the stool. The oaths are therefore what translate the king's entitlement to power into a subject's personal duty to obey.⁵³

⁵⁰ Mensa-Bonsu, n48, 269

⁵¹ Kofi Agyekum, 'Ntam 'Reminiscential Oath' Taboo in Akan' (2004) 33(3) *Language in Society* 317.

⁵² For an account of the ceremonies see Ampene & Nyantakyi III, n21

⁵³ Hagan, n10

Each chief, and queenmother, however minor, swears an oath to his township in their enstoolment process. But whether a minor *odikro* or an *ɔmanhene*, they are not officially incorporated into the larger polity until they have sworn the great oath of Asantehene. Until they do, they cannot be assigned any task of interest to Asanteman itself, in the case of *amanhene*; or the *Division*, in the case of lower chiefs. They are referred to *nkwaakwaahene* of so and so place. The term *nkwaakwa* means ‘youngmen’. But as Allman has explained, this is a reference, not to their age, but, to their political status vis-à-vis their economic power. *Nkwaakwa* are wealthy commoners. Because the oath is what renders a chief of an *ɔman* or township an officer of Asanteman, the chief who is yet to take Asanteman’s Great Oath is simply the commoners’ chief.

The Great Oath of Asanteman is known as ‘*Kɔromante Memenda*’. It invokes the death of Osei Tutu in an ambush on a Saturday (*Memenda*) at *Kɔromante* and is thus the ‘personal oath’ of Asantehene. Asantefoɔ believe that reminding the ancestors of the events immortalised in *ntam* will anger and estrange them, thereby bringing calamity upon the entity; or a repetition of the event.⁵⁴ *Kɔromante Memenda* is referred to obliquely as *ntamkesie*- the great oath. In constitutional moments such as the swearing to Asantehene, it is mentioned expressly. ‘I swear by *Memenda* that ...’ In all other situations, it is simply referred to as the Great Oath. The oaths of other blackened stools are also referred to by allusion, generally being mentioned expressly only in enstoolment proceedings.⁵⁵

⁵⁴ KA Busia *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (OUP 1951) 75-78; Kofi Agyekum, *Akan Verbal Taboos in the Context of the Ethnography of Communication*. (GUP, 2010), 26-7, 48-9

⁵⁵ Eg. The 'great oath'; of Bekwai is *Kwesida ne Mpete* (Sunday and Small-pox); combining the tragedies of two Bekwai heroes; Yaw Kofo who died on a Sunday, and Boakye Yam died of small-pox in a war against the Fanti. See RS Rattray, *Ashanti Law and Constitution* (Clarendon, 1929) at section 159 on Bekwai.

Oaths are sworn again at a macabre feast of the dead held when the Asantehene dies.⁵⁶ The event is attended only by important *amanhene*, and specific officers of their retinue. The *amanhene* swear the *ntamkesie* to the effect that they would have followed him anywhere within this realm but cannot follow him beyond.

Finally, and importantly for this thesis, oaths are used to initiate legal proceedings. A would-be plaintiff can start an action by publicly speaking an oath. If the putative defendant repeats the oath, the owner of that oath is seised with jurisdiction in the matter. Whatever the nature of the dispute between parties, the invocation of an oath turns it into a criminal matter- the offence being conduct inciting the invocation of the *ntam*.⁵⁷ The chief who is immediate overlord over the disputants has to perform purification rights. Until the state reserved capital punishment to its courts, the penalty for losing an *ntam* case was death.⁵⁸ It is now a hefty fine.

1.5.3.1. The Symbolism and Legal Role of Oaths in Asanteman's Cohesion and Asantefoɔ Identity

The judicial role of the oath is discussed more fully in the context of the polity's dispute resolution infrastructure in Part II. It suffices for now to say that the oath gives the wider community- be it the *oman* or *Asanteman* itself -a stake in the resolution of otherwise private

⁵⁶ TC Mccaskie 'Death and the Asantehene: A Historical Meditation' (1989) 30(3) JAH 417; GP Hagan & IK Odotei, *The King Has Gone to the Village* (IAS 2001)

⁵⁷ Mensa-Bonsu, n48 ,269

⁵⁸ Tom McCaskie, 'Unspeakable words, Unmasterable Feelings: Calamity and the Making of History in Asante' (2018) 59(1) JAH 3. Of course, this is no longer possible under the constitution.

disputes. It thus serves to underscore and reinforce the communitarian ethos of Asanteman that has made it such a forceful contender with the state in so many spheres.

The military oath, though now obsolete, has retained its place in the institutional memory of the polity; the rank of the *aman* being based in some cases on the fulfilment of such oaths. The praise songs of bards recall not just the victories, but also the oaths they fulfilled. Because it is in the oath that personal duty lies, it is in the oath that honour lies. Thus, in recalling their heroes as honourable men based on military endeavours, that faded category of oaths continues today to reassert the martial constitutive premise of *Asanteman* and therefore of Asante identity.

At the feast of the dead, the oath is largely ceremonial since the event is not public.⁵⁹ But it also serves as a reminder to those who swear this oath; knowing they will shortly swear a similar oath to a different person, that, as Rattray put it succinctly, ‘in Asante, the stool is greater than its occupant⁶⁰’ and that their loyalty remains to the polity. The release of the collective body of Asanteman’s leaders from personal duties to a deceased leader is simultaneously a re-vesting of those duties in the polity itself, before being once again vested in the new Asantehene as agent of the polity. The visual aspect of this process is as important as the legal one, for it serves to make it contemplative and therefore a conscious affirmation of each *aman*’s membership and their subjects’ identity.

Beyond the legal function the oath serves at the enstoolment ceremony at *aman* and Asanteman levels, it plays an emotive, psychological and visual role in the reconstitution of

⁵⁹ Hagan & Odotei, n55

⁶⁰ Rattray n 42, section 85

the polity. The event of all the officeholders in Asanteman solemnly uttering the forbidden words in the moment of reconstitution lends a sombre and awesome tenor to the moment. Importantly, the reminder of such calamitous moments reinforces the need for and utility of *Asanteman* to all subjects. The installation of Asantehene and the integration of an *ɔmanhene* or a lower-level chief is rendered a personal event for each subject by the invocation of the *ntamkesiɛ*.

In this section, I have highlighted the main constitutional symbols of Asanteman. I have explored how these symbols speak to the self-definition of individual members of the polity in order to make evident how finely the individual Asanteni's human experience and sense of self-worth is interwoven with the traditional polity of Asanteman. I have shown that Kumasi and the Golden stool have played the complementary roles of providing an epicentre and cement for the union to channel and contain the contestation and frequent reconstitution bequeathed by the origins, constitutive purpose and power structure of the polity. I have demonstrated how oaths are very much a cohesive device in Asanteman. The discussion reveals the substantial role religion has played in justifying, sanctifying and entrenching the purpose and structure generated at the polity's birth. These symbols account, in my opinion, in no small part for the state's inability to permeate the cosmopolitan centres of Asante much more than it has reached their outskirts.

1.6. The Constitutional Offices of Asante

In this section, I aim to show how and by whom Asanteman authority is deployed and what nature of power vests in each of those public offices. Precolonial chiefs were hardly absolute

rulers. Still, the three departments of official power were not separated. This section examines Asanteman's main constitutional offices. It distinguishes between their executive, legislative and judicial roles.; paying particular attention to the last.⁶¹

1.6.1. Asantehene

As noted earlier, Asantehene is the head of the confederacy. His title is *Otumfuo* (wielder of power). All edicts of *Asanteman Nhyiamu* are pronounced in his name- adding to the illusion of autocratic authority that Asanteman presents to the world. Yet, he does not make many of decisions affecting the wider polity (such as treaty ratification, the declaration of war, and taxation) alone and never has.⁶² The *aman*, and within them, the towns and villages retain significant internal autonomy.

Asantehene has both religious and executive functions and the former reinforce his right to perform the latter.⁶³ Though his authority is rooted in religion, he is not a divine ruler in the sense of being himself a god.⁶⁴ He is merely a human agent of divinity. This is what made the stool greater than the king; that *it* was divine, and *he* was not. Western states had divine kings

⁶¹ For example, the Mamponghe's silver stool is next in rank to Asantehene's, acting for the king in his absence. But because it holds no unique judicial power or function, I do not discuss it here.

⁶²Ivor Wilks, *Asante in the Nineteenth Century: The Structure and Evolution of A Political Order* (CUP 1975), 186.

⁶³ Louise F. Müller, *Indigenous Religion in Ghana: An explanation for the persistence of Asante chieftaincy in Kumasi* (PhD Thesis, University of Edinburgh 2008), 104-6

⁶⁴ Hagan, n10

but were not themselves divine formulations. This both facilitated the secularisation of and insured the state against collapse in its wake. *Asanteman* is itself divine. Its occupant is blessed with divine choice that he must continue to merit to stay in power.⁶⁵ Thus, the total secularisation of *Asanteman* is not possible without its collapse.

As his people's link with divinity, he is a king-priest. He is not vested with the authority to say what God has ordained. His priesthood is primarily in the nature of the rituals that are performed only by him. As such rituals were all directly linked to the Golden Stool, his absence is a period of listlessness and lack of direction for all *Asanteman*.⁶⁶ Rattray records how in the period immediately following an *Asantehene's* death and before the beginning of his successor's kingly rebirth, lawlessness is common in Kumasi especially.⁶⁷ In independent *Asanteman*, *Asantehene's* chief attribute and virtue was his military prowess.⁶⁸ But in postcolonial Asante, without the option of warring,⁶⁹ and deprived- or perhaps relieved- of domestic management duties by the state, *Asantehene's* judicial capacity has taken on greater significance than ever before. Likewise, the *amanhene's* and sub-chiefs'.

⁶⁵ Tordoff, n43, 415. Eg *Asantehene Osei Kwame* was destooled, for failing to return to Kumase for his own *Odwira* festival and thereby failing to perform the rituals that only *Asantehene* could perform and which, in Asante religion and constitution, are so critical to the nation's wellbeing. Joseph Dupuis, *Journal of a residence in Ashantee*, (Henry Colburn 1824)

⁶⁶ *Mamponhene* occupies the silver stool and is *Asanteman's* vice regent. In the physical absence of *Asantehene*, governance is not constrained. The lack felt is primarily spiritual.

⁶⁷ RS Rattray, *Religion and Art in Ashanti* (OUP 1927); Hagan, n10.

⁶⁸ Arhin, n8.

⁶⁹ Although in 2013 the current *Asantehene*, Otumfuo Osei Tutu threatened to issue a head warrant on the *Techimanhene* for kidnapping his subchief. Asante youth immediately responded with violent attacks on *Techiman* and vehicles returning therefrom. Myjoyonline, 'Tension mounts in Kumasi and *Techiman*' (JoyNews, 15 March 2010) <<https://www.myjoyonline.com/news/tension-mounts-in-kumasi-and-techiman/>> accessed 5 June 2020

Whether or not sitting as a forum of first instance, Asantehene's palace is the final appellate authority. In his judicial capacity, he is assisted by his Council of Elders i.e. his own oman's (Kumasi's) Council. His decisions, wherever concerned with a general principle serve to amend, re-enact or repeal general Asante customary law rules that apply beyond Kumasi and are binding on all lower judicial fora within the confederacy. The same is true of lower chiefs except that they must not run counter to an overlord's ruling. Thus, an *odikro* could by a judicial decision change a practice within his jurisdiction provided it did not contradict his omanhene or Asantehene's decisions in the matter. Such conduct, once a capital offence, may now lead to a fine; but will in most cases result in destoolment.

1.6.2. Asantehemaa

Asantehemaa is the queenmother and originally co-ruler of Asante and could be, as in the case of Yaa 'Kyaa, Prempeh's mother, exceptionally powerful.⁷⁰ The patriarchal bent of colonial British society led to a diminishing of the queenmother's status and her influence in Asante constitutional and executive matters.⁷¹ But her judicial power has suffered less. A member of *Asantehene's* Council, *Asantehemaa* sits on his left hand 'as sits the sub-conscious in the mind.'⁷²

⁷⁰ TC McCaskie 'Agyeman Prempeh before the Exile' in Nana Agyeman Prempeh I in A Adu Boahen et al, (eds) *History of Ashanti Kings* (OUP 2003).

⁷¹ Agnes Akosua Aidoo, 'Asante Queen Mothers in Government and Politics in the Nineteenth Century' in FC Steady (ed.), *The Black Woman Cross-Culturally* (Schenkman 1981).

⁷² JB Danquah 'The Culture of Akan' (1952) 22(4) *Africa* 360.

She is always the mother, aunt or sister of the present or immediate past Asantehene. Asantehemaa is an influential constitutional figure whose most important duties include organising and announcing the results of a succession election.⁷³ She has her own stool; i.e. her power is not derived from her relationship with Asantehene but is an executive office in its own right, albeit limited in scope. As with the other royal court offices, her office exists at all levels of Asante governance.⁷⁴ Queen mothers in Asante are the head of the female population of a unit and their representative on the Council of Elders. All matters affecting women, individually or collectively are steered through her. Her palace remains the primary forum for the resolution of certain matters.⁷⁵

Before puberty rites for girls fell out of favour, the queenmother was in charge of it and girls would report their first period to her. Even now, it is reported that many girls still go to the queenmother to announce their coming of age, even if they do not go through with the ceremony any longer.⁷⁶ Now, as then, the queenmother's influence is not to be underestimated. The last Anglo-Ashanti war, which nearly bankrupted the Colonial Office, is known in Ghanaian history by the name of the queen mother who instigated and perhaps even organized it- Yaa Asantewaa, queenmother of the ÷man of Ejisu.⁷⁷ Today, Asantehemaa, in particular,

⁷³ TC McCaskie 'Agyeman Prempeh before the Exile' in Nana Agyeman Prempeh I (A Adu Boahen and Others, (eds) History of Ashanti Kings (OUP 2003).

⁷⁴ RS Rattray, Ashanti Law and Constitution, (Clarendon, 1929) chIII.

⁷⁵ Donald I Ray and others (eds), Reinventing African chieftaincy in the age of AIDS, gender, governance, and development (UCalgary Press 2011), 246.

⁷⁶Takyiwaa Manuh, 'The Asantehemma's Court and its Jurisdiction Over Women: A Study in Legal Pluralism' (1988) 4(2) Institute of African Studies Research Review 50.

⁷⁷ TC McCaskie, 'The Life and Afterlife of Yaa Asantewaa.' (2007) 77 (2) Africa 151.

and her subordinate queenmothers' cooperation is required in community intervention campaigns.⁷⁸

1.6.3. *Okyeame* [plu *akyeame*]

The concept must have translated poorly into the British understanding of court, for the office has been translated into English as 'linguist'. The *okyeame* is the chief's spokesman and member of Council. The office always has multiple members and when the chief sits in state, they sit on his right hand in order of seniority.⁷⁹ The office exists to protect the dignity of the king. Because he speaks with the authority of, and, by implication, in accord with God and the ancestors, he must never publicly retract a statement he has made or be contradicted.⁸⁰ The existence of *Akyeame* minimalises the likelihood of him having to do so.

In judicial matters, questions asked by the chief might pre-empt his judgment and lead to disaffection in the affected party or observers. Thus, it is the *okyeame* who interrogates, expresses doubt as to the veracity of a statement and asks the affected party if they can provide witnesses or proof, proposes adjournments et.c⁸¹ He can raise any issue during the litigation whether or not the parties have pleaded it and can *suo motu* invite the court to take judicial notice of notorious facts. He is under a duty to be impartial, seeking truth not justice in the

⁷⁸ Beverly J. Stoeltje, *At the Queen Mother's Court: Ethnography in Kumasi, Ghana Counterpoints* (2013) 354 Qualitative Research 370.

⁷⁹ Kwesi Yankah, *Speaking for the Chief: Okyeame and the Politics of Akan Royal Oratory* (Indiana University Press, 1995), ix and ch7.

⁸⁰ Yankah, n79 ix and ch7.

⁸¹ Yankah, n79.

common law sense. So important is he during the judicial process, that all crime is viewed as ‘pummelling the *Akyeame* with a cudgel’- for crime implies a lack of faith in their ability to investigate and put a case before the chief properly.⁸² This allows the chief and elders to avoid descending into the arena of conflict. It also ensured that social inequality did not pervert justice. As a highly stratified society, this was key to social harmony.

The *Okyeame*’s office is also religious. His knowledge of the rituals and traditions needed to keep the polity in religious harmony with the gods is unrivalled and so though he is not a priest, the necessity and authority of his office is divinely legitimised. For example, he is the one who pours libation to the ancestors at all official events. In that role, he must know the genealogies, appellations etc of each ancestor.⁸³ *Akyeame* exist at every level of political authority. Every administrative head, when exercising adjudicatory power, must be addressed through an *okyeame*. Like most positions within Asanteman, the office and even seniority within it is hereditary.⁸⁴

As can be seen from the description of Asanteman’s constitutional offices above, power is widely devolved vertically, and, below Asantehene, horizontally. Between these key constitutional offices, a very great number of persons are involved, to varying degrees in the sustenance and deployment of *Asanteman*. This too is partly accountable for the polity’s resilience. It continues to participate in the daily lives of a great many Asantefoɔ and they in

⁸² Kofi Agyekum, ‘Akan traditional arbitration: Its structure and language.’ (2006) 27(5) *Journal of Multilingual and Multicultural Development* 359

⁸³ D Ross, ‘The Verbal Art of Akan Linguist Staffs’ (1982) 16(1) *African Arts* 56, 58

⁸⁴ Kwesi Yankah, ‘Power and The Circuit of Formal Talk’ (1991) 28(1) *Journal of Folklore Research* 1

its life. In this way, Asanteman's claim of authority over Asantefoo is daily asserted at myriad levels by myriad agents and allows its values and premise to be alive and important to every participant.

1.7. Rules of Succession to office in Asanteman.

The rules of succession to office for Asantehene differ only slightly from the rules of succession to an unimportant stool, and even to family stools. Most stools in Asanteman are hereditary though a number of appointive stools, filled or created at the chief's discretion, exist within the Gyaase Division.⁸⁵ Like most Akan tribes, Asante is matrilineal.⁸⁶ Eligibility to a stool is therefore traced through maternal descent. The question of which families are eligible to stool office is rather more firmly fixed now than it was in pre-colonial times when families could become royal, should they find a strong and rich member to push their interests.⁸⁷

Succession to an Asante stool is not automatic; there is no heir apparent at birth. Stool occupation is decided by election based on nominations made by the queenmother. Asante

⁸⁵ Nkɔsuohene ('progress' ie development chief) is notable example of an appointive stool created by Opoku ware II

⁸⁶ Busia n53, 11 & 86

⁸⁷ Arhin Berempong, Transformations in Traditional Rule in Ghana (Sedco, 2001), 64

chiefs had to be physically unblemished as the representation of their unit.⁸⁸ In the case of Asantehene, he would also, ideally, be a patrilineal grandson of a previous Asantehene.⁸⁹

Every enstoolment is potentially for life. Still destoolments are quite common because Akan political institutions are in many aspects subject to popular control and participation.⁹⁰ Even Asantehene may be destooled, as Kofi Kakari was in 1874.⁹¹ Common reasons for destoolment include chronic drunkenness, avarice, and cruelty.⁹² Deposition from the seat is ‘the ultimate humiliation a community could bring on a recalcitrant chief’.⁹³ It is seen as a spiritual indictment to be destooled; and is thus not an act undertaken or suffered lightly.⁹⁴ In cases of high treason involving a royal, his/her whole line could be excluded from the royal succession. In the Asante psyche, this was, and, remains a punishment worse than death.⁹⁵

⁸⁸ Müller, n62, 212

⁸⁹ TC McCaskie ‘Essays. Agyeman Prempeh Before the Exile’ in Prempeh I, King of Ashanti, and A. Adu Boahen. *The History of Ashanti Kings and the Whole Country Itself: And Other Writings.* (OUP 2003), 4

⁹⁰ WB Harvey, *Law and Social Change in Ghana* (PUP, 1966), 67

⁹¹ George Ayittey, ‘Traditional Institutions and the State of Accountability in Africa’ (2010) 77(4) *Social Research* 1183, 1196

⁹² GBN Ayittey, *Indigenous African Institutions*, (2nd edn Brill Nijhoof, 2006) ch 4

⁹³ Napoleon Bamfo, *The Hidden Elements of Democracy among Akyem Chieftaincy: Enstoolment, Destoolment, and Other Limitations of Power*, (2000) 31(2) *JBS* 149 at 149

⁹⁴ Destooled chiefs or kings are treated very harshly in Asante. They are not buried in the royal mausoleum; their stool is not blackened and their names cannot be taken on by later chiefs/kings as a stool name.

⁹⁵ McCaskie ‘Essays. Agyeman Prempeh Before the Exile’ in Prempeh I, King of Ashanti, and A. Adu Boahen. *The History of Ashanti Kings and the Whole Country Itself: And Other Writings.* (OUP 2003), 12

To depose a chief, the people hold a palaver (public durbar) at which the cause of their discontent is made known to him.⁹⁶ Destoolment is completed when a chief's sandals are taken off and his bare foot touches the ground. Contact between a chief and the earth is viewed as a challenge to the earth goddess's authority⁹⁷ and thus puts the polity in conflict with her. Forcing an ex-chief to touch the ground with his feet amounts to the community repudiating his status as an agent of divinity.

The religious undertones of Asante chieftaincy are, again, seen in the politics of the unit. By giving destoolment a spiritual dimension, Asanteman has ensured not only that its institutions will be taken seriously by both rulers and ruled, it has justified the institution and its workings metaphysically and therefore insured it. The non-divine nature of the chief permits popular control and participation that prevents the institution from becoming completely unresponsive to the needs and sentiments of the citizens and eventually sparking a rebellion that could prove its fall. Through its hereditary aspects, Asante chieftaincy harnesses the predictability and continuity inherent in monarchies. But thanks to the elective nature and popular destoolment power, it lacks the scope for tyranny that monarchy possesses.⁹⁸

The symmetry in the rules applying at the village, *oman* and Asanteman levels gives the Asanteni of any rank, a mastery of the workings of the system. These factors work to render

⁹⁶ Kudjo Ghambra v Kwamin Ewa 2FLR 65

⁹⁷ Perhaps as a claim of actual rather than delegated divinity in the chief

⁹⁸ This is not to express a naïve belief that all chiefs are or have been benign. Rather, it is to point out that the people are not as helpless under their chiefs as they would be under a traditional monarchy nor do their systems suffer the discontinuity inherent in republican democracy. As that is relevant to the institution's resonance, it is not a fact to overlook.

Asanteman itself justified by justifying its governance institutions. In this way, its longevity is sustained. From the rules of succession to office, it is easy to see how and why a tribe becomes invested in the norms of customary law. The ability of the individual member to participate in the governance, creation, enforcement, or repeal of a customary law regulation far exceeds their ability to do so at the state level.

1.8. Powers and functions of chiefs

1.8.1. Executive

The pre-colonial Asante chief was the executive head of his people.⁹⁹ Next to his religious duties, a chief's most important power/duty was to administer the land that was attached to the stool.¹⁰⁰ Even when a subject settled unoccupied land, the allodial title often fell to the stool; the settler only acquiring rights of possession.¹⁰¹ Through their control over access to land, chiefs regulated both economic activity and social mobility.¹⁰²

The Asante chief has in practice, though not in law, retained some amount of his pre-Ghana executive powers. From a comparison of Ubink's study with Nauja Kleist's¹⁰³, it is clear that though it is possible for state agents to administer a locale without the chief's cooperation,

⁹⁹ JM Sarbah, *Fanti National Constitution* (Cass, 1968), 27

¹⁰⁰ JB Danquah, 'The Culture of the Akan' (1952) 22(4) *Africa* 360 363ff

¹⁰¹ NA Ollennu, *Customary Land law in Ghana* (Sweet & Maxwell, 1962) ch1 & 2

¹⁰² Berempong (n86) 41

¹⁰³ Nauja Kleist, 'Modern Chiefs: Tradition, Development and Return among Traditional Authorities in Ghana' (2011) 110 (441) *African Affairs* 629

it is significantly easier to do so with his backing; a view supported by Stoeltje's research on the roles played by queenmothers in their communities.¹⁰⁴

1.8.2. Legislative

The chief-in-council was the supreme legislative body in independent Asanteman and is still the main source of minor regulations and by-laws on quotidian events. Being unwritten, their rules tend to be viewed by the state as pronouncements on practices rather than the regulations they in fact are. But studies on the roles chiefs play during elections suggests that in fact, the citizens view the chief's pronouncements as binding in the same way as legislative instruments.¹⁰⁵

1.8.3. Judicial

The chief was also in charge of adjudication and could exercise judicial power himself, or delegate to sub-chiefs, council of elders, the queenmother and her elders, or even the clan or family head if parties belonged to the same family or clan.¹⁰⁶ The queenmother, also had independent adjudicatory power; in particular over marriage and affairs affecting women.

¹⁰⁴ Beverly J. Stoeltje, *At the Queen Mother's Court: Ethnography in Kumasi, Ghana* Counterpoints (2013) 354 Qualitative Research 370; Kleist n102 ‘

¹⁰⁵ Beverly J. Stoeltje, *At the Queen Mother's Court: Ethnography in Kumasi, Ghana* Counterpoints (2013) 354 Qualitative Research 370; Nauja Kleist ‘Modern chiefs: tradition, development and return among traditional authorities in (2011) 110 (441) *Ghana African Affairs* 629.

¹⁰⁶ Kwame Arhin, *Traditional Rule in Ghana* (Sedco, 1985)

Today, though largely ceremonial in executive and legislative matters, her palace is still the preferred forum for disputes between or initiated by women.¹⁰⁷

On paper, chiefs are fairly powerless officeholders whose greatest importance is to remind Ghanaians of ‘their culture’. In reality, they are anything but impotent. They remain the primary source of legislation, executive order/instruction and dispute resolution across the country. The real-world impact chiefs have on the lives of their subjects far outstrips the power the Constitution purports to give them. Their reach remains determined by customary law.

In this section, I have discussed the powers exercised and functions performed by chiefs in and for their units within Asanteman. The vestiges of executive and legislative power are and sustain the echoes of Asanteman sovereignty. The very broad judicial powers chiefs continue to exercise today gives customary law a position of strength beyond what it should as a body of mere subordinate law enjoy. It is evident that the change in the status of chiefs- and therefore of customary law- is not matched by the powers and roles they still have.

The focus of this Part of the chapter has been to explain Asanteman to the reader. I have identified and scrutinised the elements of its political structure to tease out the current constitution of Asanteman. The tensions, and the acts of key players are only the immediate facts of state-tribe relations. The objective of this Part is to make the remote reasons behind

¹⁰⁷ Takyiwaa Manuh, ‘The Asantehemma’s Court and its Jurisdiction Over Women: A Study in Legal Pluralism’ (1988) 4(2) Institute of African Studies Research Review 50

these events discernible and factored into the public and academic discourse on sustaining the postcolonial African state in the face of competing centres of power.

Part 2: Asante Judicial System and Process.

As noted earlier, dispute resolution is one of the areas in which chiefs wield a significant amount of power at the unit level. It is also the only sphere in which the Constitution expressly accepts that the chiefs have power within the boundaries of the state. It is therefore rather an important aspect of the lives of all citizen-subjects whether or not they live primarily under customary law. To avoid confusion, in this thesis, I shall use ‘palace’ to refer to customary law adjudication and restrict my use of ‘court’ to the state courts.

2.1. Dispute Settlement

The Asante system of dispute settlement can be adversarial, in which case the dispute may be prosecuted along the common law’s winner-loser patterns.¹⁰⁸ Disputes can also be resolved in a conciliatory manner with parties coming to a compromise. The aim of the conciliatory resolution process is harmony. The approach the palace takes depends both on the nature of the dispute and the desired outcomes for the parties or their families. For instance, in a dispute between spouses where the parties desire the marriage to subsist, the palace will adopt a

¹⁰⁸ VS Gedzi, Principles and practices of dispute resolution in Ghana: Ewe and Akan procedures on females' inheritance and property rights, (PhD thesis, Erasmus University, 2009)

conciliatory posture and framework. But in a stool succession dispute where each faction seeks the permanent disqualification of the other, the palace will adopt an adversarial approach.

Where a conciliatory approach is requested either by a party or by an elder, no testimony- not even by the parties is taken. Since the palace already knows what the charge is, the defendant will be told that complainant is aggrieved in respect of the named matter; and that the particulars and who speaks truth is not as important as the relationships that are threatened by the discord. Counsel is given. The complainant may request, or the defendant may offer pacification if the parties are in agreement as to where fault lies. Conciliatory proceedings are held *in camera* with only the parties, any elders they may have brought as their *ɔkyeame*, or to use their good offices to appeal to the other side; and the adjudicators attending.¹⁰⁹

Adversarial cases are fought much like in the common law system, with witnesses, testimonies, and cross-examination. Hearings are public. Evidence is taken under oath although the oath is administered at the end of the testimony.¹¹⁰ It is consistent with Asante philosophy not to retract something one has said in the presence of the ancestors. Therefore, a witness gives their final version of events, corrected, and amended as they deem necessary before swearing to its truth. Should a witness be required who is not present, the chief, at the request of the *ɔkyeame*, releases a sword-bearer, who will be sworn under oath not to discuss the proceedings with anyone along the way and then tasked to fetch them. The sword-bearer's oath

¹⁰⁹ Kofi Agyekum, 'Akan traditional arbitration: Its structure and language.' (2006) 27(5) *Journal of Multilingual and Multicultural Development* 359

¹¹⁰ *Ibid*,

is to avoid him influencing the witness along the way or feeding gossip that might prejudice the case or the parties.

An interesting aspect of the judicial oath-taking of Asante, is that it is not the person swearing it who decides on what to swear. It is the person administering it who does. The idea behind that, according to Rattray, is to prevent people making up deities on whom to swear or swearing by deities who will not be offended by lies. The oath always takes the format of a statement of the obligation and then ‘may (deity) strike me dead if I fail/ lie’.

Upon the determination of the merits, the *okyame* announces the verdict of the chief-in-council and parties must declare their acceptance or rejection of the decision. If the decision is accepted, sanctions are pronounced; and libation is poured. According to Agyekum, the purpose of the libation is to formally inform God and the ancestors that harmony has returned.¹¹¹ The parties, after being warned that reviving the matter will bring supernatural wrath, are made to swear an oath that they have let go. Where the ruling is rejected, the dissatisfied party may appeal to the overlord of the palace of first instance.¹¹² The parties to that appeal are the appellant and the *akyame* of the lower court for not ‘having good ears’.¹¹³

¹¹¹Agyekum, n108 arbitration:

¹¹² Agyekum n108 for in depth discussion of process.

¹¹³ Rattray, n42; Kwesi Yankah, ‘Power and The Circuit of Formal Talk’ (1991) 28(1) *Journal of Folklore Research* 1, 7; Agyekum n108

II.2. Causes of Action in Asante Customary Law

There are three types of causes known to customary law: Civil cases (*afisem*; translates as house matters), criminal cases, (*oman akyiwade*; translates as taboos of the nation) and religious offences (*nsedie*; translates as obligations).¹¹⁴

Afisem are most likely to be adjudicated in the *ohemaa*'s palace and are the causes for which a conciliatory posture is permitted. Many *afisem* causes are known also to the courts. They include such common law actions as slander, assault, land disputes, and debt collection. But *afisem* also include causes that are not recognised under state law such as adultery.¹¹⁵ Again, they include actions that under state law are classified under public law such as theft.¹¹⁶ Normally, proceedings in *afisem* are begun by a complaint to the chosen adjudicator. However, if they are begun by a public oath, then the matter is no longer private and cannot be settled via mediation. As Agyekum explains, the invocation of an oath calls the ancestors and gods as witnesses and exposes the whole community to their wrath if they have been falsely invoked. The community therefore acquires a stake in the resolution of the matter and must collectively punish the loser to appease the ancestors and/or gods.

Similarly, *oman akyiwadie*, being criminal in nature, incite the ancestors and/or gods to wrath. Or at the very least, cause them to withdraw their goodwill from the community. Therefore,

¹¹⁴ Rattray n42, 364

¹¹⁵ Similar to the old common law tort of seduction, it is an action open only to a husband against his wife's partner. Though in Asante, adultery is significantly wider than just carnal knowledge. TC McCaskie, 'State and Society, Marriage and Adultery: Some Considerations Towards a Social History of Pre-Colonial Asante' (1981) 22(4) JAH 477

¹¹⁶ Rattray n 42

ɔman akyiwadie were previously all capital offences. Executions could only be carried out on the orders of Asantehene; although important *amanhene* could pronounce death as a sentence. This was one of the ways in which the autonomy of *aman* was controlled by central authority.

Like *afisem*, some *akyiwadae* exist as criminal offences under state law: murder, suicide,¹¹⁷ and incest (as defined within a matrilineal context). Other *akyiwadie* do not. They include insulting Asantehene or his forbears, preferring knowingly false destoolment charges, cursing a chief, certain kinds of theft, public physical fights, attempted transfer of allegiance, and certain sexual acts.¹¹⁸ Other laws or acts which are not normally *ɔman akyiwadie* can acquire that status if the palace announces that their contravention will be treated as in violation of the great oath (or the stool's oath where applicable).

2.3. The Judicial Process

Though the stages of the procedure are fixed, there are no inflexible rules about methodology or process. Witnesses discharged may be called back. A party may be instructed to produce a key witness they did not call etc. There are no lawyers, even in the adversarial disputes. The *ɔkyeame*, as noted earlier, is the palace prosecutor. He calls on parties to give their testimony, he cross-examines them before or after the opponent has done so as he thinks necessary. He discharges them from the stand and calls their named witnesses.

¹¹⁷ In Asante law, actual suicide is also an offence though not every self-destruction is criminal suicide. When it was, Rattray records of precolonial Asanteman, that the suicide's body was exhumed and tried for 'pummelling the *akyeame* with a cudgel' and decapitated. The body was disposed of in the forest and a funeral was prohibited. The funeral in Asante culture is how a spirit is released completely from this realm to enter the next and without it, a ghost wanders aimlessly between realms. Suicide was punished metaphysically.

¹¹⁸ Sex with a girl who has not yet had her first period, sex by an unmarried couple in the bushes, Rattray n42

Other than in Asantehene's court, no specific attire is expected of litigants. There, disputants wear red (*Kɔbene*) or black (*kuntunkuni*) funeral cloths as these represent Asante's colours of war (ie anger) and sorrow respectively.¹¹⁹ Stoeltje describes the typical palace judicial setting as a large room with chairs facing each other on the long sides, a raised dais with the chief's chair and umbrella; and the queen mother's stool at one short end. There is a fixed seating arrangement: *akyeame* in the front row on one side, elders in the front row opposite them, spectators and parties behind the elders. Parties and their witnesses, when called upon must stand in the empty space across from the dais to give their testimony. Judgment is delivered by the *akyeame* although it is not decided by them.

The religious notes that hold Asanteman together are once again noticeable in the functioning of the tribe's judicial system. The oath in that system, unlike in state courts, carries a heavy consequence that one is required to invoke upon themselves unequivocally. The strength of the religious facet of every Asanteni means that whatever the intensity of their participation in other religions, they will not lightly court spiritual displeasure. Thus, though lacking an explicit enforcement mechanism, the judicial system of Asanteman is effective and sustains the entity's politico-constitutional structure and law. Asanteman is not, for the foreseeable future, an endangered polity. This is a fact the state must simply accept and grapple with.

¹¹⁹ Agyekum, n53, 36

Conclusion

This chapter has sought to explain the nature of Asanteman; how power is configured within it, who its constitutional officeholders are and how their offices are filled. By looking at its key symbols and the role of oaths in its psyche and constitution I have sought to give the reader an appreciation of the nature of customary law and the depth of the hold it enjoys over Asanteman and Asantefoɔ. I have also described its judicial system by means of which customary law is regulated in terms of structure, hierarchy, process, and jurisdiction.

Several major interrelated themes can be observed from the discussions in this chapter. Three central strands merit reiteration. Firstly, in every facet of Asanteman's constitution, power and decision-making are justified religiously; and this validating mechanism has been woven finely into the tapestry of Asanteman itself. Among the widely-accepted features of religion are that it is always personal; and, it is not always rational. By tapping into these features, Asanteman has circumvented the need for constant re-engagement with the question of its continued relevance. It has also thereby translated constitutional and/or political duties and privileges into metaphysically binding personal choices. Similarly, the extent to which customary law is binding on Asantefoɔ is not reflective of either its own enforcement capacity or the scope of enforcement support it can hope for from the state. It is rooted in the religious subscription of its subjects. This is not to say that Asantefoɔ are all animists by religion. Christianity, Islam and other minority religions enjoy their share of Asante adherents. But the key thing to note is that whatever their personal religion, Asantefoɔ accept the religious premise of their polity, its structure, its legal order, and its demands.¹²⁰ The communitarian nature of

¹²⁰ Louise F Müller, 'Indigenous Religion in Ghana: an explanation for the persistence of Asante chieftaincy in Kumasi' (Leiden, 2009)

that polity means further that even those who do not subscribe to the religious beliefs underpinning the institutions nevertheless accept that the institutions have to be maintained for the sake of the polity's welfare. The dictates of customary law bind even those who do not subscribe to the religion which creates it. Thus, the enormity of the sway customary law and its enforcing institutions hold over Asantefoɔ should not be under-appreciated.

The second running theme is that the military origins of the union have been frozen into its ethos; with important advantages for the polity. First of all, it has made Asanteman an easily mobilised polity. By keeping alive across generations, the reason and method of its birth, Asanteman has remained both vivid and vindicated in the psyche of its subjects. It has also maintained the illusion of a grandeur it does not militarily possess. But the illusion is sufficient to grant its members greater glory by reason only of that membership than does their membership of the state. Again, this enhances the resonance of Asanteman for Asantefoɔ at a personal level and underwrites its longevity.

Thirdly, Asanteman's centrifugal conception of power and consequent devolution of thereof down to minute units offer and demand political participation by, and, at all the socio-economic strata of the polity. It is rare for a responsible adult Asanteni to have no community role of any nature. Even the poor have duties that afford them public dignity.¹²¹ In the result, an overwhelming number of ordinary subjects possess a status, privilege and obligation stemming from and owed directly to Asanteman itself. Participation increases investment, transparency and ultimately sustainability. Again, this buttresses the power of customary law for the Asantemani-Ghanaian.

¹²¹ Eg Nana Brodehonosesafoɔhene i.e. chief of the sweepers of plantain peels – a position still in force at Asantehene's palace. Or the crier at the village level- stereotypically also the village drunk. But his post as official bearer of public announcements from the palace gives him some dignity.

These themes are critical because they come into play in state-tribe relations. Customary law is created, validated, and upheld by Asanteman. Its hold on its subject people depends directly on Asanteman's hold on them; its sustainability, on the polity's. The religious nature of Asanteman's constitution means that customary law rules and obligations possess a religious element that can be hard to fight with either logic or state force. The ease with which Asanteman can mobilise itself belies the divisiveness of the contestation inherent in its elective-hereditary system. Instead, it creates, at least in its postcolonial iteration, an odd polity that is simultaneously disunited but not precarious; and fiercely protective of its distinctiveness. The extended participation and public dignity Asanteman offers also inures to customary law's benefit. With so many persons depending on its existence, adjudication and enforcement for their relevance, the paramountcy of Asanteman for Asantefoo is not debatable. Asanteman's law therefore occupies a special place in the soul of Asantefoo.

The weight of judicial power in the life and organisation of a state has been proved by numerous historical events at home and abroad. Judicial decisions have changed both how the state was organised and the living experience of its citizens.¹²² Judicial power's reach is not limited only by reason of it being of a customary nature and limited to customary law. In fact, it is the opposite. The very personal and deeply entrenched appeal of customary law expands the importance of adjudication and the role of customary judicial power and, with it the robustness of the entity from which it emanates. For that reason, customary law cannot be studied in isolation from the politico-constitutional systems that create and justify it. This

¹²² *Dred Scot v Sandford* 60 U.S. 393; and *Brown v Board of Education* 347 U.S. 483. Local cases include *Re Akoto* [1961] 2 GLR 523, in which the court abolished habeas corpus, and more recently *Bomfeh v AG* [2019] GHASC 2, in which the supreme court upheld an executive decision to use state funds in advancing the Christian religion in a secular republic.

chapter has sought to understand Asanteman itself to enable the thesis to understand and demonstrate how Asante customary law, interacts with, assists, or impedes state law. In the next chapter, when I focus on state-Asante relations, the impact of these three themes will keep resurfacing and make it apparent why the state's sovereignty posture toward Asante in particular and tribal systems in general should be reimagined.

Chapter 5

Asante-State Turf Wars

Introduction

Having understood how both the state and Asanteman are configured, it is now possible to cast the tensions and potential conflict between them in the mould of a struggle over sovereignty. To that end, it is prudent to recall the key elements of Walker's definition of sovereignty which I adopted in chapter 2. That definition viewed sovereignty as a simultaneously normative and factual claim by an entity that it is the supreme ordering power; the source, and also, the channel of final and absolute authority regarding the identity and status of a particular polity *qua* polity.

Any entity claiming sovereignty must therefore act to root the conduct of persons within its claimed jurisdiction in its dictates. As noted in chapter 2, without limiting the geospatial span of the claim, it would be impossible for any state to prove any measure of effectiveness. The Supreme Ordering Power must therefore claim the territory on which the people it purports to control live and express the identity it creates and moulds. Thus, wherever sovereignty claims compete or where it is contested, a great potential for conflict over how the land and people claimed may live exists.

In this chapter, I explore how the vastly differing constitutions of the state and Asanteman lead to equally differing ways of perceiving the world. The purpose is not to identify which value system is correct. Instead, I highlight how mutually exclusive their approaches are. These totally divergent lenses are the prism through which each system deploys its resources in its attempts to be the shaping force (ie the source and

channel) of the identity and lived experience of the Asanteni-Ghanaian. Being so dissimilarly constituted, the nature of the identities they are carving for their citizens are naturally misaligned. The state's view begins from a person-centred premise; while Asanteman maintains a polity-centred stance.

Given that their citizenry and territory coincide – with Asanteman's forming a subset of the state's- their differences mean that they pull citizens in divergent directions creating an inevitable struggle for dominance between the two. Again, it must be remembered that, at core, this struggle is premised on each system's acceptance of the justificatory force of its own world view. This is what makes the contest so high stakes. The quest is not simply to dominate or resist a claim that acts within the jurisdiction are validated by the state. It is, more critically, for each side, a mission to impose, on the one hand, and on the other, resist the delegitimization of its way of interpreting the world. The rights provided in the 1992 Constitution and the justice system established to police them provide an especially useful sphere for a limited but focused study on how sovereignty struggles between two political systems enter and affect the lives of ordinary citizens and how that in the long term affects the sustainability of the state.

The chapter is in two parts. In the first part, I set out in summary the constitutional ideology of the state and Asanteman garnered from the preceding chapter. The second part focuses on the nature and scope of the sovereignty challenge. I examine, first, how the two entities make rival law-making claims and the friction arising therefrom. Then, I look at their rival claims to adjudicating power and Asanteman's ability to block access to the state's institutions. I discuss the jurisdictional

challenges Asanteman presents to the state. Finally, I reflect on Asanteman's apparent need to sometimes make symbolic rejections of the state's sovereignty.

At the close of the chapter, I draw a number of conclusions. Firstly, the friction between the state and Asanteman is rooted, not in malice, but in mutual incomprehension. Secondly, the tension is neither trivial nor likely to resolve itself. And finally, dismantling either side is neither a feasible nor desirable option. This chapter sets the framework for the journey through the rest of the thesis and provides much needed clarity to guide the discussion on the relationship the state should seek to cultivate with customary law systems within its territory.

Part 1- The Constitutional ideologies of Asanteman and the state in summary

This section draws from the preceding chapters to provide a concise statement of the ethos and ideology of the state, and of Asanteman. Setting them out side by side, it becomes easier to appreciate the distance between them which, in turn, makes the sources of tension and the potential for conflict significantly easier to isolate. This clarity is vital; since the thesis seeks to propose a philosophical posture that averts conflict without destroying the traditional polities that mean so much to their members.

The underlying ideology of the state may be summed up as a liberal, individual-focused constitution. It balances, - or at least, has committed to attempting to balance, - the interests and experience of each citizen with that of the others; restrain the state

from advancing its interests or improving its efficiency at the expense of any individual; and mandate the state to take positive steps to enhance the experience of its vulnerable demographics. It provides the individual with such globally recognised rights and freedoms as the right to life, liberty, property, due process and fair trial, the freedoms of conscience, and movement. It also provides such context-specific rights as the freedom from injurious customs and a right to dignity. The state is obligated to increase participation for vulnerable minorities like mothers, and disabled persons. Despite the references to God in the Preamble, it is a firmly secular state that forbids the imposition of an official common religious programme. Still, it allows citizens to practise any religion of their choice provided it does not violate any law or other citizen's rights. Its offices are non-hereditary, elective, fixed tenure positions to which all citizens are eligible.¹

In a philosophy like the state's, equality among citizens is both a fundamental right and a second order requirement. The lived experience of one citizen can only be a limit on the lived experience on another if the intrinsic value of both experiences is the same. But it is also a second order requirement in that it is, practically speaking, impossible to give every citizen a defence against the collected power of the state without raising the sanctity of the individual above the interests of the collective. The state's world view therefore necessarily takes as justified the existence and welfare of each member of the society and mandates the state to balance the collective's interests with the individual's. In this school of thought, the state and all it stands for can be stopped in its tracks if its direction sacrifices a single member of the community and

¹ Provided they are sane and do not have a disqualifying criminal record. Article 94

the reason that halt is justified is not the special contribution that member makes to the society but her membership thereof *simpliciter*.

Asanteman's ideology begins from a military starting point and creates therefore a constitution focused on power; its diffusion and its protection. Its core beneficiary is the collective. A martial quest being necessarily a commitment to sacrifice the individual for the collective, Asanteman's constitution prioritises social harmony and the collective good over citizen's interests and experience. Indeed, it comingles the two so that the welfare of the citizen is indivisible from the welfare of the polity. It requires citizens to play preassigned roles distributed across the breadth of the polity. It differentiates between demographics of the population in the rights and responsibilities it grants members. Its offices are hereditary even if not automatic and potentially lifelong.

Its justification as a political entity is provided by religion. This serves to remove a need to interrogate the continued existence of the polity. The rightness of its choices is assessed not, by outcomes, but in their reception by the gods and ancestors. It is in this metaphysical harmony that the collective good, which is its focus, is secured through religious piety. While, in their very personal spaces, Asanteman constitution permits Asantefo's religious choice, it is only to the extent that such choice does not conflict with the larger group religion. So that the political and the religious are irretrievably entwined.

Asanteman's martial, religious premise has critical consequences for the world view from which it operates. The value of each citizen is relative to her contribution to

the community in relation to its martial efficiency and/or self-perpetuation. The lived experience of each citizen is not equally valued hence the differentiation in rights and responsibilities within the society. In that school of thought, the polity is the protective, empowering perimeter within which citizens may safely pursue their (differentiated and of varying importance) destinies. Therefore, its welfare is a prerequisite for the welfare of every citizen. To say a particular interest of a citizen of the polity should preclude an interest of the larger group from being attained is to say that interest of that citizen somehow so overrides that same interest that the interest should not be pursued. It is illogical and circuitous. Consequently, the interest of a single or even a group of citizens cannot supersede the interests of the polity itself.

In Walkerian terms, the discourse that the state and Asanteman offer citizens to react to have mutually exclusive content. The state asserts and justifies its claim by reference to the ideals of liberalism. Asanteman on the other hand asserts and justifies its claim by reference to the gods and ancestors pleasure typified in the wellbeing of the collective. The distance between their philosophies births a commensurate distance in their aims and methods. In the result, the value of the deliverables of each system is genuinely incomprehensible to the other. Thus, the tension between them is inevitable. Moreover, the situation is very confusing to the Asanteni-Ghanaian who is the internal audience to both claims. Not only is she faced with an ownership claim from two unrelated entities; she is asked to engage in a discourse with two accounts of how she came to, continues to and will express her being as she does, that differ so fundamentally that they could not both be true at the same time.

Part 2: The Sovereignty Challenge

In this Part, I examine some of the ways in which the different modes of interpreting the world leads to Asanteman resisting or challenging the state's sovereignty claim in various spheres. The part is in five sections. The first section focuses on the rival law-making claims asserted by the two sides. The second section studies the rival adjudicating claims of the polities. In the third section, I look at how Asanteman resists the state's sovereignty by blocking access to its (the state's) courts and institutions. The jurisdictional challenges Asanteman poses to the state are assessed in the fourth section. Finally, in the fifth section, I consider some symbolic rejections of state sovereignty by Asanteman to understand their purpose and impact. Together, the sections of this Part present to the reader a lucid picture of the tensions that exist between the two sides. It becomes evident that the concern of this thesis is both real and urgent and that the state needs to philosophically reconceptualise its sovereignty in ways that enable and empower it to relate differently with the tribal polities.

2.1. Rival Law-Making Claims

In Walker's definition of sovereignty, the supreme ordering power's existence and character are revealed in how it uses its unrivalled authority to shape the polity's own character and culture. Law is one of the most direct and effective tools to determine the character and lifestyle of citizens by propelling them down certain behavioural paths and away from others. As a result, every effort to shape identity must include a claim to make law. This is what makes legislating a manifestation of sovereignty. Any

contention over a state's power or ability to legislate is therefore a contestation of that state's authority.

As noted previously, the state in Ghana, asserts a power to make laws through Parliament, which it invests with all legislating power within the Constitution.² In its ranking of the sources of law it creates and sustains, the 1992 Constitution lists statutes from Parliament as second only to itself. The only limits it puts on Parliament's legislating power are in respect of amending the Constitution³, creating a one-party state⁴ and interfering with its judges or their decisions.⁵ This is a very strong claim the state makes to law-making power as a sovereign act. It is an assertion that any rule that proceeds out of Parliament and does not traverse the boundaries stated above is a rule, not of decorum or social practice; but of law. Conversely, any rule that cannot trace its source up to Parliament or is incompatible with a rule previously made by Parliament is not a rule of law. In both cases, it is irrelevant that the content of the rule is highly desirable or morally justified. The normativity of a sovereignty claim rests on the power to determine the identity of the polity not the rightness of the identity so established.

The list of sources of law in article 11 ends with customary law. Two things are implied in that ranking. First, the claim to absolute, final normative authority is reiterated with a direct claim over customary law. Second, by placing customary law as

² Article 93 (2)

³ Chapter 25

⁴ Article 3

⁵ Article 107

the lowest ranking source, ⁶ -lower even than by-laws made by a sub-office of the local assembly-article 11 refutes Asanteman's claim over Asante identity. Of particular interest to this thesis, it expressly asserts control over Asanteman by claiming to legislate in what areas and how it may participate in dispute resolution. Parliament has sought to back that claim in several legislations including:-as discussed in chapter 3-, the **Criminal Offences Act 1960 (ACT 29)**, the **Alternative Dispute Resolution Act 2010 (Act 798)**, the **Intestate Succession Act (PNDCL 111)** and the **Head of Family Accountability Act (PNDCL 114)**.

Unsurprisingly, state-focused scholars often dismiss customary law as a weak, and subsidiary source of law.⁷ In the legal sense of sovereignty, this is largely, though not entirely true. There is some measure of contestation offered against the state's claim by Asanteman. In the political sense, this is a highly contestable claim. As observed in chapter 3, Asante identity reflects the martial, metaphysically conscious, communitarian values of the constitution from which it emanates. Asante customary law, steeped in these values, occupies a central place in the lives of Asantefoɔ; be they in urban, or rural settings; within or beyond Asanteman and indeed, Ghanaian territory.⁸

⁶ Article 11

⁷ See eg Christopher Y Nyinevi, 'Winnowing the chaff out of the grains: the intermixture of customary law and spiritualism in Ghana'. (2015) 41 (4) Commonwealth Law Bulletin 555; Victor Essien, 'Sources of Law in Ghana' (1994) 24(3) JBS 246

⁸Pashington Obeng, 'Re-Membering Through Oath: Installation of African Kings and Queens' (1998) 28(3) JBS 334; Kirk Semple, 'With Fanfare, Ashanti People From Ghana Install Their New York Chief' <<https://www.nytimes.com/2012/06/04/nyregion/ashanti-group-from-ghana-installs-its-new-york-chief.html>> accessed 2 May 2020

Key aspects of individual and group private life are conducted, in Ghanaian parlance, ‘in accordance with custom’.

The unspoken implication of acting in accordance with Asante custom, however, is necessarily that one acts in accordance with Asanteman’s constitution as the entity creating and sustaining that custom. Thus, though it appears, at first glance, the least important source of law in Ghana, it is the first and most frequently used port of call in the regulation of Asantefoo lives. In the sense of political sovereignty therefore, Asanteman keenly resists the role the 1992 Constitution assigns its law-making power.

The contest over sovereignty is not simply one of source. As noted in Walker’s definition, it is a claim to be the original, present, and future decider of the conduct of members of the polity such as to lend the polity itself a distinct identity. The most direct way this is done is through the content of the law. For that reason, as I noted in chapter 2, although an account of sovereignty is not synonymous with an account of the law, the two are indivisible; the latter premised on the former. The decision as to the content of the law is very much a sovereign space of which the incidents of citizenship are a crucial manifestation. Thus, when two sides assert conflicting claims to sovereignty (whether of themselves or of the other), the nature and extent of rights citizens are entitled to will be a critical space of contestation.

This is very much the case with Asanteman and the state. The rights that Asantefoo enjoy reflect Asanteman’s purpose and ethos. The rights that Ghanaians enjoy do the same from the state’s perspective. If the liberal ideals of the Constitution

are not reflected in the lived experience of Asantefoo-Ghanaians; the state may be hard put to prove the measure of effectiveness that gives meaning to its normative claim. In that case, its sovereignty claim will lack plausibility⁹ and it is plausibility that distinguishes a sovereignty claim by a polity from a vain boast by a limited liability company for example. For, as Tucker explains, in the end and at core, the plausibility of a sovereignty claim ‘depend[s] upon a certain correspondence between its normative prescriptions and the actual behaviour of men’.¹⁰ Therefore, for the state, it is a non-negotiable constant that its hierarchy of law-making authority is effective and plausible. Asanteman law’s status as a first point of call is therefore a rival law-making claim it is indisposed to accommodating.

The incidents of Asanteman and of state citizenship do not always coincide. But neither do they always diverge. It is tempting, but inaccurate, to think that discord between them on what those rights comprise is the only space of tension over sovereignty between the two sides. In the rest of this section, I examine two categories of rights: one on which the two polities agree and another on which they do not. I use the first set to demonstrate how Asanteman could resist a sovereignty claim made by the state the content of which it does not contest. The discussion on the second set will reveal how the differences translate into the human experience of dual citizens and why it is important that the customary law systems are compelled to evolve.

⁹ Walker, n116 late 6–7.

¹⁰ RW Tucker, ‘The Principle of Effectiveness in International Law’ in Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law* (1953), 32

2.1.1. Rights That Overlap

This first category concerns rights which, in both legal orders, are fundamental rights that even the polity must justify interfering with. That is to say, the existence of these rights is integral to the justification for the existence of the polity. So that, unlike other rights which may be interfered with for good cause without causing a constitutional crisis; these rights, if tampered with, raise the question of the legitimacy of the polity itself. Neither Asanteman nor the state incites such a state of affairs lightly. Nevertheless, the coincidence of content should not be taken to reflect a point of common ground. For, the conclusion that these rights are sacrosanct is based on vastly different rationales, which again stem directly from the constitutional principles that animate them. The right to life, the property rights, and the right to dignity belong in this category of truly fundamental rights.

Human rights abuses such as the mysterious disappearance of dissenters, firing squad executions, and arbitrary confiscation of property marked the lengthiest military government in Ghana's history. The return to constitutional government was welcomed with the expectation that the fear of such abuses would no longer attend daily life in Ghana. The 1992 Constitution therefore sets very high store by the rights to life, liberty, and dignity and does not allow unexplained arrests, or detention without charge for longer than 48 hours.¹¹ Even in a state of emergency, it obligates the state to provide written explanation of the reasons for the detention to a detained person and their family.¹²

¹¹ Article 14

¹² Article 32

The post-92 state is very hesitant to take a citizen's life. Indeed, although the death penalty exists on our books, no execution has been carried out since it entered into force.¹³ Again, in reversal of historical experience, the 1992 Constitution compels the state to pay fair and adequate value for property it appropriates from citizens. Even its terminology has changed from the censorious 'confiscation' to the more conciliatory 'compulsory acquisition'. Though, the state makes a normative sovereignty claim to 'establish and sustain the identity and status of the polity' in its capacity as the polity's supreme ordering power; it is mindful of the identity its people rejected in choosing its current iteration and Constitution and is careful not to re-impose that identity on the polity so as not to lose its political sovereignty.

The trigger for Asanteman's formation was the choice between certain death for defying their overlord or a total loss of dignity for submitting to his arduous demands. The two rights at the heart of its foundation are consequently encoded into its relations with its citizen. Asanteman rarely takes a citizen's life or causes them indignity (as defined on its own terms). To do so would invoke the military honour of its citizens to throw off the polity's yoke. The distinct constitutional disadvantage a confederation has is that its component parts are configured to survive dissolution fairly easily; thereby increasing chances thereof.¹⁴ Asanteman is therefore careful to avoid sparking the secessionist instincts that have remained present in its body politic since birth. The

¹³ Oswald K. Seneadza 'The death penalty in Ghanaian law and practice: can its retention in contemporary time be justified?' (2011) 37(), Commonwealth Law Bulletin 115, 130

¹⁴ The Asantehenes of sovereign Asanteman expended considerable military effort suppressing and pre-empting acts of its aman that amounted or could grow into secession. DJE Maier, 'The Dente Oracle, The Bron Confederation, And Asante: Religion and the Politics of Secession' (1981) 22(2) JAH 229

primacy of dignity in Asanteman is discernible, for example, in the categories of non-criminal suicide¹⁵ for what they all have in common is that they allow escape from a permanent loss of dignity. The cautiousness around the right to life is evident in the rule of law in independent Asanteman that only Asantehene could order an execution.¹⁶

The inviolability of this category of rights means that there is no cause for contestation between the state and Asanteman about their existence. But it does not mean that none occurs over the state's sovereign right to legislate in respect of their scope or use. In 2017, Asantehene imposed a curfew from 8pm-4am on the day of Asantehemaa's burial. By Asanteman custom, a person who encounters the burial procession of a chief or queen mother must accompany the deceased into the afterlife.¹⁷ The curfew was scrupulously adhered to. Newspapers reported dignitaries hurrying from the funeral grounds to make it home in time.¹⁸ This represents one of the few occasions when Asanteman is willing to take a citizen's life.¹⁹ It also demonstrates that Asanteman views itself not the state as the guarantor of the right to life within its territory. The state, of course, claims that guarantor position as its preserve.

¹⁵ These included suicide in a lost battle, suicide to accompany a beloved master or mistress, suicide to wipe out dishonour. RS Rattray, *Ashanti Law and Constitution* (OUP 1927) section 299

¹⁶ Even though principal amanhene could pronounce the death sentence. Rattray (n92)

¹⁷ GP Hagan & IK Odotei IK, *The King Has Gone to the Village* (IAS 2001)

¹⁸ Gershon Martey, 'Kumasi turns into ghost-town as Otumfuo performs final rituals.' <https://www.adomonline.com/photos-kumasi-turnsghost-town-otumfuo-performs-final-rituals/> accessed 25 May 2020

¹⁹ I am here taking the announcement at face value. I discuss the incident more fully below as a case of symbolic rejection of state sovereignty by Asanteman.

This incident provides a rare instance of where the two systems differ on the application of a right that is fundamental in both their ideologies. In Asanteman ideology a citizen who loses her life in these circumstances has done so for the larger polity and in so doing has restored the harmony between the gods and the polity but also between herself and her own ancestors whose displeasure at her conduct would have been visited on her line. In state ideology, for the citizen to lose her life in this way is to arbitrarily deprive her of the most fundamental right.

What becomes apparent from this episode is that even synchrony in content does not eliminate the contest over sovereignty. The rival claims to law-making power continue to be asserted even when the content so coincides that the distinct nature of the claimants is blurred by the overlap. But being, as Walker's definition emphasises, a discourse, both claims demand a response, first and foremost from Asantefoɔ as the primary internal audience, then from other customary law systems as the wider internal audience of the state's claim and then finally to the wider world as the external audience. The first two audiences' responses to the claim are definitive of the weight of the claim. Thus, when the circumstances reveal the sovereignty contest at the base of a right these audiences have received as fundamental, but without the question of its source or vehicle arising in the course of its enjoyment, the opportunity and motivation for conflict is significant.

2.1.2. Rights Which Diverge

The political rights guaranteed by the state provide an example of where Asanteman and the state disagree on content. They show how Asanteman obstructs the identity the

state has sought to clothe the polity in thereby directly challenging its sovereignty over it (Asanteman). Asanteman does this by interfering in the enjoyment of political rights and moulding them to its way of political participation. It is not always successful; but when it is, it does put the state in quite a conundrum.

The political rights consisting in the rights to vote, form or join political parties and to not be subjected to ‘a common programme or a set of objectives of a religious or political nature’²⁰ are perhaps the set of rights most interfered with by Asanteman. The collective ethos, (which, it must be noted, does not always manifest as peaceful pressure), along with the deference to the chief means that individual choice is not always possible for Asantefoo.²¹ When chiefs pledge their support to or against a candidate, voting contrary to the chief’s edict is seen as disrespecting the stool. This makes chiefs powerful vote brokers.

For example, when in 2019, Mamponghehene, Asanteman’s constitutional vice-regent, announced at a durbar that he would withdraw his people’s support from the ruling party for its neglect of them over the previous three years, the party’s flagbearer and sitting president scheduled a visit to him the very next week and cut the sod on the construction of its main highway.²² Also, in 2019, offended by the admittedly crass statements of a party loyalist, the Okyenhene, (paramount chief of the Akyem, an Akan

²⁰ article 56

²¹ David Bampoe, ‘We’ll vote for NPP in 2020; Akyem – Kusi Chief Tells Akufo Addo (Daily Guide, 15 October 2019) <<https://dailyguidenetwork.com/well-vote-for-npp-in-2020-akyem-kusi-chief-tells-akufo-addo/>> accessed 5 June 2020

²² Akufo-addo to visit Mamponghehene after chief’s cry for attention, <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Akufo-Addo-to-visit-Mampongtenhene-after-chief-s-cry-for-attention-786636>> last accessed 01 October 2021

group organised similarly to Asanteman) and his Council banned the opposition NDC party first, in his kingdom's capital then in all 940 communities within Okyeman. The ban was lifted after the party performed pacification rites to the stool.²³ So, although the Constitution offers political freedom in respect of party affiliation and voting, and expressly prohibits political herding, Asanteman is able to effectively thwart that prohibition and in so doing resist the state's sovereignty claim to legislate the identity of the polity.

Other rights in the 1992 Constitution over which the state and Asanteman disagree include the lifestyle rights and the corporeal rights. The social harmony premise of Asanteman's constitution makes it regard such freedoms as movement, conscience, speech, association, and religion as conditional, when the Constitution treats them as sacrosanct. In this recategorisation, Asanteman challenges the state's legislative sovereignty; for it makes a rival claim about the content of the laws made by the state and therefore about the scope of the state's legislating power. Its rival claim about the content of law is that the freedoms of the citizen are those which inure to the collective or are at least not inimical to it. The challenge to the state's legislating power, by extension, centres on the state's legislative acts that prefer the citizen above his community.

This resistance to the state's law-making power is even stronger in some non-Akan parts of the country. In northern Ghana, witch camps house women- usually old-

²³ George Folley 'Okyenene forgives Kwame Zu and lifts ban on NDC'(Daily Graphic, 5 December 2019) <https://www.graphic.com.gh/news/politics/okyenene-forgives-kwame-zu-and-lifts-ban-on-ndc-in-kyebi-area.html>> accessed 5 June 2020

exiled from their hometowns on suspicion of witchcraft²⁴ Grievous breaches of customary law are punished with banishment in many parts of the country.²⁵ Public caning is not unknown as a punishment order from palaces around the country²⁶. ‘Abaawa’- young girls whose labour is purchased from their parents as household staff in wealthier homes- remain a common sight across the country.²⁷ *Trokosi*, a ritual servitude practice that was outlawed in 1994 is still going on openly in the Voltaic regions.²⁸ These practices are sanctioned by customary law but prohibited by the constitutional guarantees against forced labour, degrading treatment, and servitude. In all the spaces noted above, the customary law generating polities, by providing different and often problematic parameters of life from the Constitution’s, cast doubt on both the normativity and effectiveness of the state’s claim to be the genesis and vehicle of the identity of the polity.

The same is true of the equality and non-discrimination rights. Gender discrimination has proved a difficult phenomenon to uproot. Rooted in deep-seated cultural beliefs around gender roles. Daughters, wives, and mothers are burdened with all the chores and caregiving in the family’s life. They have little time and /or opportunity for self-development which then creates economic inequality that leads to

²⁴ Saibu Mutaru, ‘Conducting anthropological fieldwork in northern Ghana: emerging ethical dilemmas,’ (2018) 41(3) *Anthropology Southern Africa* 185

²⁵ The phenomenon is discussed in Seth Tweneboah, ‘A Clash of Legal Norms: Banishment as a Customary Religious Sanction in Ghana’ (2017) 5(2) *Journal of Law, Religion and State* 87

²⁶ Tweneboah, n25

²⁷ Kwabena O Akurang-Parry, ‘Transformations in the Feminization of Unfree Domestic Labor: A Study of Abaawa or Prepubescent Female Servitude in Modern Ghana’ (2010) 78(1) *International Labor and Working-Class History* 28

²⁸ Joseph Yaw Asomah, ‘Cultural rights versus human rights: A critical analysis of the trokosi practice in Ghana and the role of civil society’ 2015, 15(1) *African Human Rights Law Journal* 129

dependency on the male members of the family and creates a vicious cycle of poverty and dependency.²⁹ A 2015 study in some rural Ashanti settlements and Kumasi showed that wife-beating as a form of discipline was viewed by both victims and perpetrators as the cultural duty of a husband.³⁰ Customary law rules of succession prioritise males and further perpetuates the economic inequality that supports the domination of women.³¹ The depth of inequality; sexual, economic, and social that women labour under in Ghana is antithetical to the standards of equality and equity espoused and required by the 1992 Constitution and represent a rival claim by the customary law entities to be the law-making authority in their territories.

A major concern with the challenge to state sovereignty that presents as a rival claim to law-making is that lifestyle and corporeal rights are at the very heart of the experience of citizenship. They are a critical component of the identity and status of the polity that Walker categorises as a result of the discourse between the polity and its supreme ordering power. When they are interfered with so extensively by another entity, they undermine the citizen's ability or motivation to participate in the state's normative claims to sovereignty. As Walker's definition stressed, sovereignty is discursive. When the internal audience disengages from it, the claim ceases to be dialogic and loses its ability to make real world impact. Thus, even if Asanteman's

²⁹ CD Deere, and others, 'Property Rights and the Gender Distribution of Wealth in Ecuador, Ghana and India' (2013) 11 J Econ Inequal 249

³⁰ SB Adjei. 'Correcting an erring wife is normal': moral discourses of spousal violence in Ghana, (2015) 33 Journal of Interpersonal Violence 1871

³¹ Ama Hammond "Reforming the law of intestate succession in a legally plural Ghana", (2019) 51(1) Journal of Legal Pluralism and Unofficial Law 114

claim to sovereign legislative power is not itself strong enough to succeed; it is certainly strong enough to undermine the state's.

2.2. Rival Adjudicating Claims

A sovereign entity must do more than determine the content of the rules by which the polity lives, and which thereby creates the nature of the collective and the boundaries of individual identity. If it asserts the sovereignty claim to be the channel through which ultimate authority is deployed within the polity's juridical order, it must additionally decide by whom, when and how these rules are to be interpreted. The claim to be the adjudicating power is indispensably linked to the claim to make law and is equally a manifestation of the normative claim to sovereignty. Thus, even if the state and Asanteman agreed *in toto* what the rights and responsibilities of citizens were, the sovereignty struggle would not evaporate unless they also agreed equally on which entity possesses adjudicating power within the polity. This section examines the ways in which the two sides claim this aspect of sovereign power.

The Constitution makes the High Court the primary enforcer of FRHFs with the Supreme Court as the appellate forum for dissatisfied disputants. The Supreme Court's extensive judicial review powers are to be deployed to enforce and interpret of the meaning of the text of the Constitution. Even, though article 11 has accepted customary law rules as part of Ghana's common law, it includes in that definition, the rules that its own courts have determined to be rules of customary law. By so doing, the Constitution has not only made a higher-level claim to be, the supreme ordering authority in the state, it has also made the secondary claim to be the proper adjudicating power of the

content of Asanteman's constitution. This further places the state's adjudicating power above Asanteman's law-making power. It is a total claim to the whole of the adjudicating power within the polity.

Asanteman's rival claim to adjudicating power is subtler but no less forceful. By distinguishing between Asante matters and other matters, it is able to resist the claim to have its content determined or adjudicated by the state's courts, without also having to prove broader effectiveness in all parts of life in the whole of its territory. It need only remain effective within the parameters it has set out for itself to continue to pose a challenge to the sovereignty asserted by the state over its citizens.

The institutions of the state that adjudicate the state's public law are the courts. In private law, the state, in addition to these, allows international and arbitration tribunals to settle disputes over rights, provided they stay within its boundaries and always under its supervision. It also permits its courts to enforce palace decisions, again subject to their compliance with its standards. But, crucially, in the case of palace decisions, it must first enter the decision as one by its own court and then proceed to enforce it as its own judgment. This is an important act. For it is an act intended to visibly, politically and legally subordinate Asanteman's judicial power to its own. In rendering a palace decision a court decision; the state makes a claim that its adjudicating power is absolute and when it upholds a decision from Asanteman's forums, it does so as a principal to its agent.

The decentralised power structure of Asanteman and consequent devolution of judicial power to the smallest units within the military machine has allowed Asanteman to contest the normativity and effectiveness of the state's judicial power as a sovereign power. Its justice system includes palaces at all levels of the confederacy, clans and families. With each of these levels mimicking a higher level in form and structure, Asanteman co-opts all levels of dispute into its justice system.

The result is that it, with sufficient success, impedes access to courts by invoking loyalties to the collective good of the smaller and then larger units within it to which the disputing litigants belong. The libation poured at the end of a palace adjudication, for example, which invites the ancestors to witness the restoration of peace, culturally, morally and religiously (or at least metaphysically) pressures disputants from referring the matter to the courts even if they feel they are due more. By fusing the use of the forum with personal identity and community membership, Asanteman exerts a very direct pressure on citizens to maintain their membership by participation.

In adjudication, that participation is almost necessarily a withdrawal from participation in the state. Thus, Asanteman is able to fully articulate a sovereignty claim in judicial matters. This in itself is a challenge to the state's authority. It poses a further challenge by interfering with access to the courts and therefore the state's judicial power through which it could directly shape the conduct of personal lives of citizens. For instance, in 1999, shortly after the current Asantehene was enstooled, he issued a one-week ultimatum to his sub-chiefs to withdraw chieftaincy related disputes from the state

courts and redirect them through the traditional Asanteman channels for resolution.³² In response, the majority of Asante chieftaincy related cases were withdrawn from the courts.

Not all sub-chiefs complied. None of those who did not comply were noticeably sanctioned. This is of course not to say that no sanctions were implied or felt. For a polity as participatory, decentralised and hierarchical as Asanteman, sanction for deviation from the collective interest need not be of force. As noted in chapter 4, a task allocated to an officeholder in Asanteman is as much a right as a duty; one which lies not in the current performer, but in the stool and therefore sub-unit to which that performer belongs. The loss of prestige or rank due to an officeholder's decisions is almost certain to result in that person's removal from office by the unit. The ability of Asantehene (and in diminishing degrees according to rank, all chiefs) to lower an entire unit in rank and prestige by reassigning Asanteman/Division tasks, gives an intangible coercive force to edicts made in Asanteman's name. The 1999 incident discussed above is therefore not a fluke that can be written off. Rather, it is archetypal of Asanteman's capacity to hamper citizens' access to state institutions and thereby contest the state's sovereignty claims.

³² Daily Graphic, 'Enstoolment on the Golden Stool' (Daily Graphic, 9 May 2014) <<https://www.graphic.com.gh/features/features/enstoolment-on-the-golden-stool-in-april-1999.html>

accessed 5 June 2020

The obstruction of Asantefo's access to the courts acts also to prevent the state from reaching its citizens to patrol their interactions with its own institutions. The FHRFs relating to institutional encounters and vulnerable demographics are an important tool the state uses to encourage citizens to participate in its sovereignty discourse. They include the rights to a fair trial, due process, information in the event of arrest under emergency powers, and compensation upon compulsory acquisition of a citizen's property. The rights to fairness and reasonableness from administrative bodies, the right of disabled persons to the requisite provision in legal proceedings and access to public spaces, the right to appeal a decision of the courts constitute the state's efforts to create a just, inclusive society. The third set of rights in this category include such employee rights as the rights to a safe working environment and paid leave.

The first set- ie. the institutional rights- protect the citizen in the face of the coercive power of the state. The second set- the inclusivity rights- detail the state's duties in facilitating the public life of citizens. The third set is the only set with a wider duty-holder audience than the state. It addresses all employers. But the nature of Ghana's economic sector is such that 'employers' properly so called are almost entirely operating within the state's supervision (ie the formal sector). This means they are incorporated companies that have been given legal personality by the state. Unlike the natural persons involved in their management, these legal persons are not dual citizens and, owing their existence solely to the state, do not refer to traditional authorities for their values or identity.

Asanteman has no ability to interfere directly with how state provides the rights in this category. Nevertheless, Asanteman is able to hamper the state from according

them in full to citizens by affecting access to the institutions where they can be enjoyed. Chiefs have interfered with police activities including arrests, prosecutions and investigations³³ and, as provided by the 1999 example, the use of courts. Blocking citizens access to courts weakens the state's reach over the conduct of life, or, as Walker puts it, the state claim's capacity 'to make a difference in the [real] world.' This is a challenge to the state's sovereignty that it cannot afford not to respond to. But if *Adjei-Ampofo* discussed in chapter 3 is any indication, the state is inclined to respond with an uncompromising repudiation of Asanteman's authority; fuelling further the tensions that exist between the two entities.

2.3. Jurisdictional Challenges

The religious justification at the heart of Asanteman's power makes its control over its citizens both personal and spiritual. Clothed in rhetoric of 'custom', 'identity' and 'our way', edicts of Asanteman's constitutional officers resonate at a deeply personal level and cannot be countered by claims from outside that framework. The growth of non-Asante religions among Asantefoɔ has neither altered the religious connotations of Asanteman nor weakened the resonance of the identity steeped in Asante religion for its members who practise other religions. In Ubink's study of the *oman* of Ejisu, citizens expressed an overwhelming support for chieftaincy as a reflection of who they were, even when they professed religious difference.³⁴ For the state, this religiously rooted

³³ So rampant a phenomenon it is that the President in 2019 publicly rebuked chiefs over the practice. See Daniel Dzirasah, 'Don't interfere with police investigations-Pres advises chiefs' (Ghanaian Times, 15 April 2019) <<https://www.ghanaiantimes.com.gh/dont-interfere-with-police-investigations-pres-advises-chiefs/>> accessed 5 June 2020

affinity for Asanteman makes it difficult to effectively assert its jurisdiction over every sphere of the life of Asante-citizens. As noted earlier, a sovereignty claim – in its legal sense- must necessarily be absolute and final in nature. In its political sense, it must be endorsed, not merely obeyed, by the people it claims.

Asanteman's religiously rooted jurisdictional challenge hinders the state's ability to provide such rights as those it promises to persons living with disability. The right to live with one's family is not simply a right to inhabit the same dwelling. It has a qualitative component; a disabled person must enjoy the same quality of life as the rest of their family. Thus, it is a right that is easily enforced against those seeking to physically separate a disabled person and their family. It is, however, much harder to enforce qualitatively against the family itself. Where, as in Asanteman, disability is viewed as a curse or punishment from the gods or ancestors, the presence of a disabled person in the family can evoke deep, irrational resistance.³⁵ The state's jurisdiction to decide that aspect of life in Asante territory is strongly contested by Asanteman through its religious hold over its citizens. Because of the qualitative nature of such rights, that contestation strikes at the political sovereignty of the state.

The second source of jurisdictional challenge is equally complex. As discussed in chapter 2, a sovereign claim is made over a particular polity *qua* polity. A polity necessarily comprises a people and the land they inhabit. Without land, a people cannot

³⁴Janine Ubink, 'Traditional Authority Revisited: Popular Perceptions of Chiefs and Chieftaincy in Peri-Urban Kumasi, Ghana,' (2007) 39(55) *Journal of Legal Pluralism & Unofficial Law* 123, 147

³⁵ Alexander Kwesi Kassah et al, 'Abuse of disabled children in Ghana' (2012) 27(5) *Disability & Society* 689

be sovereign because they must remain subject to the dictates of the owner of the resources that sustain them. Control of land is therefore an indispensable limb of sovereignty. In Ghana, eighty percent of the land is held under customary tenure.³⁶ This is not to say that all that land is held by chiefs. Land can be held absolutely by chiefs or families or less commonly by individuals³⁷. But the owner, whoever they may be, derives their title from a customary law right. That means that the state's jurisdiction does not extend directly to the land on which the people live.

This creates some difficulty for the state. Owner autonomy over land is tied up so totally in political loyalties, that every polity retains significant control over land use in its territory. The state in Ghana, is not the polity to which the generality of landowners and users owe their access. Consequently, its ability to regulate life excludes most land-related spheres. Thus, even in those geospatial areas where the state is unchallenged in its control over the people, it encounters formidable resistance when it attempts to control the people in ways that conflict with the traditional polities' control over the land.

The tension between the state and Asanteman over the divergence between its individual rights and Asanteman's permitted land use has not resulted in violence. Nevertheless, Asanteman's control significantly affects the enjoyment of the lifestyle envisioned by the Constitution for Ghanaians. The constitutional freedom of worship includes by necessary implication the freedom to not worship at all, and to not have to

³⁶ Kasim Kasanga & NA Kotey NA, *Land Management in Ghana: Building on Tradition and Modernity* (IIED 2001) 13

³⁷ Dennis Dominic Adjei *Land Law, Practice and Conveyancing in Ghana* (Adwinsa 2015).

participate in or be compelled to observe the participation of others in any religious act whatever form it may take. But this leg of the freedom of worship does not exist within Asanteman. Any public religious duty that may be owed is owed in the name and for the good of the collective. In practical terms, it means that religious prohibitions-such as farming on 'evil days'- and obligations- such as observing the fortieth day after the death of family member -are binding on all including those who do not believe in an afterlife.

In other parts of the country, the struggle between state and tribe over religious freedom has resulted in violent clashes. For example, the month-long ban on noisemaking issued by various Ga chiefs annually during planting season frequently sees Ga youths attacking charismatic churches during their worship.³⁸ Fishermen have been attacked and forced to shore for fishing on evil days in Fanteland.³⁹ In Nungua, in the heart of the capital city, local youths consistently prevent construction and activities that break the surface of the soil on Sundays on the grounds that their earth-gods are resting and must not be disturbed. These incidents all arise from the divisibility of the polity of the state into people and territory. The control over land gives Asanteman (and other customary law systems) a firm ground on which to resist the jurisdiction of the state and thereby undermine its sovereignty claim in both a political and legal sense.

³⁸ See RA van Dijk, 'Contesting silence: the ban on drumming and the musical politics of Pentecostalism in Ghana' (2001) 4 *Ghana Studies* 31

³⁹ Joseph Kingsley Adjei & Solomon Sika-Bright, 'Traditional Beliefs and Sea Fishing in Selected Coastal Communities in the Western Region of Ghana' (2019) 11(1) *Ghana Journal of Geography* 1

2.4. Symbolic Rejections Of State Sovereignty.

Asanteman's contestation of state sovereignty is not simply an involuntary, inexorable upshot of it being a differently wired polity. Some aspects of the tension are cultivated by deliberate acts designed precisely to challenge the sovereignty of the state by rejecting or appearing to reject the state's normative claim. But it is debatable whether Asanteman is capable of proving them effective. Indeed, it is not always clear whether these acts are actually normative claims. Ie whether Asanteman itself believes that it is by the act commanding the named state of affairs into being. That ambiguity attached to what would otherwise be a weighty normative claim suggests that these acts are symbolic rather than factual rejections of state authority *ergo* sovereignty.

But even if merely symbolic, these actions make real input in the sovereignty contestation between the two polities. They strike at the internal discursiveness of the state's sovereignty claim. In our definition of sovereignty, the power asserting the claim declares certain normative states to be on account of its say so. The polity responds to that claim by compliance and endorsement, and, in so doing, simultaneously legitimises the normativity of the claim and operationalising it, makes it effective and therefore plausible. That action and reaction nature of the exchange between polity and supreme ordering power is the discursiveness required to keep a sovereignty claim alive. Rome's sovereignty in its time is still acknowledged today. But it is a historical, not a continuing fact. It is no longer discursive.

When Asanteman does these symbolic acts of refutation, it breaks the discourse ongoing between the state and Asantefoo'-citizens. Such acts import uncertainty as to

the veracity of the state's normative claim that then undermines Asantefoo's ability to interact with that claim as conclusive. These provocative acts typically take one of two forms. Asanteman may do an act to present itself internally and externally as a polity that has not been subsumed by the state in one type of resistance. The second form consists in an act that positions Asanteman as the internal audience to the state's claim. In that position, it reacts disbelievingly to the claim and thereby raises questions as to the claim's effectiveness.

Otumfuo Osei Tutu II became Asantehene in 1999, when the Constitution was only seven years in force and the Rawlings military-turned-civilian government was in its last year. For that reason, the discussion does not draw on his predecessor's reign except to note that Opoku Ware II resigned from his position as Ghana's Ambassador to Italy when he was elected Asantehene. That choice was in itself arguably a symbolic claim on behalf of Asanteman. Otumfuo Osei Tutu has, in his twenty-year tenure, done several acts of symbolic rejection of state sovereignty. I discuss two key examples of each of these two types of actions to demonstrate how Asanteman postures as rejecting the state's claim to sovereignty over its citizens and how such posturing though without substance has great effect.

In 2005, Otumfuo negotiated directly with, and successfully secured funding from the World Bank for some development projects in Asante.⁴⁰ Ordinarily, the World

⁴⁰ Alex B Asiedu and others 'An Asanteman--World Bank Heritage Development Initiative in Promoting Partnership with Ghanaian Traditional Leaders' (2009) 55(4) Africa Today Magazine, 3.

Bank does not deal with sub-units of a state directly. In other words, it is a platform for sovereign entities. In dealing directly with Asantehene, this institution of the international comity of states, appears to have accepted that, even if Asanteman is not sovereign, it is sufficiently similar to a state to be a better partner in respect of Asante territory than the state. It must be noted that these symbolic acts need not be belligerent gestures. As with the World Bank-Asanteman partnership, it could be a seemingly harmless act with a net positive result. But its bearing on the effectiveness and normativity of the state's sovereignty claim would be nonetheless detrimental and might trigger in the state an aggressive, negative response that is invariably at the expense of the ordinary citizen.

Speaking at a UN High-Level Forum on the Culture of Peace in New York in 2019, Asantehene talked about his mediating role in Ghana's peaceful handover of power after the 2016 elections. It is pertinent to note that neither candidate was Asante. Again, neither Asantehene's mediation action nor his publication of the fact was belligerent. But his publication of the fact to an international audience of states does bring into question the state's ability to shape the identity of the polity *qua* polity before an external audience. Asantehene symbolically cast Asanteman as a peer rather than a subset of the state.

The second type of symbolic posturing by which Asanteman contests the state's sovereignty occurs on the internal plane of the discourse. An example is found in the events of Asantehemaa's funeral in 2017. Shortly before the final funeral rites for Asantehemaa Nana Afia Kobi Ampem II, Asantehene announced that he could not

guarantee the life or safety of any person who was encountered by Asantehemaa's burial procession. Residents of Kumasi were 'advised' by the king to stay indoors between 8pm and 4am on the burial day.⁴¹ In independent Asanteman, any such person had to be killed to accompany the queenmother. Asantehene's pronouncement was nothing short of a threat of death- a second degree felony under state law. It also violated several freedoms guaranteed by the state: including the freedoms of movement and liberty. Nevertheless, the streets of Kumasi emptied until the successful return of the procession was announced.

Would a person who stayed out to take pictures of the historic moment really have been killed? It is impossible to say. It seems unlikely that if, say, the Vice-President of Ghana had been in the path of the procession, he would have been killed in line with Asanteman's constitution. But ordinary residents of Kumasi were not willing to test whether it was a symbolic or authoritative statement. So, it will never be conclusively known. But several facts are worth noting and reflecting on. Firstly, Manhyia 'advised' rather than ordered residents to stay home. Secondly, it did not expressly pronounce a death sentence for non-compliance. Instead, it prevaricated; pronouncing a non-guarantee that amounted to a death sentence. Thirdly, a very specific time period was assigned to the advice. Taken together, the first two facts present Asanteman as the internal audience to the state's sovereignty claim to guarantee the rights to life, liberty, and the freedom of movement. For it appears to accept that these rights and freedoms exist and therefore seems to accept the state's role as the identity-

⁴¹ J Owusu-Mensah, 'Kumasi goes dead as Asantehemaa goes home' (PrimeNews, 20 January 2017) <https://www.primenewsghana.com/general-news/kumasi-goes-dead-as-asantehemaa-goes-home.html>> accessed 5 June 2020

defining power. But then, Asanteman promptly denies that such rights can exist at a time it does not want them to.

Despite its seemingly subordinate stance, the statement is making an authoritative claim that it is the source of the absence of those rights in this instance and, by implication, of their existence ordinarily. The specificity of the period of non-guarantee lends a menacing tone to it and, at once reverses the submissive tenor of the earlier two statements. As noted before, sovereignty is a discourse between the asserter and the recipient of the assertion; on an internal and also external level. Again, as I noted in chapter 2, the internal audience's reaction to the claim, is the more critical plane of the discourse that is sovereignty. So, Asanteman, positioning itself as the internal audience, and then reacting sceptically to the state's sovereignty claims, amounts to a rejection of those claims. Yet, it in the same breath, it offers so little to justify the scepticism that the rejection can only be symbolic.

The second example of this second type of symbolic rejection of state sovereignty that I dwell on occurred in 2010. The chief of Tuobodom, a vassal of Asanteman in the Brong Ahafo Region was allegedly kidnapped by the chief of Techiman in continuation of a long-standing dispute between the two townships. After a short period of seeming inaction by the state, Asantehene announced that if the state did not act, he would kidnap the Techimanhene and that the agents of the state could then 'come and face me here.'⁴² Kidnapping a chief is an indignity to his person.

⁴² Joe Awuah Jnr, "I Will Kidnap Techiman Chief: Otumfour Warns Mills," Daily Guide, March 16, 2010.

But more importantly, it is an indignity to his stool and therefore his ancestors, the stool being what unites the ancestors to the people. It is an indignity to his people both present and unborn; and finally, to his overlord if he has one. Even if a chief is facing destoolment charges at the time of the indignity, a lack of response by Asanteman will cause a constitutional crisis. Thus, Asantehene adopted a posture of belligerence that is only tolerable from a sovereign state; which it is not. Again, however, the facts suggest that this was a symbolic rather than factual position. First, the threat was issued as a future threat rather than as an instruction. Second, it was issued on a condition prerequisite. Third, a reprisal was expected not from Techiman, whose chief he would have kidnapped, but from the state. Again, the first two facts suggest that the rejection is only symbolic, while the third serves to give the threat the cloak of credibility.

These symbolic rejections of state authority are not without effect. They serve to reinforce the perception of strength and military might of Asanteman and the commensurate weakness of the state in the minds of its citizens. This is, of course, an entirely false state of affairs. Asanteman does not possess the ability - military or otherwise - to substantiate the claims it is making for itself or nullify those of the state. However, by keeping the citizens in this belief, it undermines the political sovereignty of the state in ways for which the state's legal sovereignty cannot compensate.

2.5. How Does the Difference in Ideology Inform the Configuration of Judicial Power and The Judicial Process in the Two Entities?

The justice system of the state reflects its individualistic ethos. The Supreme Court's constitutional enforcement power is directed at constraining the coercive power of the state from being used against the citizen, including in furtherance of that citizen's own interest. The jurisdiction of each court is clearly demarcated, and disputants do not have infinite choice which forum to choose for a particular grievance. There is a sharp distinction between public and personal matters. Private disputes remain private no matter the scale. Disputes – whether of private or public law- are secular matters and their resolution have no religious implications for either the individuals or the collective. This is in line with the premise that the quality of the individual's experience is the purpose of the state.

By contrast, Asanteman's justice system aims to restore peace. It will prevent evidence from being led in some private matters and often seeks reconciliation whether by restitution or by appeasement. It may share the burden of peace on both parties by imposing a conciliatory stance on one party and a receptive stance in the other. There are only two clear rules on the jurisdiction of the palaces. The first is that a lower palace cannot be the appellate forum for a decision of a higher palace, and the second is that decisions from Asantehene's palace are always final. Private disputes can, by invocation of an oath, become public matters involving every member of the polity's

physical and spiritual welfare. This, too, is in line with the Asanteman premise that the person cannot thrive unless the collective thrives.

The appeal process provides further occasion for the divergence in their purposes to bubble to the surface through their methods. In the court,⁴³ the person defending an appeal is the winner in the lower court. In the palace, it is the *akyeame* of the lower palace. This has a significant impact on the Asanteni. To appeal against another person's victory in court is simply to reject one's own defeat. In contrast, the palace appeal essentially accuses the *akyeame* of incompetence and thereby pits the appellant against the political subunit to which he/she submits. It is a huge responsibility. Where the courts require only dissatisfaction in a putative appellant, Asanteman requires additionally a good deal of bravery.

In some matters, the two systems appear to hold the same position. But even there, the underlying reasons are often very different, and this affects how an attempted breach is treated. For example, both systems frown on re-litigation of settled affairs. But whereas the courts do so to limit uncertainty and inefficiency, the palaces do so to keep the gods and/or ancestors from punishing the whole community. In criminal matters (*oman ekyiwadie*), the palace will inflict punishment to deter recurrence; just as the courts do. But unlike the courts, its interest in preventing recurrence is not the

⁴³ As noted in previous chapters, I use 'court' to refer to the state's judicial forums and 'palace' to refer to any forum – including ad hoc, family level fora- constituted under customary law.

individual safety of members.⁴⁴ Rather, it is the collective welfare of the society which is metaphysically compromised by crime.

The two systems thus operate in ways that directly mirror the central premise of their sustaining entities. But being so different, these philosophies have resulted in a mutual incomprehension about the purposes and methods each of the other. That incomprehension, in turn, breeds suspicion and impatience, and results in friction between the two sides. The contestation Asanteman offers the state's normative claims and effectiveness therefore present a real danger of destructive conflict.

There are two ways to approach the potential for conflict proceeding from the tension. The first approach is to allow the tension to culminate in the destructive conflict inherent in their mutual incomprehension. Two outcomes are possible with this approach. In the first outcome scenario, the state falls in the conflict and systems exists as an independent and fully sovereign state. The second possible outcome of this approach sees the customary law systems fall and the state impose a single, identity corresponding with the FHRFs across the territory. The alternative approach is for the state to reconceptualise its relationship to Asanteman (and all other customary law polities) in a way that allows them to co-exist without eroding all the tension or aggravating it.

⁴⁴ Antony Duff & Zachary Hoskins, 'Legal Punishment', in Edward N Zalta (ed.) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/archives/win2019/entries/legal-punishment/> accessed 5 June 2020

The first approach is easier if no reason other than that it requires less deliberation and intentionality. However, neither of the two outcomes it could yield is ideal. The demise of one system-whether the state or the customary law polity- is a loss to the other because both sides perform real and critical functions in the lives of citizen-subjects; and their existence offers both intangible and practical benefits. To illustrate the point, I briefly examine below what benefits each side provides.

2.6. What The State Brings to The Table

The state, for its part, errs if it drops- or even alters- its sovereignty claims. The ways in which its claims are effective are uniquely able to meet some key needs of the various polities contained within its boundaries. For one, the state is an indispensable tool for ensuring equitable access to a decent standard of living for all citizens across the breadth of its territory. The capacity to pool resources from all over the territory and redistribute them to support the poorest areas with revenues from the wealthiest is one only the state could possess. Even within Asanteman, *Manhyia* has very limited ability to redistribute wealth regionally; thanks to the autonomous status of the *aman*. Ghana's resources are not evenly distributed. While Asante is especially fecund and mineral rich, some of the coastal parts are near barren and the harsh savannah of the north hold no mineral resources. For those tribal polities inhabiting less endowed territory, this redistributive power of the state is critical to their survival.

Additionally, the tribal polities do not possess the tools to navigate the globalised world either culturally or economically. Even the more mature states in the West are experiencing a significant loss of power. Their ability to provide in or monopolise those spheres which have traditionally been the *raison d'etre* of the state has been strongly curtailed or rivalled in the post-global order. Security, adjudication, and economic activity are now taken over by multinational associations and private agencies. The state is shouldering the burden of meeting these challenges. Asanteman and other tribal orders are simply not configured to thrive in that milieu and are likely to be quickly overrun. Tierney notes how Quebec, Scotland, and Catalonia have modified their goal of secession into demands of greater autonomy in the face of the enormity of the statal challenge in the post-global order.⁴⁵ The customary law orders are no better placed to make it on their own and so require the state to insulate them.

Finally, many enemy tribal orders inhabit Ghana. It is the state which has played a mediating role when such orders clash. The Guinea Fowl War (1994) between the Nanumba and Konkomba, and the recurrent Alavanyo-Nkonya violent conflicts are just two examples of when the state's mediation has been required. After several decades of unrest, the state in 2019 finally brought a resolution to the Dagomba civil war⁴⁶ that saw the Ya-Na beheaded in 2002.⁴⁷ It is hard to see how that war could ever have ended without the involvement of the state. The state's demise would signal the end for many

⁴⁵ Stephen Tierney, 'Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State' (2005) 53(1) ICLQ 161, 182

⁴⁶ Wyatt MacGaffey, 'Death of a King, Death of a Kingdom? Social Pluralism and Succession to High Office in Dagbon, Northern Ghana' (2006) 44(1) JMAS 79

⁴⁷ BBC, 'Funeral for Ghana's beheaded king' < <http://news.bbc.co.uk/1/hi/world/africa/4896066.stm>> accessed 1 October 2021

tribal orders. Some would be overrun by stronger neighbours. Others like Winneba, and Dagbon would erupt in internal violence and self-destruct. Thus, despite its challenges and inadequacies, the state is important for the tribal orders to thrive. In its absence, the territory would split into ‘an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt’.⁴⁸ Therefore, the first option in which the state ceases to be is not a good solution for either the state or Asanteman.

2.7. What The Tribal Orders Bring to The Table

On the other hand, the tribal orders are critical to the state's survival. Partly because it is so much younger than Asanteman and partly because it was for most of its pre-1992 life not the most benign entity, the state’s legitimacy and political sovereignty are incomplete. Its association with the tribal orders helps it circumvent the legitimacy deficit and inchoate political sovereignty. The customary law polities often translate the state's existence and utility to their subjects. In the lead-up to the 2016 elections, for example, the Electoral Commission's anti-election violence campaign consisted of advertisements which began with people stating their names, then adding ‘I am a/n [tribal affiliation]; I am also a Ghanaian.’ Even state agencies recognise that the tribal polities are the primary politico-constitutional identity of the state’s citizens. As can be seen from the example above, the state is able, when it chooses, to harness the legitimacy of tribal polities to further its cause.

⁴⁸ Alexander Hamilton, Federalist no 9

Furthermore, the state has not -and will not for the foreseeable future- be able to fully penetrate the territory within its jurisdiction. Its inability to provide social services such as publicly funded schools, healthcare, and security everywhere in its territory has severely limited its ability to cultivate the meaningful relationship with its citizens that yields full political sovereignty. The customary law systems provide culturally mandated social networks that act as the social safety net supplying some of these needs for its rural members.⁴⁹ Thus, as polity *qua* polity, the customary law systems provide real value for the state and their loss would be the state's also.

But critically, and, independently of their symbiosis with the state, customary law polities are valuable and should not be pushed out of existence by the state. They are valuable to the citizens as individuals in a dual way. Firstly, customary law is instrumentally valuable. From our study of Asante in chapter 4, it is abundantly clear that Ghana's tribal polities are what Will Kymlicka calls societal cultures. He defines a societal culture as:

a culture which provides its members with meaningful ways of
life across the full range of human activities, including social,

⁴⁹ See eg Bright Bensah Drah, *Crisis Foster Care in an Age of HIV and AIDS: Experiences of the Queen Mothers of Many Klo, Ghana* (PhD thesis University of Toronto 2011); Dorothy Naa Dedei Quaye, *A Comparative Study Of Urban Poverty Among Migrants And Indigenes In The Communities Of Chorkor And Old Fadama, Accra* (Master's Thesis, University Of Ghana 2018); RM Gyasi, DR Phillips,& K Abass, 'Social support networks and psychological wellbeing in community-dwelling older Ghanaian cohorts' (2019) 31 *International Psychogeriatrics* 1047

educational, religious, recreational, and economic life,
encompassing both public and private spheres.⁵⁰

Members of a societal culture have ‘a shared vocabulary of tradition and convention’.⁵¹ They do not share just the memories of common glories in the past and a will to continue them in the present.⁵² They also share common institutions and practices which cover the full range of human life.⁵³ Members belong to it at a level more primal than other types of group membership- whether social, political or religious. So steeped in its ethos, ethics and outlook are they that members are incapable of defining themselves outside of the perimeter of that culture.

Like Kymlicka, I consider culture intrinsically linked to freedom as the concept is envisioned by liberal theory. Liberalism treats certain primary freedoms as both fundamental and individual. Thus, liberal constitutions grant persons the power- through a bill of rights- to determine what a good life means, and when they realise they are wrong, redefine and pursue that new life.⁵⁴ It is in this that liberalism’s superiority as a state posture lies; that it empowers citizens to achieve that goal which Weiler so eloquently describes as the aim of all constitutive efforts by any group of humans: ‘to try and try again to live a life of decency, to honour our creation in the

⁵⁰Will Kymlicka, ‘Freedom and Culture’ in Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1996), 76

⁵¹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 231

⁵² Ernest Renan, & MFN Giglioli, *What Is a Nation? and Other Political Writings*: (Columbia University Press 2018)

⁵³ See Copp, David (1992), ‘The Concept of a Society’, *Dialogue*, 31/2: 183–212.

⁵⁴ Kymlicka n50, 80

image of God or the secular equivalent'⁵⁵. To put it more prosaically, liberalism acknowledges and empowers 'rational revisability'⁵⁶ and therefore allows humans to be truly free.

However, though much is made of rational revisability, it is a power that is at best inutile in the absence of a meaning-infusing frame of reference. It is only clear to me that X is a good and Y is not when I have abstract principles for assessing value. In other words, my moral ideology determines my actions, my options, and my goals. As the product and also producer of the societal culture of a tribal polity, customary law provides the parameters of moral ideology from which its members abstract these principles. For example, in SB Adjei's study on wife-beating in Ghana which showed that husbands consider it their right to correct/ discipline their errant wife, 72% of the respondents were Akan.⁵⁷ The perception of themselves as entitled or positioned to determine a grown woman's ways is a product of Akan customary law systems placing husbands above wives. The belief that such correction can or should be done by physical violence is, again, because the moral Akan polities considers physical violence against women acceptable; even desirable. By affording context, reference and meaning to the quotidian lives of citizens, customary law orders equip them to deploy their rational revisability powers in the pursuit of a good life. In sum, for its subjects,

⁵⁵ JHH Weiler, 'In defence of the status quo: Europe's constitutional Sonderweg' in JHH Weiler & M Wind (eds), *European Constitutionalism beyond the State*, 18

⁵⁶ Allen Buchanan, 'Revisability and Rational Choice' (1975) 5*Canadian Journal of Philosophy* 395

⁵⁷ SB Adjei, n30, 1892

customary law both illuminates the range of options and provides the spectacles through which we identify experiences as valuable'⁵⁸

Secondly, customary law is intrinsically valuable. As the framework of meaning, customary law plays a key part in the construction of self by its members. Social psychologists have shown that personal identity is constructed in and through the answering two questions: 'who am I?' and 'am I worthy'⁵⁹. The answers to these critical questions have been proven to be essential to psychological well-being and are shaped by internalized group traits, values, norms, and experiences⁶⁰; in short one's culture. Taylor argues that full grasp of a person's cultural framework is critical to her personal values, ethics, (and therefore) behavioural choices, and analyses about what makes her unique and valuable. Thus, without culture acting as a normative template, a person lacks points of reference against which to self-define.⁶¹ Usborne & Taylor have also shown how that cultural framework allows a person to retain her sense of self and her identity even when she moves out of the physical milieu of that societal culture

⁵⁸ Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 228

⁵⁹ See eg Peter J Burke & Jan E Stets, *Identity Theory* (OUP 2009); J Campbell, Self-Esteem and Clarity of the Self-Concept. (1990) 59 (3) *Journal of Personality and Social Psychology* 538.

⁶⁰RD Ashmore, K Deaux, & T McLaughlin-Volpe, 'An organizing framework for collective identity: articulation and significance of multidimensionality' (2004) 130(1) *Psychological Bulletin* 80.

⁶¹ DM Taylor, 'The quest for collective identity: the plight of disadvantaged ethnic minorities (1997) 38 *Canadian Psychology* 174. DM Taylor *The quest for identity: From minority groups to generation Xers* (Praeger 2002)

and has to function in other societal spaces.⁶² Culture reduces personal uncertainty,⁶³ provides a link of continuity⁶⁴ for the individual and provides some resilience against the fear of death.⁶⁵

Customary law is the substructure and also the summary of the societal culture that each tribal polity is. It is thus the most fundamental toolkit its subjects have for constructing their identities and selves. So, it is not only useful because of what it allows citizens to do, it is valuable also because it allows citizens to be who they decide to be. For the majority of Ghanaians for whom they are the primary source of meaning, therefore, customary law systems are not merely beneficial, they are essential. Thus, quite aside the value the customary law systems offer the state, *qua* polities, they hold both instrumental utility and intrinsic value to the citizen-subject. Leaving the tension between state and tribal polities to escalate to the point of combustion, chips falling where they may, is simply not an option.

⁶² E Usborne & DM Taylor, 'The role of cultural identity clarity for self-concept clarity, self-esteem, and subjective well-being' (2010) 36(7) *Personality and Social Psychology Bulletin* 883; DM Taylor & E Usborne, 'When I Know Who "We" Are, I Can Be "Me": The Primary Role of Cultural Identity Clarity for Psychological Well-Being.' (2010) 47(1) *Transcultural Psychiatry* 93.

⁶³ F Sani and others, 'Perceived collective continuity: seeing groups as entities that move through time.' (2007) 37 *Eur. J. Soc Psychol* 1118.

⁶⁴ MJ Chandler and others, 'Personal persistence, identity development, and suicide: A study of Native and non-Native North American adolescents.' (2003) 68(2) *Monographs of the Society for Research in Child Development* 1.

⁶⁵ Tom Pyszczynski, 'What Are We So Afraid Of? A Terror Management Theory Perspective on the Politics of Fear' (2004) 71(4) *Social Research*, 827.

Conclusion

This chapter's mission has been to set out the problem the thesis seeks to rectify. It began with a concise restatement of the constitutional ideologies of the state and Asanteman. Pointing out how individual-focused and non-intrusive and secular the former is versus how communitarian, militaristic and religious the latter is compels the reader to accept how truly dissimilar the two entities are and from there to understand the nature and cope of friction sharing citizen-subjects generates.

The second part of the chapter illustrated how this friction is in fact a struggle over sovereignty. The four ways in which the sovereignty challenge plays out is discussed. First both sides make rival law-making claims. They also stake competing adjudicating claims. The odd situation where both polities do factually have jurisdiction over the same physical territory is the source of the fourth way in which the sovereignty challenge is fought out. Asanteman's more immediate control over the land within its boundaries gives to no small strength to resist the state's sovereignty claim; and predictably eggs the state to assert it ever more firmly over the same. Finally, we saw how Asanteman undermines the state by taking every opportunity to make a real or symbolic rejection of the state's sovereignty.

At the end of this discussion, it is evident that the sovereignty question has such high stakes for both polities that neither side will be able to disengage. However, the continued aggression on both sides is destined to end in violent destruction of one (or perhaps even both) side(s) unless a deliberate strategic approach is urgently adopted to manage it. The chapter closes by disposing of any doubts whether it would be better for that final, combustive resolution to be allowed to happen and the sovereignty challenge

resolved once and for all. I elucidate the roles that the state and the tribe each play in the lives of their citizen-subject and how pivotal those roles are to her self-actualisation. This First Part too the thesis ends on a sober note. If, in Ghana, both state and tribal polity are, as shown above, indispensable, then they cannot be left to go on as they are. A less laissez-faire approach is needed to guide state-tribe interactions in Ghana into a mould that guarantees sustainable even if not entirely amicable co-existence. The second Part of this thesis tackles that difficult question.

PART II

IN SEARCH OF A WAY FORWARD

Chapter 6

Federalism, Rights, and Diversity; Lessons from Nigeria.

Introduction

In order to manage the sovereignty -related friction into its optimal state- i.e., neither exploding nor dissipating- we must find a way to balance the dual identities that their shared citizens possess. Bringing state-tribe relations to a place where the Asanteni-Ghanaian is able to fully enjoy being both Asante and Ghanaian is the only way to allow both sides to be right about being the author and determiner of the kind and quality of life she enjoys. It is only when this is achieved that the sovereignty question loses its power to destroy one or both entities, and instead becomes the fully empowering vehicle of statehood and identity that it is meant to be.

This chapter begins the second Part of the thesis. The Part is dedicated to tackling the sovereignty problem identified in chapter 5. It will be recalled that the Asanteni-Ghanaian is used in this thesis as a paradigm of the doubly affiliated character of the postcolonial Ghanaian person. Thus, the aim of this Part is not to find a solution that addresses the Asanteni-Ghanaian to the exclusion of Ghanaians from other customary law systems. The solutions explored must therefore be able to preserve the multiplicity of tribal polities *ergo* identities and, as well, the state. For that reason, I look toward philosophical constructs touted for their management of cultural diversity. I study federalism, bicameralism and constitutional pluralism. Further, I assess whether any of these concepts is also able to motivate the customary law of tribal polities to evolve in tandem with the rights entrenched in the 1992 Constitution. I call this coordinated advancement constitutional congruence. Ghana's strategy for dealing with the internal sovereignty question

must demonstrate both an ability to maintain the constitutional character of all Ghana's tribes and, at the same time, stimulate constitutional congruence between all orders present in the territory in the sphere of human rights regimes.

This chapter focuses on federalism and is in three parts. The first Part sets out the scope of the theoretical engagement with federalism that this thesis undertakes. I do not seek to comprehensively review federalism for its theoretical soundness or moral justifiability. My interest in it, in this chapter, extends only to its ability to manage diversity and generate congruence in rights regimes between the state and the customary law polities. Part I therefore sets out and discusses the merits and demerits of the arguments made in favour of federalism's management of diversity. Part II is a brief overview of federalism in Nigeria, which, because it shares some characteristics with Ghana, is the jurisdiction whose practice I use to test the theory in the African context.

Part 3 is a juxtaposition: Nigerian experience versus federalism theory. I assess whether the advantages the theory suggests federalism has have been shown in the Nigerian experience to be real as far as managing diversity goes. I also answer the question of whether a federal African state can look forward to a standard experience of rights for its citizens across its territory regardless of their customary law affiliation. I conclude that federalism is inappropriate for Ghana because it entrenches difference in ways that make it impossible to create the constitutional congruence required to prevent conflicting sovereignty claims that confuse citizen-subjects, preventing them from optimising their statal and tribal identities.

Part 1- Federalism as a Manager of Diversity.

In 1955, the British constitutional advisor on the final form of independent Ghana's Constitution, echoing the thoughts of Ghana's last colonial governor,¹ advised against the federation agitated for by Asanteman² on the grounds that Ghana was too small a territory for federalism to be a viable or efficient configuration.³ But countries like Austria, prove that size is hardly determinative in a discussion on federalism. In recent literature, federalism is endorsed as a constitutional design mechanism suited to divided societies. In this Part, I briefly describe what federalism is. I set out what its advantages are held to be in respect of diversity management and consider how those advantages relate to sovereignty.

1.1.What is federalism?

The prudent place to start in an abridged discussion of federalism is with an explication of the terminology. It is useful to distinguish between federalism, and federation.⁴ Federalism in the broadest sense, refers to the theoretical advocacy in support of a governance arrangement in which the government of a stated territory is split into two levels: a central coordinating and constraining authority, and smaller unit-based governments addressing more local needs and interests. Thus, the governmental structure federalism promotes is a combination of shared rule and self-rule⁵ with

¹ Charles Arden-Clarke. 'Gold Coast into Ghana: Some Problems of Transition. (1958)34(1) International Affairs 49, 56

² Jean Marie Allman, *The Quills of the Porcupine: Asante Nationalism in an Emergent Ghana*. (UWP 1993)

³ FC Bourne, *Report of the Constitutional Adviser*. (Government Printer, 1955.)

⁴ Preston T King, *Federalism and Federation* (Croom Helm, 1982).

⁵ Ronald L. Watts, 'Federalism, Federal Political Systems, and Federations', (1998) 1(1) *Annual Review of Political Science* 117, 120; Daniel J. Elazar, *Exploring Federalism* (University of Alabama Press, 1987)

its heart being a constitutional division of power between the centre and the regions.⁶ Federalism is not merely a descriptive label of a territory's government. It is a philosophic posture; a normative commitment to both autonomy and interdependence.⁷

By contrast, 'federation' is descriptive not prescriptive. In a federation, the splitting of the levels is neither determined nor revisable by the centre acting unilaterally.⁸ But as William Riker observes, all governments, whatever their form, are tiered. So that while split level government is a marked feature of federations, federating does not consist in it. Rather, 'a federation is a bargain about government, a bargain based, however, not on an enforcement procedure, but on simple trust itself.'⁹ In other words, federal arrangements survive more because both parts deal in good faith with each other; than because of a fear of reprisal although that possibility always exists.

Equipped with fully functional governments, each subunit is sufficiently independent to be something of a secession risk. Meanwhile, the state is able to mobilise resources and other subunits to crush any recalcitrant unit (which is what President Lincoln did in the American civil war). The trust in a federation consists in an acceptance -on the part of the centre-of the limited and potentially dangerous autonomy of the subunits, and -on the part of the subunits- the limited but potentially crushing supremacy of the centre. As Helder de Shutter says, a federation is a sort

⁶ KC Wheare *Federal Government* (OUP 1964), 62

⁷François Rocher, 'The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism' in AG Gagnon (ed) *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (UTP 2018)

⁸Andreas Follesdal, 'Federalism', *The Stanford Encyclopedia of Philosophy* Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2018/entries/federalism/>>

⁹ William H Riker, 'Federalism' in Robert E Goodin, and Philip Pettit. *A Companion to Contemporary Political Philosophy* (Blackwell 1998), 612

of mix between a ‘unitary domestic nation-state and an international institutional structure’.¹⁰ To call a state a federation is simply to describe how it functions.

In sum, *federalism* is a normative model, while *federation* is a country with a predetermined vertical power division structure.¹¹ This distinction is of more than semantic value to this thesis for two reasons. Firstly, to conflate them is to assume that simply federating will infuse federalism into a legal order. But it is not that automatic. A state may be federal in structure without having fully articulated a normative commitment to federalism. The case of Quebec is instructive. For the extended period Quebec harboured secessionist hopes,¹² it could not be said to be committed to federalism though it participated in a federation. Now, however, that Quebec agitates for greater autonomy within Canada¹³ instead of outright independence, Canada can more correctly be called a *federalist* state; not simply a federation. This chapter, though dwelling on federal practice in its study of Nigeria, is interested in *federalism* not merely federating.

Secondly, it is not my aim to exhaustively examine federal practice in general or even in Nigeria. My aim in this chapter is to assess federalism as a theoretical solution to the double-barrelled goal of maintaining diversity while stimulating constitutional congruence in the divided

¹⁰ Helder De Schutter, ‘Federalism as Fairness’ (2011) 19(2) *Journal of Political Philosophy* 167, 168

¹¹ For the distinctive physical features of a federation see François Rocher, *The Quebec–Canada Dynamic or the Negation of the Ideal of Federalism* in AG Gagnon (ed) *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (UTP 2018)

¹² Reference re Secession of Quebec, [1998] 2 S.C.R. 217

¹³ Benoît Pelletier, ‘Appendix: The Future of Quebec within the Canadian in AG Gagnon (ed) *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (UTP 2018); Nadine Changfoot and Blair Cullen, ‘Why Is Quebec Separatism off the Agenda? Reducing National Unity Crisis in the Neoliberal Era’ (2011) 44 *Canadian Journal of Political Science* 769

societies of postcolonial Africa. Thus, I do not engage with theoretical debates on federalism that go beyond this point.¹⁴

I note what federalism scholars readily admit: there is no (or no agreed upon) normative theory of federalism.¹⁵ In other words, the question of what federalism ought to be has not yet been answered definitively. Pro-federalist arguments are in the main, outcomes-based justifications.¹⁶ I do not seek, in this chapter, either to assess the objective normative strength of extant federalist theories, or to propose one. Rather, I limit myself to evaluating the force or lack thereof in the diversity related justifications being espoused in the academy; and, by applying them to the Nigerian experience, assess whether they are able to deliver on the double-barrelled goal of this thesis. If they are, then federalism is the solution to the sovereignty challenges that rob the citizen-subject of a balanced enjoyment of her dual identities in Ghana.

1.2.The Rationale For Federalism

Federalism has been said to offer numerous advantages including increased commerce and therefore prosperity;¹⁷ aggregated governance expenditure thereby reducing the cost of providing statal services;¹⁸ and, most frequently, both in the literature and in practice, military ends.¹⁹

¹⁴ For example, I do not tackle the discourse on confederation versus federation or construct a historical narrative of federalism's evolution.

¹⁵ K Scott, *Beginning a Theory of Federalism* in K Scott, *Federalism: A Normative Theory and its Practical Relevance* (Bloomsbury 2011), 1; Dimitrios Karmis & Wayne Norman, 'The Revival Of Federalism', in Dimitrios Karmis, & WJ Norman. *Theories Of Federalism, A Reader* (1st ed., Palgrave Macmillan 2005), 3.

¹⁶ Scott, n15.

¹⁷ Alexander Hamilton Federalist 12.

¹⁸ Alexander Hamilton Federalist 15

¹⁹ Riker, n9, 814-5

However, the justification offered for federalism with which this thesis is concerned is that it simultaneously protects the territorial integrity, and constituent cultural identities of ultra-diverse states. That is to say, it allows the citizens of the constituent parts to develop and maintain their sub-national identity and also enjoy and contribute to the national identity. As a diverse state whose constituent parts predate its whole, the challenge of the dual heritage of its citizens is one that preoccupies Ghana. Federalism is then a constitutional design posture that is worth the while for scholars of Ghana's constitution to explore. In the rest of this section, I set out the argument in favour of federalism's power to nurture the differences present in the body of a state composed of diverse peoples, and to do so without tearing the state at the seams.

In his treatise on representative government, John Stuart Mill explains that federalism is preferable where neighbouring peoples are incapable of or indisposed to live together harmoniously.²⁰ Being unable to coexist peacefully; such peoples could not successfully form a unitary state. But they would nonetheless profit from pooling resources to fend off more powerful states. Federalism creates an avenue for them to form a state to cooperate towards those greater needs without having to either resolve or eliminate their differences. In this way, federalism allows diversity to thrive within the parameters of a state. This argument is very appealing. Postcolonial African countries have unnatural borders that frequently encompass historically enemy polities.

But even without actual enmity, there is such distance between the ways in which the various polities' lives are organised that a consensus on many things socio-religious and anything political is actually unattainable. Africa's experience of statehood proves that states are held together either by common ground between citizens or by force. African states that faced no

²⁰ John Stuart Mill, 1861. *Representative Government*, (Batoche 2001) 188, ch17

sovereignty challenges while under violent authoritarian regimes grapple with internal cohesion or even disintegrate when they attempt liberal democratic government. Ghana is a good example of the former²¹ and Sudan²² of the latter. Absent the brute force dictators are capable of, peoples who are too culturally dissimilar or historically opposed struggle to find the mutually beneficial reason to maintain the state inherited from colonial masters. Meanwhile, a campaign to create similarity among such discrete polities entails much violence and cost and is infeasible and undesirable. By sidestepping most of the diversity related challenges, federalism offers the postcolonial African state exactly what Mill suggests- a shot at cohesion and longevity.

Alexander Hamilton and James Madison, in their *Federalist Papers* assert that federalism allows a state to live and act though disagreement about some very fundamental issues of its nature continue to exist between its parts. This is an entirely plausible claim. Having facilitated the creation of a state between disparate and perhaps opposed groups, federalism then enables that state to be at peace while still being able to provide the typical statal goods. Because every question admits of as many answers as there are federal units, there need not be a single correct answer to most questions. Thus, the correct answer to when new yams can be eaten could, for one polity, be when the chief has celebrated theyam festival, and, could, for another, be when there is no old yam in the market. The answer that is right in the north will be executed in the north and the one that is right in the south will be executed in the south. Federalism removes the zero-sum element from the determination of a multitude of issues. And thus, simultaneously allows for diversity while preserving territorial integrity.

²¹ The secessionist sentiments in the Volta region that dogged the independence era have resurfaced since the 1992 Constitution came into force and have become increasingly more aggressive in recent years. See Isaac Zaiba, 'How can Ghana address calls for independence in Western Togoland?' <<https://blogs.lse.ac.uk/africaatlse/2020/11/02/how-ghana-address-calls-independence-western-togoland-volta-hsgf/>>

²² The Republic of South Sudan broke away after a 98.9% vote in favour of secession at a 2011 referendum following two separate and lengthy civil wars.

A related advantage championed by Felix Morley is also based on the role federalism allows local views to play in the lives of citizens. Though for him, it is how that secures liberty rather than its intergroup war prevention effect that justifies it. According to Morley, the case for federalism is even stronger ‘if the federation embraces a large area, with strong climatic or cultural differences among the various states therein.’ For Morley, locals are best equipped to resolve local problems, not remotely located central governments. Therefore, federalism is what best secures their interest.²³ By empowering locals to prioritise themselves and their aspirations in the use of their share of the state’s resources, federalism gives members of each part freedom. So, for Morley, federalism preserves diversity by guaranteeing individual liberty.

There is force in Morley’s argument. Peoples who cannot be trusted with the resolution of their own parochial problems are not ready for self-government.²⁴ Once that competence can be assumed, it is unfair that the resolution to such problems should consider factors that may not be present in their locality simply because they are present in another. Committing a region’s resources to their use according to their preference makes each region both free and unique. What a person can reasonably expect to be able to do (ie act, think, be) within a community of humans is determined by that community. As such a person’s expectations will reflect the societal culture and frame of reference of their community. In being so applicable, accessible and comprehensible to the members of the community, the laws and rights regimes that emerge from that community do actually empower individuals within it. Federalism allows groups to retain the lenses of their societal culture when considering their options or courses of action. It makes it possible for citizens in different parts of the country to make choices informed by what they understand and

²³ Felix Morley, *Freedom and Federalism* (Liberty Press 1981).

²⁴ Richard Ekins, ‘How to Be a Free People’, (2013) 58(2) *American Journal of Jurisprudence* 163.

believe most fundamentally about life. Thus, federalism nurtures diversity in ways that secure true liberty to the individual.

Another way federalism is said to foster diversity is by giving voice to groups so small they would be lost in a nationwide conversation.²⁵ The argument goes that in a large single unit such as Ghana, the needs and peculiarities of minorities are lost in the compromises needed to create a national agenda. Smaller groups therefore invariably get lost in translation or are consciously sacrificed for the greater good. This is obviously unjust. In such cases, for those whose voices are not drowned out- also invariably the larger groups- the experience and value of citizenship is significantly greater than for the smaller groups who get left behind. By breaking up a country into federal units, a new opportunity for the smaller groups to be seen and their interests too catered for at the national level opens. So that while they have the same benefit of the larger state that more visible groups have; they also acquire in the subunits the benefits that at the national level they are too invisible to access. Riker sums up this argument well when he says that the powers guaranteed the subunits ensure that interests so regional, they cannot hope to sway decisions about the national interest or direction can still win locally, where they matter.²⁶

This argument appeals on two fronts. Firstly, from a political viewpoint, the inclusivity that the member units bestow on the whole order keeps it from becoming corrupt and worthless in the eyes of marginalized groups. When small groups feel invisible, they cease to see value in their continued presence in the state. Such groups over time become, at best, disaffected and

²⁵ Daniel Weinstock, 'Towards a Normative Theory of Federalism' (2001) *International Social Science Journal* 75, 79

²⁶ Riker n9 at 616

apathetic. At worst, they attempt, either alone or in association with other marginalized groups, to secede. Federalism makes an exceptional offer to small minorities in danger of being forgotten or forced into a larger group's identity mould. It grants them both their self-determined identity, and the visibility and feeling of worthiness within the union that imbues a sense of belonging and generates an attachment to and investment in the larger entity. In so doing, it forms of the constituent parts a diverse, yet unified state.

Furthermore, from a jurisprudential standpoint, federalism results in more just societies. 'Just' here does not mean morally improved; but rather, more procedurally equitable societies. Federating will not remedy any moral flaws inherent in a society- after all American federalism protected slavery, Nigerian federalism allows gender discrimination, and Indian federalism has not prevented religious persecution. But by giving equivalent value (or near) to all subunits; federations allow members of the country to retain the frame through which they navigate life. i.e., citizens participate in the nation-state on their own terms.²⁷

This is the key value of retaining diversity, after all. Accepting the foundational principles upon which a person's society and therefore worldview is built is a validation of their personhood. What good does it do to hand a person a whole basket of rights but take away from them the frame of reference by which they will interpret, exercise, and enjoy the rights? Therefore, though it would be simpler and certainly faster to build strong states in postcolonial Africa by erasing the many differences that distinguish the myriad tribes one from the other; it would also be self-defeating. Political justice requires, as Kymlicka contends, that societal cultures be

²⁷ This is similar though not the same as the argument Norman makes that federalism's fairness lies in that it allows for divergent understandings of citizenship to participate in a single entity in different ways, each compatible with a particular understanding of citizenship. Wayne Norman, 'Towards a philosophy of federalism.' in Judith Baker (ed.), *Group Rights* (UTP 1994)

recognized and empowered to become the vessel through which national culture is assimilated. This is not to say that every voice will capture the nation's imagination. But each voice is sure to be heard. The ability to put their thoughts into the public discourse discourages groups from becoming belligerent and thus underwrites the longevity of the larger nation-state.

In unitary Ghana, tiny minorities like the Vagala, Isale, Nchumburu etc. are completely invisible to the point that their existence is unacknowledged in textbooks for the mandatory levels of schooling. Federalism, on Riker's view, would make such groups, at the very least, more visible as they would make up less negligible portions of their subunit populations and, appearing in a subunit, finally become visible in the nation-state. This visibility will, in turn, increase their sense of belonging to and interest in Ghana, thereby enlarging and boosting the discursivity of the normative relations (ie sovereignty claims) between the state and these minorities. This argument does increase federalism's appeal as the philosophical way forward for our divided societies as they navigate constitutionalism.

Though much is made of federalism's ability to secure liberty in the literature, the arguments and examples largely apply to individual liberty. It is only in the more recent literature that the identity of groups is advanced as the beneficiary of federalism's liberty-protecting prowess. This is unsurprising. For, as Karmis and Norman have shown, the great theories of federalism, from Rousseau through Publius, and Toqueville to Mill all begin from a monistic conception of sovereignty.²⁸ This underlying premise shaped the way these thinkers perceived the subunits in the exercise of their powers. Federalism is in these theories a concentrated form of decentralisation that differs from devolution in that the functions allocated the subunits cannot be

²⁸ Karmis & Norman, n15, 14.

unilaterally revoked by the centre. But that the sovereignty of the polity was contained in its entirety in the state itself was never really debated.

Contemporary writers like Will Kymlicka position federalism as a pluralist theory which allows for the retention of cultural identities within a national identity. He argues that people who originate from a societal culture and live within a larger nation state should be able to enjoy dual citizenship of the two polities which define them.²⁹ Federalism, he argues makes this possible because it respects the self-determination of the component polities within the nation-state. Kymlicka envisions citizens of a multicultural state as living free from fear of marginalisation or forcible integration into a uniform culture. This vision of federalism changes the monistic parameters of classical federalist theories, replacing them with a pluralist epicentre, thereby imbuing it with new force in the discourse about its ability to enable divided societies live together as a state whilst retaining their unique societal cultures.

It can be argued that federations have generally perceived of themselves as entities of dual citizenship -with varying degrees of attachment to the subunit citizenship. Texans, for example identify with Texan identity separate from American identity, and distinct from New Yorker identity. But as noted earlier, these differences not being stark or incompatible either with each other or with Americanness, the subunit identity is not too vibrant. The societies contemplated by Kymlicka's multicultural federalism draw their sub-identity is drawn from a societal culture, an organised politico-constitutional entity. As such, the sub-identity is so much stronger that it competes with the national one. In the American example, Texan identity does not stem from an entity that dictates the content and form of that identity and to which Texans respond.

²⁹ Kymlicka, n50, 19

In Nigeria, tribal identity, stemming as it does, from the constitutional tribal entities does assert what being a member means independently of, and, therefore, in contention with the state.

Multicultural federalism, by acknowledging the duality of the identity of members renders itself more elastic and therefore suggests a promise to be useful in the postcolonial African context that its classical counterpart, with its monist premise, does not have. In the final part of this chapter, we will assess whether multicultural federalism delivers on this promise by applying it to the Nigerian situation, and drawing from that, conclude whether it is the way forward for Ghana. If multicultural federalism is able to provide philosophic guidance and articulation to the *de facto* but unpremeditated dual identity of its members, then it will be shown to be a formidable theoretical posture with which African scholarship should engage more seriously.

Part 2- Nigerian Federalism.

In this Part, I introduce the reader to the federal structure of the nation-state of Nigeria. The Part is in three sections. The first section explains why I choose from among all the federations in the world Nigeria as the case study. I then provide an overview of Nigeria's federalism from a constitutional and political viewpoint. Finally, I describe briefly the tribal diversity within her boundaries. The aim of the Part is to help the reader understand both the configuration of the state of Nigeria and the form and extent of her tribal diversity. This will allow for a fuller assessment of federalism's potential to meet the dual goals of this thesis: preserving cultural diversity while stimulating constitutional congruence.

2.1. Why Nigeria?

The choice of Nigeria as a study jurisdiction is informed by several factors. Firstly, like Ghana, it is a common law jurisdiction in West Africa. It is also the region's only federation. Of the four African states configured as federations therefore, it is the one most similarly situated to Ghana in terms of historical experience and ethnic makeup. Secondly, its 1999 Constitution is the second oldest democratic constitution in West Africa (after Ghana). This means that like Ghana, the Constitution has been in force long enough for a study of the effectiveness of its sovereignty claim and challenges to be both informed and insightful.

Admittedly, Nigeria's federal arrangement centralises (many critics say overcentralises³⁰) power in the federal government and this federal arrangement may be responsible for some of its problems. But this does not undermine the validity of my choice of Nigeria as the case study. Like Nigeria, Ghana's long experience with military government has resulted not only in an overcentralised government; but, more importantly, in a cultural inclination to overcentralise power. If then, Ghana were to federate, she would struggle similarly with issues of overcentralisation. Nigeria therefore provides excellent foil for the study of federalism's potential to manage diversity in Ghana.

2.2. Introduction to Nigeria.

2.2.1. The Federal State

Officially known as the Federal Republic of Nigeria, Nigeria comprises 36 subunits referred to as states and a neutrally located seat of government known as the Federal Capital Territory of Abuja

³⁰ e.g. Emmanuel Ibiam Amah, 'Federalism, Democracy and Constitutionalism: The Nigerian Experience' (2016) 53 *Journal of Law, Policy and Globalization* 1

(FCT). For the avoidance of confusion, in this Part, I refer to the states as subunits and reserve the use of ‘state’ to reference the federal nation-state. Nigeria runs a presidential system of government with a two-chamber legislature and a multi-tier but integrated judicial system.

The federating of the subunits into Nigeria did not, as in Europe and North America, originate with the subunits. Western federations were all consciously created to pool together resources for specific purposes without giving up the distinctiveness of the parts and were therefore created with a commitment to *federalism*. Nigeria became a federation so the colonial government could balance the books of the Northern Protectorate.³¹ The federation born of this decision could hardly have been committed to federalism. The subunits created did not conform to existing tribal boundaries and were not concerned with their preservation. The externalized nature of the journey to federating shows in the challenges Nigeria has had staying together and the continued threats of secession in various parts of its territory.³² As in Ghana, colonial administration was carried out via indirect rule through traditional authorities.³³ Nigeria became the independent federation of Nigeria in 1960³⁴ and then a republic in 1963.³⁵

³¹ Frederick Lugard, *Nigeria: Report on the Amalgamation of Northern and Southern Nigeria*. 1919, 7 para 5

³² Eg Movement for the Emancipation of the Niger Delta (MEND), Movement for the Survival of a Sovereign State of Biafra (MOSSOB), Movement for the Survival of the Ogoni People (MOSOP) Odua People’ Congress (OPC), and the Arewa Consultative Forum (AFC).

³³ AE Afigbo, *The Warrant Chiefs: Indirect Rule in Southeastern Nigeria, 1891-1929*. (Longman, 1979); Mahmud Tukur, and Michael J. Watts. *British Colonisation of Northern Nigeria, 1897-1914: a Reinterpretation of Colonial Sources* (Amalion 2016)

³⁴ Nigeria Independence Act 1960 sections 8 & 9

³⁵ Section 2, Constitution of the federal republic of Nigeria, 1963

The years between then and the entering into force of the 1999 Constitution were quite turbulent ones. 1966 saw the demise of the First Republic and as well back-to-back coups d'état³⁶. The unexpected depth of the people's preference for a federated government was revealed by the backlash that followed General Gowon's attempt to reorganize Nigeria into a unitary state. Within months, even that authoritarian regime buckled and returned the country to the federal structure it had before³⁷ with an increase in subunits but deeply centralized power.

Successive coups kept the military in office until 1979³⁸ when they handed over power and the short-lived Second Republic began.³⁹ In 1983, it was overthrown and once again a succession of coups⁴⁰ kept the country under military rule until the 1999 Constitution was promulgated and elections held. This ushered in Nigeria's Fourth Republic. (Her Third Republic was stillborn; having been overthrown before it was inaugurated).

Nigeria under military rule epitomized the distinction between federation and federalism. Though the structure remained one of central and subunit governments, the centre both held and was normatively committed to holding all power or as much of it as possible. Popular sovereignty was of course not part of the Nigerian constitutional ethos for the twenty-nine cumulative years of military rule that preceded the 1999 Constitution. Being a model of democracy, federalism, and military rule, make, as Joshua Bolarinwa observes 'strange

³⁶ January 1966, July 1966. See Max Siollun, *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966-1976)* (Algora 2009).

³⁷ The Unification Decree no 34, 1966

³⁸ 1975, 1976

³⁹ Toyin Falola, and Julius O. Ihonvbere. *The Rise & Fall of Nigeria's Second Republic, 1979-84.* (Zed 1985)

⁴⁰ 1983, August 1985 (palace coup), December 1985 (alleged coup), 1990 (failed coup), 1993 (palace coup).

bedfellows'.⁴¹ Those twenty-nine years of unfettered power left a trail of human rights abuses that only served to engrave a distrust of the state in her citizens. The attempted Biafran secession and the bloody civil war that followed is only one example in a long series of violence and abuse against the populace.

The 1999 Constitution sought to reverse the long trend of a sovereign state occupied by a non-sovereign people and declares the Constitution to be a product of 'we the people of the Federal Republic of Nigeria'. It was to usher in a new state which is built on the principles of democracy and social justice, whose sovereignty resides in the people, whose primary purpose is their security and welfare and in which their participation is assured.⁴² However, this Constitution was neither drafted by a constituent assembly nor ratified by referendum. It was unilaterally crafted and promulgated by the military government of the day. This has led to much criticism of its legitimacy and a strongly held view in some quarters that the Constitution is not the will of the people and cannot be proof of their sovereignty.⁴³

While this was true at its birth, it becomes less persuasive with every year the Constitution continues in force. The 1999 Constitution's unrivalled longevity does much to shore up its legitimacy. The multiple amendments that have been made to it by elected assemblies, despite its rigid super-majoritarian amendment rules;⁴⁴ the enthusiastic public

⁴¹ Joshua Olusegun Bolarinwa, 'Reinventing True Federalism in Nigeria: A Perspective' (2014) VIII(3) *Journal of International Relations* 40.

⁴² Section 14

⁴³ Tunde I Ogowewo, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (2000) 44(2) 135; Wole Soyinka, 'Lessons From Nigeria's Militarized Democratic Experiment', *New York Times* Oct. 9, 2019, <<https://www.nytimes.com/2019/10/09/opinion/nigeria-militarized-democratic-experiment.html>> last accessed 08/09/2021; Julius O Ihonvbere, 'How to Make an Undemocratic Constitution: The Nigerian Example' (2000) 21(2)*Third World Quarterly* 343.

⁴⁴ Four-fifths majority of both houses of the National Assembly to amend Chapter IV (Fundamental human rights), Section 8 (process of creating/altering boundaries of states, local government areas), & section 9

participation in elections organized under its aegis; and the significant body of case law on constitutionally guaranteed rights all act as, and attest to, its ratification albeit *ex post facto*. Still, the Constitution does suffer a serious legitimacy deficit and the state it established struggles with political sovereignty owing to the dubiousness of its origins.

Of particular interest is Chapter IV of the 1999 Constitution which enshrines what it calls Fundamental Rights. These rights are rooted in liberal democratic theory and are quite similar to the FHRFs in Ghana's 1992 Constitution discussed in chapter 3. They include the rights to life, liberty, dignity, fair trial, equality, free movement, and the freedom of worship. These rights may be enforced through the courts. As our working definition from chapter 2 states, sovereignty involves the making, and backing up of a claim to be a supreme ordering power which controls the nature and quality of life and to whose commands and right to command citizens respond. The rights in chapter IV of the 1999 Constitution constitute just such a claim and by empowering the courts to enforce them, the state deploys its judicial power to back this claim.

Central to the operation of the 1999 Constitution is the idea of the 'federal character principle.' It posits that the government culture of Nigeria should always reflect the federal character of the Constitution. This is, in essence, an articulation of a normative commitment to federalism. So, it is now possible to say of Nigeria that she is a federalist, not merely a federated

(amendment of the Constitution); two-thirds majority of both houses of the National assembly to amend any other part. In both cases, a resolution by two-thirds of all the states in their state legislatures must thereafter approve the proposed amendment for it to enter into effect.

state. In the next Part, we shall examine whether this federalism lives up to Kymlickan expectations.

2.2.2. The Nigerian Judicial System

As the vessel through which Nigeria articulates and executes the liberal and federalist identity of its society, the judicial system is an important player both in the sovereignty struggles the state faces, and in its diversity preservation efforts. In this section, I briefly explain how the judicial power is structured.⁴⁵ Understanding how, and at which points the courts interact with customary law in this federal order makes it possible to assess whether these interactions and non-interactions are capable of achieving the balance in the citizen-subject's identities that this thesis seeks.

At the apex of Nigeria's judicial machinery sits the Federal Supreme Court which is the final appellate court and the enforcer of the Constitution. The Court of Appeal is the next rung of judicial authority and the point at which the subunits' courts dovetail into the federal system. It is required to have at least three judges each who are competent in customary law and Islamic personal law. The Federal High Court completes the hierarchy of federal courts. It is the only court that sits in all 36 states and the FCT. It has exclusive jurisdiction over a range of federal matters including taxation and oil mining.⁴⁶ Below them are subunit High Courts which have original general jurisdiction and can hear matters in customary, common or Islamic law. Of equal status with the subunit High Courts are the Customary Court of Appeal and the Sharia Court of

⁴⁵ For a fuller explication of the judicial system of Nigeria, see Rotimi Suberu, 'The Supreme Court of Nigeria in Nigeria' (2008) 46(3) JMAS 451.

⁴⁶ Section 251(1) of the 1999 Constitution

Appeal of the subunits. Then there are lower courts of the subunits: the customary courts, sharia courts and magistrate courts. The hierarchy ends with several other lower courts which, do not interact with customary law, and as such are not relevant to this discussion.

One fundamental way in which this federalist judicial system differs from Ghana's unitary one is the existence of state-sponsored customary law courts. Judges of these courts are appointed by the state but are empowered only to hear cases in which there is a question of customary law.⁴⁷ Rules of customary law after being proved as questions of fact may be judicially noticed.⁴⁸ Through this mechanism, Nigeria hopes to give justice to its peoples according to both the Constitution and the rules of their organic frame of reference: customary law. In the next Part, we will assess whether this method of safeguarding diversity while putting customary law under state supervision is working.

2.2.3. Tribal Polities, Tension and Sovereignty

The other side in the sovereignty struggles with which this thesis is concerned is the tribal polities that abound within the territory claimed by Nigeria. Like Ghana, Nigeria is diverse on multiple levels. Firstly, it is home to about 250 tribes.⁴⁹ This, it must be noted, is the number of tribes not tribal polities. Within the same tribe, there may be multiple distinct tribal polities. The Efik, and

⁴⁷ What amounts to a 'question of customary law has proved more problematic than one might have thought. For a discussion on these challenges, see Joseph Otabor Olubor, 'Customary Laws, Practice And Procedure in the Area/Customary Court, and the Customary Court Of Appeal', speech delivered at training session for newly appointed judges held by Nigeria Judicial Institute, 1996.

⁴⁸ Section 17, Evidence Act 2011. It replaced section 14(2) of the Evidence Act 1945 which required repeated proof in a court of record before judicial notice could apply. For a critique of the new rule, see Anthony Osaro Ewere 'Safeguarding the rule on judicial notice of custom in Nigeria: Preference for the Repealed Rule of Evidence' (2019) 45(3) Commonwealth Law Bulletin 454

⁴⁹ Ejiogu, n55, 26

Ibeno, for example, are organized in city-states which are each fully autonomous, self-standing polities,⁵⁰ not unlike the city-states of Montesquieu's Italy.

Secondly, Nigeria is religiously heterogeneous. With roughly equal numbers of Christian and Muslim majorities⁵¹ and, as well, a sizable minority practising traditional tribal religions,⁵² religious domination is a deeply entrenched fear in its political affairs.⁵³ The predominantly Muslim northern states are distrustful of the predominantly Christian South and Middle Belt- a feeling which is fully reciprocated. This makes religious disagreements potentially explosive despite the constitutionally secular posture of the federal state.

Thirdly, there are multiple, dissimilar political configurations across the tribal polities. The Hausa in the North have strong centralized caliphates⁵⁴ with multiple levels of devolved authority. The Igbo, in the southeast, live in small standalone village democracies,⁵⁵ the Andoni of the Eastern Niger Delta are a largely republican society comprising various quarters,⁵⁶ etc. Even

⁵⁰ Ejiogu n55, chapter 2

⁵¹ Rotimi Suberu 'The Supreme Court of Nigeria: An Embattled Judiciary More Centralist Than Federalist' in Nicholas Aroney & John Kincaid, *Courts in Federal Countries: Federalists or Unitarists?* (UTP 2018), 292

⁵² Andrew McKinnon, 'Christians, Muslims and Traditional Worshippers in Nigeria: Estimating the Relative Proportions from Eleven Nationally Representative Social Surveys' (2021) 63 *Rev Relig Res* 303

⁵³ Ushe Mike Ushe, 'Religious Conflicts and Education in Nigeria: Implications for National Security', (2015) 6(2) *Journal of Education and Practice* 117; Insa Nolte, 'Religion, development and politics in Nigeria: Religious groups between shared concern and competition' in M Clarke (ed), *Handbook of Research on Development and Religion* (Edward Elgar 2013) ; Jude C Aguwa, 'Religious Conflict in Nigeria: Impact on Nation Building' (1997) 22(3) *Dialectical Anthropology* 335; Eddy Aitah, *Nigeria's Membership in The Organization of Islamic Cooperation: Origin, Nature And Impact*, (Master's thesis, Florida Int. University 2020) ch1

⁵⁴ Adamu, "The Hausa and Their Neighbors," 270; and MG Smith, 'The Beginning of Hausa Society' in Jan Varaina and others, *The Historian in Tropical Africa* (OUP 1964).

⁵⁵ EC Ejiogu, *The Roots of Political Instability in Nigeria: Political Evolution and Development in the Niger Basin*. (Routledge 2016), 35

⁵⁶ OC Asuk, 'The Development of Underdevelopment in Andoni (Obolo) of the Niger Delta' (2019) 8(3) *Journal of Arts & Humanities* 25.

among city-states, government is organized differently. Some, (eg Efik) are oligarchical while others (eg Ibeno), are monarchical.⁵⁷ There are, additionally, class and wealth distribution cleavages as well which aggravate the ethnic, political and religious diversity. This is the situation in which Nigerian federalism is operating. Whatever its failures, it has kept Nigeria's territorial integrity even as her tribal cultures continue to dominate the lives of their citizens. At first blush then, it could be argued that from the Nigerian experience, federalism is the constitutional design philosophy that best achieves our dual goals and boosts the sovereignty of the state. In the next Part, I look beyond the surface to see if this initial impression holds true in better light.

Part 3- Federalism: the Solution to The Diversity and Constitutional Congruence Challenge?

The literature on federalism has been developed almost exclusively based on western countries. Since that discourse is yet to mature into a normative one, it goes without saying that the circumstances upon which the appealing rationales discussed in Part I were built are foreign to the African context. They may therefore be completely true without being at all applicable. This Part discusses the arguments set out in Part I in light of Nigeria's experience under its 1999 Constitution, to determine if indeed federalism may hold the key to a benignly multi-ethnic, liberal, sovereign postcolonial African state.

The Part is in 2 sections. The first section applies the justifications offered to the facts of Nigerian history. In the second section, I make and substantiate three claims: first, that federalism has preserved diversity but has failed to make it benign in Nigeria. Second, federalism

⁵⁷ Ejiogu, n55, 32-38

has eroded the attainability of a common rights regime across Nigeria. And third, while federalism has preserved the territorial integrity of Nigeria and will likely continue to do so successfully, it has also aggravated the sovereignty challenges the state faces from tribal polities. For these reasons, I do not endorse federalism as the way forward for Ghana.

3.1. Do Theory And (Nigerian) Practice Diverge?

This section takes the pro-federalism arguments around diversity set out in Part I and measures them against the experience of Nigeria in this her Fourth Republic. I seek to determine whether in practice, as in theory, these arguments have force. My position is that if they are not supported by the Nigerian experience, then federalism is not suited to the Ghanaian situation.

3.1.1. Preserving Diversity by Preventing Interethnic War.

Federalism can certainly count some success in that regard; for it has not completely failed to prevent interethnic violence in Nigeria. Given the geographical distribution of income-generating resources in that country, this is no mean feat. The oil resources which account for 66% of government revenue,⁵⁸ are heavily concentrated in the South. The northern caliphates, which are resource poor, are also numerically stronger and could, no doubt, wage wars of conquest to gain access to some of the revenue generating resources of the South. Because of its strength, the state—even under its dictators—has always made some effort to accommodate or circumvent northern sensibilities. Thus, it can be deduced from the support these northern states have shown for the

⁵⁸ Reuters, Nigeria's revenues rise in June on higher oil, tax receipts

<<https://www.reuters.com/article/us-nigeria-oil-revenue-idUSKCN24K0LD>>;

federalist culture of the 1999 Constitution⁵⁹ that the federal arrangement is managing the tribally organised competition for resources quite well.

The substantial body of inter-state litigation in the Supreme Court over resources⁶⁰ offers another pointer to the effectiveness of the federal arrangement for maintaining the territorial integrity of Nigeria by managing the diverging interests. Much of the inter-subunit litigation centres on ownership of natural resources, and revenue allocation. Post-1999 Nigerian federalism, has managed to protect Nigeria's territorial integrity. With the hegemonic influence of the three largest tribes, the multiple cleavages and historical antagonism between tribes, and with the state, the challenge of territorial integrity cannot be overstated. Federalism has made it possible for the strong, poor north and the rich, weak south to coexist within the confines of one state. In the absence of a centripetal force like the military, the secessionist sentiments that have flared up in so many parts of the country at so many points in its pre fourth republic history, would have certainly re-ignited and blazed through the union, tearing it apart if the federalism of the 1999 Constitution were not by and large successful. This, too, is a coup for African federalism.

3.1.2. Local Resolutions to Local Conditions thus Nurturing Cultural Identities.

⁵⁹ Rotimi Suberu., "Managing Constitutional Change in the Nigerian Federation." (2015) 45(4) Publius, 552, 558;

⁶⁰ Eg AG Bayelsa State & Anor [2012] SC 106/2009; AG Nasarawa State v. AG Plateau State [2012] LPELR-SC 214/2007; AG Rivers State v. AG Akwa Ibom State & Anor [2011] SC 27/2010; AG Rivers State v. AG Plateau State v. AG Nasarawa State [2005] 9 NWLR (Pt. 930). AG Ogun State & Ors v. AG Federation [2002] 14 SCM 19.;AG Ondo State v. AG Ekiti State [2001] 17 NWLR (Pt. 743); AG Nasarawa State v. AG Plateau State [2012] LPELR-SC 214/2007.

Nigerian scholars note, generally with approval, that creating more, ethnically sensitive states out of existing ones has given visibility to some formerly invisible tribes and allowed them some control in the determination of their own lives and affairs. In the First Republic, the whole Nigeria was divided into three extremely large regions -each with a dominant tribe. The Igbo dominated the Eastern region; the Yoruba the Western and the Hausa-Fulani the Northern region. The 200 plus other tribes were drowned out in regional and national affairs. So that in any national or subunit decision, those interests and needs that were unique to their geo-cultural situation were never able to sway the larger collective's decision, be it nation or subunit. These small tribes were therefore forced to accept the causes and methods of the big three, at the expense of their own causes and methods.

It is telling that in haste to undercut the then imminent Igbo secession attempt, the Eastern region was split into three, giving minority tribes like Ijaw, Ijo and Efik states in which they were more visible. The minority tribes of the former Eastern Region did not join 'the Independent Republic of Biafra' when it tried to break away.⁶¹ Perhaps the experience of Igbos that made Nigeria an unattractive proposition was not the experience of the other tribes. But they would have had little choice in the matter. Each member would have found themselves pushed into a new identity from which they could not escape and to which they had, perhaps, never consented.

Faith in federalism's ability to give their voices volume and their problems greater relevance has sponsored agitation for subunits over the years and led to the three regions being further broken down into first twelve, then eighteen, then 21 and now 36 plus the FCT. Groups

⁶¹ Ejiogu n55, p9

that have gone from ignored minority in an old state to politically active majority in a new subunit include the Ijaw of Bayelsa State, and the Ogoni of Rivers State. Naturally, many other minorities continue to complain of neglect (including within the new subunits) and agitate for their own subunits. But even the continued agitation for states is a sign that the tribes believe that federalism gives voice to parochial interests and offers tailored solutions thereto.⁶² Though it may work only imperfectly, Nigerian federalism is indisputably working to give both voice and localized solutions to (some of) Nigeria's small peoples.

What about group identity? Has Nigerian federalism been able to preserve the identity of the component groups? It would be mendacious to answer in the negative; even if it would be overzealous to answer in the affirmative. Religion is one of the most pervasive aspects of societal culture, dictating every aspect of the life of its adherents. Therefore, religious identity is at once a group and an individual identity. Twelve of the 36 subunits in Nigeria have adopted sharia penal law as their state law. The Christian majority subunits have mostly declined to exercise their constitutional right to establish Sharia law courts and have established only the customary law courts. Other subunits have established both Sharia and customary law courts. In each instance, the decision what kind of accommodation subunit judicial power should make for the societal culture of the inhabitants of the subunit is determined by the subunit itself and is therefore aligned to that culture and the identity it bestows on its citizens- at least as far as the religious majorities

⁶² I do not deny the truth in the view, pace JF Bayart, that politics being the most lucrative industry in Nigeria, the agitation for more states can partly be ascribed to a search by the national elite for more political offices in which to enrich themselves. See JF Bayart, *The State in Africa: Politics of the Belly* (Longman 1999). Nevertheless, if federalism were not providing voice for marginalized groups, the quest for self-enrichment would take a different form- perhaps agitation for more government agencies, or more independent bodies, not more states.

are concerned. To this extent, it can be said that federalism is able to protect group identity quite effectively⁶³- albeit only for dominant groups.

3.2. Federalism, Constitutional Congruence and Sovereignty.

To commend itself as the constitutional design for Ghana, federalism must show itself able to maintain the differences that mark Ghana's peoples as distinct polities, and simultaneously, forge, through the constitutional rights, commonalities that bind them into this single nation-state. Having seen in the previous section that federalism sufficiently, if imperfectly, meets the challenge of our first goal, I assess, in this section, whether it performs as creditably in respect of the second goal: ie constitutional congruence. Ultimately, I conclude that it does not. Federalism so entrenches differences as to make them irreconcilable. FHRFs will therefore only exist to the extent that tribal polities within a subunit possess them at customary law. So that though it may be the only feasible option for a large, populous state like Nigeria, it is not ideal for Ghana.

Federalism hardens boundaries of difference in ways that facilitate or at least are amenable to discrimination. Even Morley acknowledges that, in the final analysis, federalism requires a virtuous citizenry that appreciates and values its freedom collectively and individually, and, therefore, the freedom of each other, and so exercises this freedom responsibly.⁶⁴ Like Waldron's core case against judicial review, the force of Morley's position flounders at the point when it relies on human magnanimity. It is not the way of groups to be as sensitive to the rights of others as they are of themselves. Indeed, the whole essence of a constitutionally entrenched bill of rights is to prevent for-the-moment powerful subsections of society from oppressing less powerful minorities therein. So, if federalism's ability to protect diversity rests on the responsible

⁶³ The situation of the religious minorities is discussed further below in this chapter.

⁶⁴ This is how John Kincaid reads Morley. Felix Morley on freedom and federalism. (2004) 34(4) *Publius* 69, 74

and benign use of freedom by subunit majorities, then it is a formula for the unmitigated oppression of subunit minorities.

The experience of Nigeria does not prove the reliance on human virtue prudent. With the number of tribes in each subunit, what the creation of subunits has done is to create out of once-oppressed minorities, new oppressing majorities; thereby exacerbating the problems of the smallest tribes. The alignment between state and tribal/religious identity, allows the latter to supersede national identity and therefore widens the gaps between groups, encouraging ethno-political violence.⁶⁵ For those belonging to ethno-religious majorities, federalism has enabled them preserve those ethno-religious identities while embracing 'Nigerianness'. For the significant populations who comprise minorities- whether as Christians in the Shar'ia subunits, as Moslems in the Christian states, as animists in Christian & Moslem accommodating states, or in whatever permutation of minority they exist- federalism has not been so kind. Acts to which majority members spare little thought (such as having an afterwork beer with friends, for a Christian in Zamfara state, or scheduling meetings around prayer times, for a Moslem in Lagos State), are major acts of rebellion with potentially grave consequences for minority members of the same subunit.

Furthermore, these boundaries have made it possible for tribally motivated discrimination to have the implementation resources of the state through subunit governments. For example, subunit governments have enforced educational and employment policies that discriminate against non-indigenes of the subunit,⁶⁶ including exclusion from employment in the government sector. As in

⁶⁵ O Okpanachi 'Building Peace in a Divided Society: The Role of Civil Society in Muslim-Christian Relations in Nigeria, in SHUR International Conference on "Human Rights in Conflict: The Role of Civil Society, (2009),4

⁶⁶ Rotimi Suberu The Challenge of Ethnic Conflict: The Travails of Federalism in Nigeria (1993) 4(4) Journal of Democracy, 39, 46

Ghana, the state is the leading employer in Nigeria.⁶⁷ Exclusion from government employment is therefore a very major bar to inclusion in the benefits of the society.

In such a climate, it is impossible for the rights experiences of different citizens in different states to ever coincide. How can there ever be a single, definitive set of rights across the territory, when membership of the larger polity does not carry equal weight as membership of the subunit? A Texan who moves to Alaska is not excluded from any part of Alaskan life or benefit thereof. But an Efik who moves to Lagos state is. The boundaries and membership of the independent constitutional polities within the subunits are meaningful in ways that demand expression. Excluding national but not tribal members is the expression of that membership. As Rotimi notes, federalism has resulted in ‘a sharp contraction of the geo-political space in which a Nigerian can claim indigene status within a particular state and enjoy full citizenship rights.’⁶⁸ The bill of rights the Constitution entrenches can under these circumstances be(come) nothing more than the parchment barrier about which Madison warned.⁶⁹

From the resistance General Aguiyi-Ironsi’s short-lived effort to make Nigeria unitary faced, it is evident that Nigerians prefer her federated. Nonetheless, Nigeria struggles to integrate *federalism* into its political life in ways that make her the more just, more inclusive society federalism’s advocates hail it for. The reason for this may lie in the colonial, and, therefore, externalised origins and rationale behind her federating moment. Be that as it may, with its huge population, varying levels of economic strength, and its people’s political inclinations, a

⁶⁷ Ukandi G Damachi, and Tayo Fashoyin, ‘Labour Relations in the Nigerian Civil Service’ in Alan Gladstone and others, *Current Issues in Labour Relations: An International Perspective*, (De Gruyter, 2019) 319, 319

⁶⁸ Eghosa E. Osaghae and Rotimi T. Suberu, *A History of Identities, Violence, and Stability in Nigeria* CRISE Working Paper No. 6 2005, 21

⁶⁹ James Madison, *Federalist* no.48

federation may be the only sustainable way to structure that state. But this study of its experience shows also that federalism -at least in the classical sense- cannot meet the second object of this thesis. The problems classical federalism has caused in Nigeria are sure to afflict a federal Ghana as well.

Its revised iteration championed by Kymlicka as multicultural federalism, as appealing as it is at first glance, is on further enquiry, incapable of performing better than its classical counterpart. The hope of delivering on a unified constitutional rights experience for all citizens in the multiculturally federalist state relies too heavily on the Canadian example when it argues for political autonomy for landed societal cultures.⁷⁰ Not every societal culture in Africa is landed.⁷¹ The Konkomba-Nanumba War in northern Ghana was a war between two societal cultures: one a tenant but now numerically stronger, the other landowner but numerically small.⁷² Kymlicka's federalism would leave the numerous Konkomba without entitlement to self-determination or would erase the ancestral land ownership of the Nanumba. Then, there are tribes that live in small, scattered pockets across the territory such as the Guan in Ghana and the Ijaw in Nigeria.⁷³ These groups live on their own lands, but in small independent settlements so widely separated that it is hard to envision how they could be administered as a single unit.

⁷⁰ Bernard Yack 'Multiculturalism and Political Theorists' (2002)1(1) *European Journal of Political Theory* 107, 114

⁷¹ De Shutter notes that Kymlicka makes the 'inappropriate' assumption that the world is 'transparent mosaic of cultural and linguistic wholes, where clear and stable boundaries mark off monolingual and mononational societal cultures.' De shutter, n71,173

⁷² Dzodzi Tsikata, & Seini Wayo, 'Identities, Inequalities and Conflicts in Ghana', CRISE Working Paper 5 2004.

⁷³ Charles Ukeje & Wale Adebani, 'Ethno-nationalist claims in southern Nigeria: insights from Yoruba and Ijaw nationalisms since the 1990s' (2008) 31(3) *Ethnic and Racial Studies* 563, 578

Furthermore, such a large number of tribes live in some African states that autonomy for each is unworkable. Ghana, as noted in chapter 3, has over eighty tribal groups. Nigeria has 250. These numbers do not factor in the multiplicity of standalone units that may exist in non-centralised tribes. To give each of them autonomy is simply infeasible. Eighty plus subunits cannot reasonably form a single functioning state. Even the Hausa states, united and somewhat homogenised by Islam are separate political entities. The number of subunits Kymlicka's multicultural federalism would yield in Nigeria or Ghana, would paralyse the state, rendering it so ineffectual as to make secession a viable and prudent decision for polities like Asanteman. Kymlicka asserts that bunching together several cultures into a subunit would solve that problem. But even he is at a loss what would hold such a subunit and *ergo* the federation together.⁷⁴ Without a satisfactory answer to this difficult question, the upside of adopting multicultural federalism in Ghana is elusive.

The praise and approval with which the creation of subunits is generally spoken notwithstanding, the diversity problem, and, in particular, the suppression of minorities is still under-resolved. Daniel Bach's 1989 observation remains true twenty years into Nigeria's constitutionalist federalism. "The creation of states and the development of 'statism' have added—and not substituted—new patterns of cleavages to the pre-existing ones."⁷⁵ With the creation of every new subunit in which some tribal minorities are empowered, an equally good case is made for creating another one to liberate another group- including, sometimes, from the newly created subunit. Multicultural federalism has, thus, in Nigeria, intensified rather than alleviated the

⁷⁴ Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, (OUP 2001) 93-4.

⁷⁵ Daniel Bach, 'Managing a Plural Society: The Boomerang Effects of Nigerian Federalism,' (1989) 27(2) *Commonwealth and Comparative Politics* 218^[17]_[SEP].

demands for new subunits. Further, it has generated greater competition for resources and new pressures for the federation as more and more nonviable states are created⁷⁶ or agitated for.⁷⁷

To give in to these pressures will eventually cause the state of Nigeria to collapse. The state must therefore set some limits on when, why and how many subunits it will allow. These limits will invariably and necessarily be somewhat unjust. Some groups, though as Nigerian as every other, will not enjoy the self-determination inherent in having or dominating a subunit. In the final analysis therefore, Kymlicka's kind of federalism will not preserve the state or even the true scope of the diversity therein.

While all nineteen northern subunits have Shar'ia Courts, Shar'ia plays no role in the judicial system of the southern subunits.⁷⁸ Because Nigeria is federal, the question was never whether Nigeria should adopt Islamic penal law but rather whether specific states should. Doubtless any effort to turn Nigeria itself into a Sharia nation would cause her to implode. Federalism has allowed different parts of the federation to have different answers to that issue. But even this example of federalism's accommodating power is not the uncomplicated victory it could seem. The implementation of Shar'ia in the Muslim majority subunits has not been without casualties. The Christian and other religious minorities in these subunits have suffered targeted violence and are obliged to live by customary laws alien to their own tribal polities.⁷⁹ An aerial view of Nigeria

⁷⁶ Emmanuel Amah 'Federalism, Nigerian Federal Constitution and the Practice of Federalism: An Appraisal' (2017) 8 Beijing Law Review 287, 293; Henry Alapiki, 'State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy' (2005)48(3) African Studies Review 49.

⁷⁷ 20 new states are currently being considered by the Nigerian Senate. <<https://www.channelstv.com/2021/08/08/senate-denies-proposing-creation-of-20-new-states/>>

⁷⁸ Abdulmumini A. Oba, 'Religious and Customary Laws in Nigeria' (2011) 25(2) EILR 881

⁷⁹ For example, a non-Muslim wedding in Kano was violently broken up by the Hisbah on grounds of music being 'un-islamic' and therefore immoral. Human Rights Watch, "'Political Shari'a'? Human Rights and Islamic Law

produces an appealing picture of diversity in technicolour. But, once one zooms in, the suppression and domination the multitudes of minority groups must endure become obvious blotches on the earlier image.

Furthermore, the adoption of Shar'ia beyond personal law matters in twelve states is unconstitutional. Section 10 of the 1999 Constitution prohibits federal and subunit governments from adopting an official religion. Adopting Islamic penal law amounts to elevating what the Constitution treats as a customary law system to subunit level authority. Nor is the federal state/government unaware of it. But it is not in a position to make these twelve quite powerful and religiously united subunits comply with the constitutional standards without war, and it is not clear that it would win such a war. By giving them full autonomy within its boundaries, federalism resourced Hausa states to raise their customary law to subunit status and helped them to shore up Hausa sovereignty claims by eroding Nigeria's sovereignty claim.

Federalism seems to simultaneously underwrite Nigeria's existence while also empowering subunits to resist or interfere with the state's ability to control the discourse which is its sovereignty. Letting this act, which is clearly a rejection of the state's sovereignty stand has kept the peace but has thrown the supremacy of the Constitution and therefore the state's sovereignty into question. Federalism carries in Africa the danger that strong tribal polities already discomfited by their subordination to the state are able to appropriate the subunit to promote their ends and push their sovereignty claims. This only aggravates the friction in unhelpful ways.

in Northern Nigeria' (2004)16(9) Human Rights 80. Music is an integral part of many ceremonies in many societal cultures. It is not a little thing to be deprived of one's access to one's cultural music because of its incompatibility with another culture's identity.

Conclusion

It cannot be said that the diversity promotion credentials of federalism are so borne out by the Nigerian experience as to commend it to Ghana. It has shown its ability to provide an equal experience of worthiness to every cultural identity within Nigeria to be inadequate. Nevertheless, it must be conceded that with all its problems, federalism is what has allowed Nigeria to make accommodations that a unitary state could not have, without completely losing its sovereignty. It must therefore be credited with the continued existence of Nigeria as a single state. Thus, to some extent, federalism has alleviated the sovereignty challenges that the Nigerian state faces from customary law systems.

However, the victories federalism counts on the diversity front are, unfortunately, cancelled out by its total failure to stimulate constitutional congruence. When the identity created by the federal state is not vastly dissimilar from the identity created by the subunit, as is often the case in western federations, it is possible to envision a form of federalism that could preserve the differences between subunits while accentuating the rights of the state identity. This is because these rights will, in the main, be part also of the subunit culture. But where, as in Nigeria and most parts of Africa, the constitutional rights are rooted in liberal democratic theory and the customary law rights are rooted in tribal constitutional theory, it is difficult to believe in a configuration of federalism that is able to achieve congruence between state and tribal law.

The coincidence of subunit governance structure with some customary law systems, which federalism facilitates is another repercussion Ghana cannot afford. In chapter 5, we saw that Asanteman, unable to fully articulate a sovereignty claim, sometimes resorts to making

symbolic rejections of the state's sovereignty. These acts, we saw, operate to undermine the discursiveness of the state's claim to be the supreme ordering power in the country. Federalism in Nigeria empowers customary law systems to use the subunit's infrastructure to now, not just symbolically, but also factually reject the state's claim to be the supreme ordering power in their territory and in doing so, mounts a factual rival sovereignty claim. This sets the two systems on the very sort of violent collision course that federalism is hailed for averting.

In the judicial sphere on which this thesis focuses, it is not difficult to see how federalism widens rather than narrows the distance between the Constitution and some customary law systems. As official, state-sponsored, subunit-enforced courts, the customary and sharia law courts are proof that these bodies of law are legitimate. The idea may have been to demonstrate that they are subordinate to the Constitution which overrides them in every instance of conflict. What has happened, ironically, is the exact opposite. The judges (or Khadis in the case of the Islamic courts) are constrained to apply strictly proved customary law. Nor have they the power to strike down rules of customary law as unconstitutional. No doubt, under these circumstances, some rules of customary law which are arguably incompatible with the rights regime of the nation-state will nevertheless have to be upheld by the customary courts. By setting up courts, whose mandate is provided by the state but whose content is not, the state has impeded its ability to control the content of customary law rules. Judges in these courts are bound more by the rules proved in their courts than the rules outside customary law and in this case the Constitution.

It could be argued that the customary law courts could simply follow the Constitution, overriding customary law rules when they are sub-optimal. The court could do that. But then, there would hardly be a distinction between the common law court and the customary law courts-

for that is what the former already do. People who take a dispute to a customary law court clearly do not want it to be settled outside the principles of customary law. They are unlikely to continue to use a customary law court that behaves as a common law court.

Moreover, a customary law rule that is amended by a customary law court is likely to suffer the same fate as one amended by a common law court: the amendment will be ignored.⁸⁰ It would also trigger a crisis of legitimacy. For though empowered by the state, they are legitimised by the customary law polities whose rules they apply. Their ability to command compliance hinges on the customary law polities accepting their work as legitimate. An attempt to legislate customary law by a source it does not recognise is easily discredited. This leaves customary court judges with only the passive-aggressive method of declaring proved rules obsolete to nudge reform. If, however, the political authorities of an affected customary law polity should reject that ruling, the state would have no way to insist upon it. Federalism makes it very difficult for the state to inspire constitutional congruence between all its parts.

Federalism has aggravated ethnoreligious violence in Nigeria, not diminished it. Conflicts over Niger Delta resources and over the use of Shar'ia law cost the country not less than ten thousand lives between 1999 and 2007⁸¹. In the words of Suberu Rotimi, 'Nigeria's experiment in federal governance... is remarkably resilient and innovative, but also profoundly conflicted and problematic'.⁸² What is inescapably evident from the Nigerian experience is this: If Ghana were to adopt federalism, it would resolve (to a dubious extent) her challenge with

⁸⁰ GR Woodman, "Some realism about customary law-the West African experience" (1969) *Wis L Rev* 128

⁸¹ International Crisis Group, 'Nigeria's Faltering Federal Experiment', (Africa Report No. 119, 2006)

⁸² Rotimi Suberu, 'Prebendal Politics and Federal Governance in Nigeria,' in Wale Adebunwi and Ebenezer Obadare (eds.), *Democracy and Prebendalism in Nigeria: Critical Interpretations*. (Palgrave Macmillan, 2013), 79, 84)

managing the diversity of her component peoples. But its price would be unjustifiably high. For it would eliminate any hope, however longitudinal, of the constitutional congruence needed to give citizen-subjects full access to both identities.

From our study of Asanteman, we have learnt that, even within the confines of the multi-ethnic state, Asanteman has retained enough of its precolonial sovereignty to sometimes challenge, sometimes reject (or appear to reject) the state's sovereignty. It would be deeply imprudent of the state to avail Asanteman of its infrastructure to further develop the latter's sovereignty claims. Decentralising will weaken the state and strengthen Asanteman. There is little possibility of a subunit parliament in Asanteman that would legislate contrary to Asante customary law or a judiciary that would withstand Asantehene's edicts or an executive that would take any step without Asantehene's prior approval. Thus, the only purpose federalising Ghana would serve would be the preparation for Asante secession.

The ability to infuse *federalism* into a federation depends on the subunits joining the federation voluntarily, informed by their knowledge of the benefits thereto. Ghana's tribal polities are not there by choice. Therefore, the value of membership cannot be treated as uncontested even if it is being enjoyed. The factual and symbolic rejections of the state's sovereignty, the rival adjudicatory and law-making claims and the jurisdictional challenges we see in chapter 4 lead to only one conclusion. A federated Ghana would not be a federalist Ghana and, a mere structural shift into federation will be weaponised by Asanteman to disintegrate the state.

It could be argued that if the subunits were carved to break up Asanteman, it would solve that conundrum. But experience from creating administrative regions and corresponding Houses of Chiefs out of Ashanti suggests that this would make no difference. When, in the 2013 case of *ex parte Obaapanin Amma Mansa*, an arbitration by Asantehene was challenged before the Brong

Ahafo Regional House of Chiefs, the House was unable to interfere with Asantehene's proceedings. When, before the Supreme Court, their decision and Asantehene's jurisdiction were challenged, even that elevated forum refused to question Asantehene's kompetenz.⁸³ It is hard to see how the state would motivate Asanteman to evolve its customary law regime in tandem with an external constitution in a federal Ghana.

Federating would reverse some of the gains the state has made in FHRFs in Asanteman. For example, we saw in chapter 5 that the freedom of worship guaranteed in the 1992 Constitution has provided safe passage from the compulsory religion of Asanteman. A federated Ghana, in which Asanteman had state infrastructure to prosecute its ends would allow it to impose its identity more fully on all persons within its territory, erasing nearly all of the citizen's statal identity. This would put Asantefoo in much the same condition as the Christian in Zamfara or the Moslem in Lagos. They would all have to be exactly as Asanteman determined or suffer consequences. Instead of a march toward ever more tangible FHRFs, the reversal would render them more and more like paper soldiers. While the reasons given in the Bourne Report are spurious, this chapter's study of federalism reveals that its conclusion was right. Federalism is not ideal for a country with Ghana's aspirations and circumstances.

⁸³ Unreported, SC, decided 23rd January 2013.

Chapter 7

Bicameralism, diversity, constitutional congruence, and Botswana.

Introduction

In the course of the constitutional design debates regarding Ghana's Independence Constitution, the idea was mooted that the House of Chiefs be constituted into a second chamber of the legislature with voting powers limited only to legislation affecting customary law.¹ The idea was eventually unsuccessful. But, even now in some quarters, that view still surfaces² and it reflects a school of thought that believes in bicameralism's power to preserve diversity while facilitating coordinated action within a divided state. In this chapter, I examine this idea more closely.

Can bicameralism achieve the delicate balance between the maintenance of state and tribal identity in which the constitutional FHRFs are enjoyed by subjects of differing customary law systems? As my focus in this thesis is on state-tribe relations, I explore bicameralism as a two-chamber legislative arrangement in which the second chamber is composed of chiefs. My arguments and conclusions are not made with the workings of fully elective bicameral legislatures in mind. Though they may in some cases apply to such systems, the chapter's focus is always on the model of an elected lower house and an upper house of chiefs.

¹ Hansard HL Deb vol 201 cc107-60 24 January 1957, 117 <<https://api.parliament.uk/historic-hansard/lords/1957/jan/24/ghana-independence-bill> >

² Ransford E Gyampo, 'Chiefs and Electoral Politics in Ghana's Fourth Republic' (2008) 8 *Humanities Review Journal* 10

The chapter is in three parts. In the first, I consider bicameralism's potential to initiate and sustain constitutional congruence in theory. I then examine the theoretical explanations offered in support of bicameralism's capacity for preserving diversity. In Part II, I introduce the reader to Botswana's bicameral setup to provide a context for the thrust of the final Part. Part III juxtaposes the theoretical positions discussed in Part I with the experience of Botswana; highlighting where the theory matches the experience and where it does not. I conclude the chapter by drawing out the implications of the Botswanan experience for the viability of a similarly bicameral Ghana.

Ultimately, I conclude that bicameralism does indeed facilitate convergence in constitutional rights regimes between all the polities. But it so comingles state and palace that it erodes the constitutional character of the tribe. Despite the developmental advantages of the uniformizing effect of bicameralism, it does not necessarily improve the lived experience of citizens. For they must make meaning of those new opportunities/benefits without the help of the interpretive frame that tribal law and culture provide.

The over-alignment completely resolves the tension between tribe and state, thereby settling the sovereignty challenges firmly in favour of the latter, at the expense of the tribal polities. In chapter 5, we saw that both sides perform real and important roles in the life of the citizen-subject, which together, empower her to define and pursue her idea of a good life. We concluded therefore that the resolution of the tension in favour of either side (state or tribe) was undesirable. Since bicameralism leads to this untenable place, I do not in the end recommend it for Ghana.

Part 1- How Bicameralism Preserves Diversity and Generates Constitutional Congruence in Theory.

This Part discusses bicameralism around two central arguments. It is therefore in two sections. The first constructs the argument that bicameralism can generate consilience in the constitutional evolution of the multiple tribal polities in Ghana. As with many constitutional concepts, the literature on bicameralism is informed primarily by western experience. So, there is no literature directly drawing on the House of Chiefs model that this thesis studies. The case for bicameralism in this wise is therefore extracted from arguments that it weaves differing perspectives into a single holistic and, ideally, consensual, but, at minimum, collective course of action. From these, I make the case that bicameralism can effectively nudge customary law systems to evolve along the same tangent viz the constitutional rights and freedoms thereby creating constitutional congruence within the territory.

The second section examines the argument that by incorporating the differing views of different demographics of society into state action, bicameralism preserves the diversity of thought and perspective present in the body politic. I must stress that this discussion is limited to bicameralism's relationship with diversity preservation and constitutional congruence. All its other aspects are beyond the scope of the thesis and are therefore not engaged with. Thus, a conclusion that bicameralism fails in one, or both of these respects is not also a conclusion that bicameralism is failing in Botswana or should be abandoned.

Bicameralism is here defined as a legislative institution with two chambers in its legislature.³ I note that federal states are very often also bicameral, and this raises interesting lines of inquiry about the relationship between federalism and bicameralism.⁴ However, having in the previous chapter rejected federalism for our purposes, these lines of inquiry are not relevant for this chapter's discussion. I focus, therefore, on bicameralism within a unitary state structure. I use the terms 'lower house' and 'first chamber' interchangeably to refer to the elected chamber and the terms 'upper house' and 'second chamber', also interchangeably, to refer to the chamber composed of tribal leaders.

At first glance, bicameralism seems to be just a way of configuring legislative authority; much of the discourse on the concept is concerned with its effect on the calibre of the product viz, quality of resultant legislation. But a reflection on the role legislative power plays in a state clarifies how a legislative configuration can address a sovereignty challenge. As Chesterton so elegantly put it, 'what is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is

³ Because my argument does not require the second chamber to have any actual legislative powers, I end the definition there and instead of relying on Uhr's in which the chambers share legislative powers. J Uhr, 'Bicameralism', R Rhodes, S Binder, B Rockman (eds) *The Oxford Handbook of Political Institutions* (OUP 2006).

Lijphart shows by empirical study how the ways in which the two chambers are populated do not always tidily fit the unicameral-bicameral dichotomy. See Arendt Lijphart, *Patterns of Democracy* (2nd ed. YUP) 2012, 188-189. However, this challenge is irrelevant for this discussion and so easily sidestepped. I proceed from the simple premise of the existence and character of the double chamber legislature rather than the methodology by which they come to be separated.

⁴ A good example of work that explores those lines of inquiry is Marta Arretche. 'Federalism, Bicameralism, and Institutional Change: General Trends and One Case-study.'" (2010) 4(2) *Brazilian Political Science Review* 10

what constitutes a free people.’⁵ Thus, the power to legislate is at the heart of any claim to sovereignty.

As our working definition from chapter 2 highlights, a sovereignty claim requires the supreme ordering power to purport to ‘establish and sustain the identity and status of the particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.’⁶ Legislation is one of the most obvious means by which such a claim can be made or proved. Therefore, this chapter is at its heart a discussion on managing the inter-order friction to channel the competing sovereignty claims into a single jointly authored one.

In the model of bicameralism in which I am interested, the second chamber, comprising tribal leaders, is, like the elected lower house, representative. But whereas lower house members represent the people as individuals grouped only for ease of administration, the upper house represents the people as subjects of the customary law polities. The difference may be explained thus. A person who lives in, say, Adentan constituency is represented in the lower house by the Adentan MP. If he moves to Ablekuma, he is no longer represented by the Adentan MP. By contrast an Asante woman living in Bantama is represented by the Bantamahene in the Upper House. When she moves to Adentan, she is still represented by the Bantamahene. She does not become

⁵ GK Chesterton, *Heretics* (John Lane 1919), 67

⁶ Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003), 6ff

a Ga by that move and therefore cannot be represented by the Ga Mantse of that area. This ambulatory allegiance does not exist in the western models of bicameralism. As such, the conclusions I draw in this chapter may not hold true for those models. Similarly, certain classifications or criticisms which may be true of western bicameralism may just not apply in this African model I have outlined above. I am mindful of this in drawing on existing literature and so engage only with those arguments that would apply in the African model too.

Lijphart's seminal classification of bicameral systems into weak, strong, and insignificant⁷ bicameralism is a good example of western truths that are inapplicable to this discussion. In 'strong' bicameral systems, the two chambers of the legislature are very differently composed and possess roughly equivalent power in the legislative process. "Weak" bicameral legislatures either have chambers so similar in composition as to be similar in perspective, or the power division is heavily weighted in one chamber's favour. A legislature's bicameralism is labelled insignificant if there is both a congruence of composition and an asymmetry of power. Weak or insignificant bicameral systems are often dismissed as not of particular value.⁸

For my purposes, these distinctions are irrelevant. The legal power of a body does not always correspond with its *de facto* position. While Lijphart considers a very

⁷ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*. (2nd ed. YUP, 2012), ch11

⁸ Eg Jeremy Bentham to his Fellow-Citizens of France, on Houses of Peers and Senates (Robert Heward 1830), 39 and 44 (XII s 1 and XIII s 8; Abbe Sieyes, cited in Shell, D. 'The History of Bicameralism' (2001) 7(1) *Journal of Legislative Studies* 5, 13,

wide range of factors in determining whether a system's bicameralism is insignificant, weak or strong,⁹ these factors invariably boil down to the legal conditions under which the chambers exist. As noted earlier, the scope of customary law so expands the jurisdiction the Chiefs effectively enjoy that their *de jure* power will almost certainly outstrip their political power. A lack of formal power therefore is immaterial in this discussion. The House of Chiefs could have veto power over matters affecting customary law or delaying power or even merely advisory power, as our case study, Botswana's House of Chiefs, does. As long as it is formally required to endorse or reject state legislation, a House of Chiefs is a powerful player in state action whether or not its resolutions are binding.

1.1. Generating Constitutional Congruence

In this section, I examine whether bicameralism can facilitate the process of constitutional congruence. While the argument is made generally, its viability will be tested in Part III using human rights regimes within the state and the customary law systems in Botswana. If bicameralism can achieve constitutional congruence, it has met the first threshold of this thesis and may well hold the cure to the sovereignty challenge that is costing citizen-subjects as individuals, and the state and tribal polities *qua* polities in Ghana.

⁹ Sometimes also incongruent /congruent see Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*. (2nd ed. YUP, 2012), ch11

Sovereignty does not come up much in the extant literature on bicameralism. While it is viewed as a way to preserve the distinctions between parts of the state, it is never doubted that these parts form both the same state and the same society. In other words, the viewpoints bicameralism in western experience draw out, though different, are rooted all in the same societal culture. They therefore spring from the same supreme ordering power. This is why constitutional congruence is not found among bicameralism's virtues in western literature. In the context of Africa, however, this important strength of bicameralism should not be overlooked.

Because the borders of African states were externally formed¹⁰ and, in some cases¹¹, very briefly enforced by colonial authorities, they face real challenges keeping intact the borders they inherited. The historical experience of tribal polities with the state does not predispose them to collaborate with the state. Ghana's military governments, and, before them, the colonial state all used the state's coercive power to undercut or bully tribal polities. Their new sanctity under the 1992 Constitution has given tribal polities a new strength and opportunity to resist the state to which they hold on firmly. As a result, most customary law systems in Ghana will, as we saw from our study of state-Asanteman friction in chapter 5, reject the state's sovereignty or posture as doing so whenever possible. At the same time, the legitimacy tribal polities enjoy makes their leaders a hard obstacle to circumvent for the state. The state has, in consequence, the thorny problem of multiple, defiant, and sometimes obstructing,

¹⁰ See Thomas Pakenham, *The Scramble for Africa, 1876-1912* (Weidenfeld & Nicolson 1991)

¹¹ Such as Ghana's eastern border region of Volta which until the end of WWII was German territory and, which, thereafter, was British controlled for only a decade before being reluctantly integrated to Ghana at the latter's independence.

constitutionally protected, self-referencing sites of authority who wield so much legitimacy and political sovereignty that it cannot overreach them.

Creating of its former enemies a forum for legislative consultation or participation reframes their interactions into a more conciliatory tenor. A house of chiefs operating within the arena the state uses to express its internal sovereignty legislatively is likely to succeed in achieving a collaborative posture in the tribal polities for two reasons. Firstly, it is a noticeable reversal of the state's previous combative stance and will be received by the chiefs as some admission of their status and self-chosen identity. Secondly, obstinate resistance to the state's overtures reflects badly on the chiefs. The severe cost in legitimacy should discourage the House of Chiefs from obduracy. The citizen-subject, in abiding by laws co-produced by the two authority sites in her life, responds simultaneously to both sovereignty claims. The need to assert or reject each other's sovereignty is eliminated and the sovereignty challenge resolved.

As we saw in chapter 2, a polity is not sovereign if the rules it enforces are rules made by another. We saw in chapters 4 and 5 that Asanteman is not sovereign, yet it retains echoes of its pre-colonial sovereignty that are strong enough that it has not had to review its self-perception as sovereign. We also saw how this propels Asanteman to resist the state's sovereignty or posture as doing so. The self-perception of tribal polities requires them to be able to assert that, by and large, they enforce rules that they made themselves. As I argued in chapter 2, sovereignty is the very worth of a polity because it speaks of its maturity into a self-sustaining entity. Unless a polity is sovereign, it is fungible. For the tribal polities therefore, being co-producer of the rules within the state's legal order about the rules in their own legal order makes them the

producers of their own rules and arguably producers of the state's rules. This role aligns so much better with their self-perception than the truth of their subordination which the state has been trying to force them to accept. Not only do they no longer need to use outlawed practices to rebut the state's sovereignty claims; they are also, in fact, compelled to enforce such laws to prove their claims effective. By these means, bicameralism aligns palace adjudication with court adjudication so that citizens can expect similar outcomes whether they go to the court or the palace.

With no legal power to by themselves make law for the state, the chiefs' involvement in the legislative process is no threat to the state's sovereignty. The state remains initiator and enactor of laws within its own legal order and retains the right to enforce those laws in the territories of tribal polities even when their chief is opposed to those laws. This *de jure* power assures the state that despite the interpretation the chiefs might put on their presence in its legislature, its sovereignty is not compromised. With each side reassured that the other by their collaboration is acknowledging the claims it has made over citizen-subjects and in relation to itself, conflict is avoided. The state acquires the benefit of the tribal polities assistance in changing tribal law to conform to its (the state's) chosen standards. In this way, bicameralism breeds constitutional congruence and, harmoniously.

A related advantage of bicameralism is that it increases the political legitimacy of the state's legal order. Chiefs are the custodians of the ideals of personhood in the various tribal polities. Involving them in the creation of legislation brings these ideals

within the circle of factors that go into the formulation of law. An upper house of chiefs is therefore very likely to increase efficient gains in the legislature. Efficiency, in legislative parlance, refers to the ability to produce legislative outcomes that retain the balance of power between the two chambers.¹² So, when a negotiated outcome is clearly a compromise between the two chambers, there has been a gain in efficiency.

In our model of bicameralism, the lower chamber deliberates from a statist point of view. Then the chiefs factor in the values of their various customary laws. The outcome, being something of a compromise between statist and customary law perspectives, should necessarily be better, and should thus better ensure that the experience of citizenship offered by the constitutional state actualises the dreams to which each citizen, steeped in their customary law worldview, aspires. Personhood-sensitive legislation in the state's legal order will do much to reduce the mistrust with which the average citizen views the state. The state's legislation accommodating the worldview of the customary law polities reduces the mutual incomprehension that dogs their relations at present and diminishes occasion for sovereignty-rooted clashes.

Again, this model of bicameralism keeps either chamber from becoming tyrannical.¹³ Unlike British Peers, who, as JS Mill put it, are 'suffered to exist in deference to habit and association' and therefore are not an effective check,¹⁴ the

¹² George Tsebelis and Jeannette Money, *Bicameralism* (CUP 1997)

¹³ Tsebelis & Money, n12, 34-36

¹⁴ John Stuart Mill, 1861. *Representative Government*, (Batoche 2001) ch 13

institution of chieftaincy enjoys real legitimacy¹⁵ in the larger society particularly in the eyes of the large population living on the fringes of the state but firmly within the tribal polities. Chiefs do consequently command the tide of social support outside the house that is necessary for them to form a chamber which can withstand the power of the democratically elected House. The chiefs' forum could, by withdrawing support for a legislation, diminish public affection for the elected house and in so doing undermine its apparent unfettered power. The weight of the second chamber's political power should incentivize the lower chamber to seek the latter's cooperation in matters affecting customary law.

But it is not only the elected chamber that requires checking. Customary law is not always benign. The participatory control subjects have over chiefs in principle is not always a lived reality.¹⁶ Chiefs are not always progressives who desire to move their polities into the twenty-first century.¹⁷ Indeed, Captain George Maclean, whose tenure as the administrator of British merchant interests on the Gold Coast solidified

¹⁵ K Bofo-Arthur, 'Chieftaincy in Ghana: Challenges and Prospects in the 21st Century' (2003) 2(2) *African and Asian Studies* 125; Donald Ray and others (eds) *Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development* (University of Calgary Press 2011)

¹⁶ Eg. Though free speech was supposed to be a right at Asanteman Nyhiamu meetings, Dormaa in its rebellion of 1951 cited pacification levies for honest opinions. Alessandro Triulzi, 'The Asantehene-in-Council: Ashanti Politics under Colonial Rule, 1935-1950', (1972) 42(2) *Africa* 98, 104-106

¹⁷ Some chiefs sell off large tracts of communal lands to foreign investors and appropriate the revenue. See Tsikata & Yaro n 72; the chief of Besease refused to support fundraising for a public library for his town, Janine Ubink (2007) *Traditional Authority Revisited: Popular Perceptions of*

Chiefs and Chieftaincy in Peri-Urban Kumasi, Ghana, (2007) 39(55) *Journal of Legal Pluralism and Unofficial Law* 123, 139; many chiefs in the Western region abuse tenant farmers changing the terms of their contract after they have developed productive cocoa farms see Janine Ubink & Kojo Amanor *Contesting Land and Custom in Ghana: State, Chief and the Citizen* (LUP 2008)

British jurisdiction over the territory, acquired his position of trust with the locals through adjudication, often against chiefs.¹⁸

Bringing the chiefs into the spotlight during the legislative process creates of the first chamber a patrolling body that can call out the chiefs when they are not acting in the interest of their polities. In the absence of a belligerent state to resist, holding onto injurious practices can no longer be presented as defending the tribal polity. The result of this dynamic will be the harmonisation of tribal and statal lines of growth. The state will then be freed from the expensive and exhausting dynamic of (threat of) coercion/retreat which currently dominates its relations with the tribal polities. In causing the two chambers, representing the two orders, to check each other in this way, bicameralism balances statal and tribal identity.

1.2.Preserving Tribal Identity.

In this section, I examine the potential that the literature assigns bicameralism as a tool for respecting and protecting cultural diversity within a nation-state. Jeremy Waldron, writing in approval of bicameralism, echoes a widely held view about the importance of difference in the deliberations of the collective in a just society.¹⁹ He argues that bicameralism introduces the perspective of interest groups that would be left out of the popularity contest that representative elections are, and so ensures that as many interest groups as possible participate in the deliberative process that results in a society's laws,

¹⁸ JD Fage, 'The Administration of George Maclean on the Gold Coast, 1830-44' (1955) 1(4) Transactions of the Gold Coast & Togoland Historical Society 104, 115 ff

¹⁹ Jeremy Waldron, 'Bicameralism and the Separation of Powers', (2012) 65(1) Current Legal Problems 31

standards, and aspirations²⁰. This is especially helpful for minority groups which could otherwise be overrun by majoritarian interests²¹. The key to reaping bicameralism's benefits, he says, is to ensure that the two chambers are so differently composed that their styles and spirits of deliberation necessarily and inherently differ.

Waldron's view has deep roots in western theory. Aristotle maintained that all the three forms of government: monarchy, oligarchy and democracy are skewed toward the interest of one identifiable portion of society. Monarchies prioritise the monarch, oligarchies secure the good of the elite and democracies the interests and passions of the have-nots. The only way to have a government that truly looks out for the common good is to have a mixed government- ie one in which all these interests are represented. For Aristotle, a two-chamber legislature wherein the larger house represented the proletariat and a second, smaller chamber populated by the aristocracy, worked with the monarch was the only way to ensure the stability of good governance and the attainment of decent legislation²². Waldron calls this quality control²³. In the context of a modern democratic constitution, Aristotle's model could be summed up in modern times thus: a first chamber of popular representatives + a second chamber of elites (whether economic, social or religious as that society's needs dictate), + the executive

²⁰ Waldron, n19 35

²¹ Meg Russell points out that as the elite model of bicameralism was used to protect class minorities (Europe) and the territorial model geographic minorities (USA), bicameralism can be modelled to protect other kinds of minorities, including linguistic minorities (Belgium) or religious minorities (Bosnia and Herzegovina), even professions (Morocco) see Meg Russell, *Bicameralism in Theory and Comparative Perspective*. In *The Contemporary House of Lords: Westminster Bicameralism Revived* (OUP 2013), 44-45

²² Aristotle & H. Rackham, *Aristotle: Politics* (Heinemann 1959), 78

²³ Waldron n19, 40

(president or prime minister) = good governance. Aristotle's view, which Waldron agrees with, sees the strength in bicameralism as the effort to achieve the contradictory goals of differentiating and uniting simultaneously.

Not only is this an ambitious goal; it is also one that requires a level of acceptance (or at least a non-resentment) of the privileges and position of the elites that modern liberal states, with their egalitarian ethos tend to lack. What reason could the liberal state offer the proletariat for why they should be excluded from the elite whose view will receive special consideration in the second chamber of their joint state? Unsurprisingly, the preservation of difference was more popular as a justification in pre-modern, aristocratic Europe than it is now or even was in non-aristocratic societies like America.

The literature hailing from the twilight days of aristocratic Europe depicts a distinct resistance to the special attention given interests of privileged groups. The second chamber is summarily dismissed as redundant. Sieyes put it thus: 'if the second chamber agrees with the first, it is useless, if it does not, it is bad'²⁴ In his merciless lambast on bicameralism, Jeremy Bentham agrees. He writes:

Will it be said that to the second chamber belongs more appropriate aptitude... than to the first? ... This cannot be said: if to this same second chamber more such appropriate aptitude

²⁴ Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance*, (OUP 2012)

belongs than to the first, [then] not second ought it to be, but first, or rather ... the only chamber.²⁵

With the loss of belief in the superiority of the aristocracy, European scholars struggled to see the value of privileging their perspective.

In the context of an English style second chamber, composed of hereditary peers or even of socio-economic elites, -as in the US- these views may well be warranted. Until the 1999 Act ended their presence as of right, British peers attended Parliament in their personal, not representative, capacities.²⁶ Their presence therefore added little to the representative character of the institution. In North America, senators are not differentiated from members of the House in ways that render persons in one chamber ineligible for membership in the other. So, queries like Vernon Bogdanor's exasperated: 'How can the same electorate be represented in two different ways in two different chambers?'²⁷ may be validly hard to answer.

But, in respect of the postcolonial African context, there is an easy rebuttal to these doubts. African states are populated by multiple tribal polities. These polities cover the full spectrum of dissimilarity. They range from groups that consider themselves as collectively the same ethnic group but also as distinct individual tribes (such as the Fante and Asante of Ghana, who view themselves and each other as Akan,

²⁵ Jeremy Bentham to his Fellow-Citizens of France, on Houses of Peers and Senates (Robert Heward 1830), 39 and 44 (XII s 1 and XIII s 8)

²⁶ Donald Shell, 'The History of Bicameralism', (2001) 7(1) *Journal of Legislative Studies* 5, 8.

²⁷ V Bogdanor, *The New British Constitution* (Hart 2009) 160

but not as of the same tribe), to those who consider each other's existence almost as an existential threat (such as the Igbo and Hausa-Fulani in Nigeria). This means that the cultural, political, and social differences in their world views as epitomised by their customary law could not possibly be properly captured in a unicameral legislature populated through the liberal democratic methodology of the Constitution.

An Upper House of Chiefs brings the customary law systems into the process of creating the rules of the experience of citizenship which their palaces are called on by ordinary, and especially, rural citizens to enforce. The nature of the deliberative process of legislation is sufficiently extended and (at its best) sufficiently respecting of each member's viewpoint to allow the final product to be the collective work of all participants.²⁸ By this method of perceptual aggregation,²⁹ legislation produced through bicameral deliberations preserves the character of each component demographic in the state.

This argument sounds persuasive. It is hard for a state to be mindful and respectful of its minority members if it does not have access to their viewpoint. That viewpoint, shaped as it is by the features that distinguish each minority demographic from the others and from the majority, inputs the unique lenses of each demographic- in this case tribes- into the decision-making of the state and thereby preserves them.

²⁸ I should note that Waldron does not accept that peoples of western states can be accurately viewed as homogeneous. Indeed, he does not accept that 'the people' exist as a collective at all. Waldron n19 42. By his account, the reason I just stated for African states would apply also to Europeans but operating as individuals not as collective subunits within the state.

²⁹ Adrian Vermeule, 'Second Opinions and Institutional Design' (2011) 97 Virginia Law Review 1435, 1452.

On further reflection, however, the appeal of the diversity preservation argument dims. Can it be said that the interests represented in the second house cover every interest excluded from the first? And if so, equally? If not, then what is the case for representing some interests (or more fully) than others? Surely the arguments that justify the special attention to those interests that come through apply with equal force to all those that are overlooked, excluded, or drowned out in the representative forum.

As will be seen below, Botswana's tribes are not equally situated in terms of power. Neither, as Part I of this thesis demonstrated are Ghana's. A second chamber intended to ensure the cultural perspective and role of customary law in the operations of the state can only be fair to all relevant tribes if they can each count on having as much voice as every other tribe in the forum. If not, then the existence of the second chamber may well serve to exacerbate, rather than alleviate, the marginalisation and sense of bewilderment of the smaller groups. This could then have the knock-on effect of making the tribal people lose faith in their organic institutions of leadership. Unable to make sense of the state or trust their chiefs, these unfortunate segments of society, already poor and vulnerable, will be completely adrift and struggle to make meaning of the world and their citizenship. As a preserver of cultural and constitutional diversity therefore, bicameralism, unless our discussion in Part III shows it to escape this trap, is not the solution this thesis seeks.

Part 2- Botswana: An African Bicameral System

In this section, I introduce the reader to the bicameralism of the small southern African country of Botswana. The Part is in three sections. In the first section, I explain why I choose from among all the bicameral systems in operation today, Botswana as the case study. I then provide an overview of Botswana's bicameralism from a constitutional and political viewpoint. Finally, I briefly describe the tribal diversity within her boundaries. The aim of the Part is to help the reader understand both the configuration of the state of Botswana and the form and extent of her tribal diversity. This will allow for a fuller assessment of bicameralism's potential to meet the dual goals of this thesis i.e. preserving cultural diversity while cultivating a similar experience of the constitutional rights for all.

2.1. Why Botswana?

Over forty percent of the world's states are bicameral. So, what makes Botswana especially interesting in a study of this nature? The answer lies in its particular form of bicameralism: the model of an elected lower house, and an upper house of chiefs. The members of the American, Canadian, Liberian or, indeed, any fully elected second chamber do not differ substantially from the members of the also fully elected first chamber. Such differences as are discernible are largely economic. They represent regions which are merely administrative units of the state (or sub-unit) and which have no independent existence of it. The claim to be a differently composed second chamber is tenuous at best in these other bicameral systems.

The members of Botswana's second chamber represent actual polities which are differently configured from the state and, which resonate with the populace in a different but (more) fundamental way. Thus, it provides the best modern example of bicameralism's real-world capacity to manage diversity in a heterogenous state. Again, this configuration puts Botswana's chiefs, rather unusually for the postcolonial African state - in a generally cooperative posture towards the state. This renders it a good case study for bicameralism's ability to create convergence in rights regimes across the myriad customary law regimes in Ghana.

Introducing Botswana

The State

The former British colony of Bechuanaland became the unitary state of Botswana in 1966. Its Constitution-the oldest on the continent-saw major amendment in 2005. The most directly relevant of which is the enlargement (and renaming) of the *Ntlo ya Dikgosi* (House of Chiefs) from eighteen to up to thirty-five.³⁰ The executive power of Botswana is vested in a president who is assisted by a vice president. To the uninformed, Botswana might appear to have a unicameral legislature. After all, voting power is vested exclusively in the National Assembly. Nor do any of the usual terms used to indicate bicameral arrangements appear anywhere in the amended text of the 1966 Constitution. There is no mention of a 'second' or 'upper chamber', or a 'senate'. But a closer look at the text, will settle any doubts as to the bicameral nature of

³⁰ Constitution of Botswana 1966, §77(1)

Botswana's legislature. The provisions on the *Ntlo ya Dikgosi* appear under the chapter titled Parliament. So, it is clearly intended to be treated as part of that institution.

Set up to advise the National Assembly, and government, the *Ntlo ya Dikgosi* is a body that comprises a majority of elected chiefs (*Dikgosi* sing. *Kgosi*) and a small number of chiefs who are permanent members. Its advisory mandate is in respect of matters affecting tribal property or organisation, customary law, its recording or its ascertainment, the powers or tenure or appointment and removal of a *Kgosi*³¹. Parliament cannot entertain any bill in these spheres until the *Ntlo ya Dikgosi* has given its advice or has had thirty days to give advice thereon.³² It can summon a member of cabinet or other minister to appear before it.³³ Though its advice is not legally binding, its right to give such advice is. In the limited spheres it has advisory power, legislation is not validly enacted unless it has been passed by the National Assembly after reference to the *Ntlo ya Dikgosi* before being assented to by the President.³⁴

In chapter 5, we saw how the Ghanaian Constitution's limitation of the House of Chiefs' mandate to customary law is much more far-reaching than is immediately obvious. The same situation applies here. Customary law cuts across every sphere of life within the tribal polity. A mandate over customary law is nothing less than a mandate over the lifestyle of its subjects. Consequently, though it has no actual

³¹ *Ibid*, §85

³², §88(2)

³³ §85

³⁴ §87(1)

legislative power, the Ntlo ya Dikgosi is an important and powerful player in the legislative and political process in Botswana.

Botswana's judicial system comprises a Court of Appeal at its apex, a High Court which is a court of record and lower courts in the form of Magistrate and Customary law courts. There are three levels of customary law courts: the Customary Court, the Customary Court of Appeal and the Customary Law Commissioner. A customary court is established when a licence is granted upon the petition of a chief to the minister, who is at liberty to grant, refuse or revoke a licence.³⁵

In this, Botswana differs from our other study jurisdictions. No palace adjudication that operates outside of its sanction and supervision is acknowledged by the state. While the customary law courts in Nigeria are also established by the state, they do not, unlike in Botswana, sit in or replace traditional palace adjudication. In Botswana, when the chief's petition is approved, his palace is reconstituted into a customary law court. The Act acknowledges that some traditional dispute resolution continues outside of its customary courts. But by refusing to recognise or enforce such decisions, it undercuts their value to would-be users, guaranteeing pride of place to the state-backed customary courts.

Practice and procedure in these courts are to be in accordance with customary law³⁶. However, so subsumed into the state's own ethos and infrastructure are the

³⁵ §7 Customary Courts Act, Cap04: 05.

³⁶ §30 Customary Courts Act, Cap04: 05.

customary courts that they are provided with the power of contempt on the same terms as common law courts³⁷ and custodial sentences inflicted by customary courts are served in state prisons³⁸. Bicameralism, as Botswana shows, need not simply be a matter of legislative methodology. Botswana is therefore a very good example of what bicameralism could look like for African countries.

2.2.2. Tribal Diversity, And Tension Within and With the State

Botswana is less ethnically diverse than Nigeria or Ghana. But it is hardly the homogenous society that the state projects it as being.³⁹ Its most influential ethnic group, the Tswana, are organised in eight tribes. Though, they account for only about eighteen percent of the populace,⁴⁰ the Tswana, being larger than any other group, collectively constitute the cultural and political (and also economic) majority. Minority tribes include the Kalanga, Basarwa (also known as San or Bushmen⁴¹), Ndebele,

³⁷ Ibid, §20

³⁸ Ibid, §23

³⁹ Richard Werbner, *Reasonable Radicals and Citizenship in Botswana: The Public Anthropology of Kalanga Elites (IUP 2004)*, 38-39. Solway notes that it translates into policies of 'assimilation into Tswana' like language policy, & the permanent membership of Tswana chiefs in the *Ntlo ya Dikgosi*. Jacqueline Solway, "Culture Fatigue": *The State and Minority Rights in Botswana* (2011) 18(1) *Indiana Journal of Global Legal Studies* 211, 215

⁴⁰ RETENG, *The Multicultural coalition of Botswana*. (RETENG 2005)

⁴¹ I acknowledge Solway's assertion that all these terms are or were originally derogatory and externally imposed. However, she also notes that as they have no word in their own languages to describe themselves collectively- being independent bands historically, even they are coming to accept these collective labels in order to be able to agitate for their group rights collectively. I note here therefore, that I use these terms out of necessity not disrespect. Jacqueline Solway, n39, 217

Whites, and Indians. In all, there close to fifty tribes who between them speak twenty-six languages in Botswana.⁴²

A long history of discrimination in favour of Tswana tribes dating to colonial times has led to this numerical minority being the only fully recognised⁴³ ethnic group in the country. Indeed, the only permanent members of the Ntlo ya Dikgosi are the chiefs of the eight Tswana tribes. Many of their customs and practices are treated as Botswanan culture.⁴⁴ For example, more people speak Setswana than English, thanks to colonial and postcolonial state education policy.⁴⁵

At independence, government took the position that it would be easier to achieve the sort of national cohesion needed to rapidly attain their developmental aspirations in a homogenous society than in the multicultural state created by colonialism.⁴⁶ To that end, a policy of assimilation was instituted and aggressively pursued by the post-independence state. President Mogae's endearing but misleading caption for it, 'scrambled eggs',⁴⁷ evokes images of all the cultures being whipped

⁴² Lydia Nyati-Ramahobo, *Minority Tribes in Botswana: The Politics of Recognition* (Minority Rights Group 2008), 4

⁴³ For a discussion on the importance of recognition see for example, Benedict Rickey, 'Imagining Alternatives: Tribal Citizenship and the Politics of Recognition in Botswana', (2006) 26(3) *Cambridge Anthropology*, 45

⁴⁴ Nyati-ramahobo notes that attempts to assert non-Tswana identity is received as anti-Botswanan Lydia Nyati-Ramahobo, 'From a Phone call to the High Court: Wayeyi Visibility and Kamanakao Association Campaign for Linguistic and Cultural Rights in Botswana', (2002) 28(4) *Journal of Southern African Studies* 681

⁴⁵ Andrew Chebanne, 'The Khoisan in Botswana – Can multicultural discourses redeem them', (2010) 5(2) *Multicultural Discourses* 87

⁴⁶ Werbner, n39, 38

⁴⁷ Richard Werbner, 'Cosmopolitan Ethnicity, Entrepreneurship and the Nation: Minority Elites in Botswana', (2002) 28(4) *JSAS* 731, 734

together into a single and new culture belonging as much to one component group as the other.

This is not, in practise, how the assimilation policy was or is implemented. What this policy sought /seeks to do is to progressively erase other societal cultures, by elevating Tswana culture into the national culture, while withdrawing state acknowledgment of the existence of the other cultures, until they are asphyxiated into oblivion. This policy is known, resentfully, as ‘tswanification’⁴⁸ Never a consensual project, Tswanification has had its opponents since independence.⁴⁹ But it has faced increasing resistance over the last few decades.⁵⁰ With more and more minority tribes making use of ‘lawfare’,⁵¹ international conventions and treaties and social media campaigns to assert and insist on their difference.⁵² The homogeneity and cohesion pursued and arguably achieved by tswanification is under siege. In the next Part, we draw on this small country’s experience to examine the theoretical arguments of Part I.

⁴⁸ Werbner n39, 38

⁴⁹ Richard Werbner, ‘Challenging Minorities, Difference and Tribal Citizenship in Botswana’ (2002)28(4) JSAS 671, 676

⁵⁰ Maria Sapignoli, *Hunting Justice Displacement, Law, and Activism in the Kalahari* (CUP 2018), 71-111; Richard Werbner, ‘Conclusion: Citizenship and the Politics of Recognition in Botswana. in I Mazonde, (ed.), *Minorities in the Millennium: Perspectives from Botswana* (Light Books 2002); Nyati-Ramahobo n44;

⁵¹ Solway, n39, 231

⁵² *Ibid*, 239

Part 3- Theory vs. Experience

The thesis seeks to enable the state to manage its relationship with tribal polities such that the tension inherent in their clashing sovereignty claims neither explodes into destructive conflict nor disappears completely. By keeping the tension taut but latent, the state will create an empowering space for citizen-subjects who will at last be able to enjoy both identities equally. The constitutional philosophy that will be endorsed for Ghana in this thesis will be able to both preserve tribal identity and stimulate constitutional congruence between the rights regimes of the state and the tribes.

In this Part, I assess the advantages of bicameralism outlined in Part I against the lived experience of Botswana to determine their validity. The aim of this Part is not to determine whether Botswana ought to continue as a bicameral state. It may well be that in regard to the other justifications offered for bicameralism, (such as, what George Washington called the ‘cooling down’ of legislation⁵³) Botswana is benefitting much from being bicameral. This study would not know. The conclusions of this thesis are limited to the object of its interest.

3.1. The Argument for Constitutional Congruence.

Botswana’s bicameralism allows it to bring different customary law systems to the table to reflect on the experience of citizenship in Botswana, and together, the two houses enable the state to produce more just, more natural (for the people’s condition at any given time) and more universal rights regimes for Botswanans. The state’s

⁵³ Daniel Conway Moncure, *Republican Superstitions as Illustrated in the Political History of America* (HS King 1872), 47-48

articulated policy of congruence in terms of identity has been quite well advanced by the meeting of minds found in the bicameral arrangement.

The collaborative relationship bicameralism has bred between state and chiefs has enabled the former to co-opt institutions and practices of traditional authority into its operations thereby legitimising its own authority.⁵⁴ For example, state programmes are often presented to the rural public at a *Kgothla*. This is the traditional assembly at which decisions of the tribe or settlement or even family are made, and disputes resolved.⁵⁵ It is hosted by the Kgosi and the elders.⁵⁶ By communicating with tribal citizens in the place and by the methodology to which they are accustomed, and, which they consider the proper forum for governance affairs, the state has been able to elicit the peoples' cooperation with comparative efficiency and effectiveness⁵⁷. The state has with Chiefs' support turned into success projects like anti-litter campaigns and environmental programmes, preventing tree cutting and veld burning, and also mobilising people in building dams for rural development.⁵⁸ The collaborative relationship between chief and state has therefore generated the common developmental parameters that are a primary prerequisite for constitutional congruence.

⁵⁴ Wazha G. Morapedi, 'Chieftainship and modernity: the case of Botswana' (2006) 1 Boleswa Occasional Papers in Theology and Religion, 8

⁵⁵ Rod Lloyd, Defining Spatial Concepts toward an African Urban System (2003) 8(3), Urban Design International 105, 114

⁵⁶ Piwane Constance Moumakwa, The Botswana Kgotla System: A mechanism for Traditional Conflict Resolution in modern Botswana. Case study of the Kanye Kgotla (Master's Thesis, University of Tromsø 2010)

⁵⁷ Ørnulf Gulbrandsen, the State and the Social: state formation in Botswana and its precolonial and colonial genealogies (Berghahn 2012) chs4 &6; Linchwe II, "Chieftainship in the 21st Century", in Botswana in the 21st Century (proceedings of a Symposium organised by the Botswana Society, Gaborone, 1994) 395

⁵⁸ AJGM Sanders, 'Chieftainship and Western Democracy in Botswana' (1983) 2(2) Journal of Contemporary African Studies 365, 373

Moreover, with the two chambers working together, it has been easier to implement policies and laws that align life with the Constitution as well as eliminate those that do not. Because the Ntlo ya Dikgosi is with the state agreed on the operationalisation of the rights in chapter II of the 1966 Constitution, the chiefs who man both the formal and informal⁵⁹ customary law dispute resolution mechanisms, are committed to adjudicating in line with the decisions emerging from the joint deliberations; making their implementation is much less fractious and one-sided.

Conversely, legislation like the criminalisation of FGM,⁶⁰ and the head of family accountability law⁶¹ which were passed by Ghana's unicameral government without much input or buy-in from the chiefs have become paradigms of Madisonian parchment soldiers. Neither the state courts nor the palaces are receiving (in the case of the former) nor entertaining (in the case of the latter) complaints of FGM law violations. Botswana's bicameralism makes the realisation of the constitutional rights regime a joint effort and responsibility.

By enabling the state to frame its interactions with the people through the lenses of their indigenous constitutions, Botswanan bicameralism gives government efforts to turn constitutional aspirations into constitutional realities with the informed sensitivity and legitimacy critical to success. Instead of separate and frequently conflicting assertions -or indeed rejections- of (the other's) sovereignty, the two forces put (or are

⁵⁹ Ie in chiefs' palaces that are not officially granted customary law court permits.

⁶⁰ §49A, Act 29

⁶¹ PNDCL114

seen to put) forward an integrated claim and so eliminate completely the possibility of combusive collision. For example, nearly 85% of criminal cases are handled by the customary courts.⁶² Criminal complaints are made first to the Police who then determine whether the matter falls within the jurisdiction of the customary courts or magistrate courts.⁶³

This is not to say that the two sides agree at all times. It is merely to show that by drawing the chiefs into the decision-making process through the *Ntlo ya Dikgosi*, Botswana allows the two sides to resolve, sidestep or defer the tension as the case may be in private. For example, the Abolition of Marital Power Act⁶⁴- which abolished the guardianship of women by their husbands does not apply to marriages contracted under customary law.⁶⁵ The government has declared its intention to address this problem but has not yet. The Ntlo ya Dikgosi's opposition to extending the Act to cover customary law marriages⁶⁶ account for the government's slowness to move on it. Even when the two sides do not agree, the collaborative relationship they have formed inclines both sides to proceed cautiously and resolve as much between them as possible before involving the people or calling on their loyalties. This avoids grandstanding and the

⁶² CM Fombad (ed), *Essays on the Laws of Botswana*, (Juta 2007), ch1; Rekha Kumar, 'Customary Law and Human Rights in Botswana', (2009) 52 *Human Rights & Human Welfare Working Papers*, 4

⁶³ Government of Botswana <https://www.gov.bw/tribalcustomary-courts/trial-civil-and-criminal-cases-tribal-court-kgotla>.

⁶⁴ Act 34 2004

⁶⁵ *Ibid*, Part I

⁶⁶ Patrice Cailleba and Rekha A. Kumar, 'When customary laws face civil society organisations: Gender issues in Botswana' (2010) 4(9) *African Journal of Political Science and International Relations* 330, 331

consequent entrenchment of positions, ego-saving posturing and combativeness that historically escalate minor disagreements into wars.⁶⁷

Bicameralism has put a spotlight on the chiefs and their attitudes towards the modernisation of Botswanan culture. For example, when Chief Banika advocated in the Ntlo ya Dikgosi that corporal punishment administered at the Kgotla should be extended to women,⁶⁸ there was much public concern from across the country and government issued a statement chiding the house for entertaining such views.⁶⁹ In a unicameral Botswana, Chief Banika might have simply gone on to make and apply this rule within Pandamatenga. The retrogressive rule would have gone without notice outside this territory. Putting chiefs into a publicly scrutinised upper house that could be undermined by the lower house's reactions to their positions has served the checking function discussed in Part I.

The Botswana experience confirms that bicameralism makes constitutional congruence attainable. However, both the habit of collaboration and the exigencies of running that collaborative relationship so align traditional leaders with the state, that the lines of loyalty can become blurred for chiefs. Firstly, by drawing chiefs into the state apparatus, bicameralism enlarges each chief's vision, and, to an extent, mandate. In considering proposed laws or programmes, they no longer limit their informing

⁶⁷ Eg Guinea Fowl War of 1994 in Ghana, which was triggered by a disagreement during bidding, between two potential buyers for a guinea fowl in ... market. See HAS Pul, 'Exclusion, Association and Violence:Trends and Triggers in Northern Ghana's Konkomba-Dagomba Wars.' (2003) 10(1) African Anthropology 39

⁶⁸ Official Report of the House of Chiefs, June 2000, 102

⁶⁹ Donald I Ray and others (Eds), *Reinventing African chieftaincy in the age of AIDS, gender, governance, and development* (UCalgary Press 2011), 480

factors to those that affect their own people. Instead, they are frequently called on to consider the welfare of the broader nation-state.

This can make it harder for chiefs to be faithful to their constituents' interests.⁷⁰ A project that might be disastrous for their own community could be very advantageous to the nation state. For example, Ghana's long history of mineral mining has left the rural inhabitants of mined lands, at best, no better, but, more usually, worse off than before the mine came.⁷¹ But it would be untrue to say that mining has left Ghana as a whole worse off. A chamber of chiefs is not created to mind the nation-state's interest. That is already catered for by the elected lower house. Chiefs are in the legislature to keep the parochial interests of their people and their polity *qua* polity from being forgotten, overlooked or misinterpreted. When they focus on the wider interest, it defeats the purposes for which they are enstooled and, also, the purposes for which they are involved in legislation.

President Khama negotiated with chiefs to take over all diamond resources in the country and for the revenues to be put into a central treasury rather than given to the individual tribes from whose land they are mined.⁷² For the nation-state, this was a good thing. For the tribes on whose land the diamonds are located, it is not ideal for even a miniscule percentage of the revenues could liberate them from government

⁷⁰ Eg chiefs must determine what a customary law rules exist not by reference to his area/people's peculiar circumstances, but by the common law standards of fairness and justice which could be so foreign to the people as to be incomprehensible. See understanding chieftainship in Botswana (2015) 59(2) JAH 271 290

⁷¹ See Emmanuel Aboka Yaw and others "Review of Environmental and Health Impacts of Mining in Ghana." (2018) 8(7) Journal of Health & Pollution 43

⁷² Mineral Rights in Tribal Territories Act,1967 (Act 31) §2

dependency. The find of diamonds in the Central Kalahari Game Reserve in the 1980s led to Bushmen living within that territory being forcibly resettled in camps outside the reserve; unable to continue the hunter-gatherer lifestyle which has been their way of life for centuries.⁷³

From a statal perspective, the use of the diamond resources for all parts of country mitigates the cost to the small minority of Bushmen tribes whose way of life is destroyed and whose members are battling depression and alcoholism in large numbers.⁷⁴ Diamond-mining has been good for Botswana even if it has not been as kind to Kalahari Bushmen. When Botswana became independent, she was one of the poorest countries in the world.⁷⁵ Diamond mining has been the main impetus behind its new, successful status. It is hard to imagine how the chiefs of these Bushmen tribes would have been able to resist the state's vision of diamond trade.

Additionally, chiefdoms are of differing economic means. Not every chiefdom can afford the expense of having its leader go frequently to the capital in order to participate in the proceedings of the chamber. This is a conundrum. If the state gives a stipend, it opens the door to control of chiefs by government that erodes that body's ability to protect tribal identity. If it does not, it excludes poorer tribes who are already likely to be marginalised.

⁷³ Olivia Jane Winters 'The Botswana Bushmen's Fight for Water & Land Rights in the Central Kalahari Game Reserve, (2015) 13 *Consilience* 285.

⁷⁴ N Schimmel, 'The Abuse of 'Development' and its Consequences for Indigenous People: A case study of Botswana's Bushman community' (2009) 52 *Development* 514.

⁷⁵ World Bank, Botswana Overview < <https://www.worldbank.org/en/country/botswana/overview> >

The state in Botswana⁷⁶ provides chiefs with a stipend. Ghana does not and this, perhaps accounts for how ineffectual the National House of Chiefs (NHoC) has been thus far in the Fourth Republic. It is so lacking in resources that it does not even have its own office and, thirty years after its establishment under the 1992 Constitution, it continues to meet at Manhyia as Asantehene's guests.⁷⁷ Still, though, undoubtedly necessary, the stipend changes the dynamic between the *Ntlo Ya Dikgosi* and the executive. It gives the chief a personal rather than representative dependency on the state, providing chiefs with a personal reason to support government policies. This has made it easy over the years for the state to exert increasing control over chiefs. For instance, the Ntlo ya Dikgosi rejected the Balopi Commission recommendation that it be given an independent budget; agreeing instead with the government that it did not need one even though this was among their complaints when the Commission consulted with them prior to its report.⁷⁸

The case of *Gaseitsiwe v The Attorney General*⁷⁹ well illustrates how control over the chiefs can cause them to prioritise state interests over tribal interests. In that case, the minister for local government, lands and housing suspended the paramount chief of the Bagkwetsi tribe for not acting in conformity with the ministry's stated policies. One instance cited of such misbehaviour included the Kgosi's frustration of

⁷⁶ Ntlo ya Dikgosi (Salaries and Allowances) Act 2019

⁷⁷ <https://nhoc.gov.gh/>

⁷⁸ Keshav Sharma, 'The Role of Traditional Leaders in the Administration of Customary Courts in Botswana' in DI Ray & others (eds) *Reinventing African Chieftaincy in The Age of Aids, Gender, Governance, and Development* (UCalgary Press 2011), 475

⁷⁹ 1996 BLR 54

the minister's planned visit to address his tribe's kgotla regarding the failed visit of the Zambian president. What is interesting about the Court's decision upholding the suspension is that no mention of was made of how the chief's acts affected his tribe. The focal point throughout the trial was the effect of the Kgosi's action on the state's plans and policies. Therefore, even if it were evident that the Kgosi's actions were in the interest of the Bagkwetsi, his suspension would still have been upheld by the court.

The result is that the *Ntlo ya Dikgosi* is not, as a body, nor are its members, as individuals, positioned to resist colluding with the state. The receipt of a salary makes the state able to hold the *Ntlo ya Dikgosi* to ransom, forcing them to focus, not on their people's welfare's; but on their own. The report of the Balopi Commission highlights this loss of connection between the house of chiefs and the people, accusing the house of having lost direction, and involving themselves in state matters that should have been left to politicians.⁸⁰

The *Ntlo ya Dikgosi's* response to the report showed a remarkable level of deference to government preferences. For one, their report was issued after the government's White Paper; and, for another, it agreed with the government even where the latter's position was disadvantageous to the house.⁸¹ This lack of independence is inevitable where the house established to preserve diversity owes its sustenance to the very arm that would act against diversity. Instead of protecting the rural citizen's rights,

⁸⁰ Report of the Presidential Commission of Inquiry into Section 77, 78 and 79 of the Constitution of Botswana (hereafter Balopi Report) 2001 para 62-64

⁸¹ E.g. rejecting the recommendation for the power to initiate bills. Sharma n81, 475

culture, context of choice from state override, the Ntlo ya Dikgosi, sometimes, rather facilitates it.

This is a terribly traumatic event for tribal subjects. The state in Africa has a history of subject abuse. From the heavy, exploitative yoke of colonisation to the oppressive leaders and/or forcible acculturation etc, African states do not, in the main, have a reputation for being benign states towards their citizens. Though chieftaincy has had its fair share of bad press, there is something deeply comforting about its indigenous origins, and this breeds a confidence in the institution that allays citizen discomfiture about the motives of the liberal state. Thus, when the chiefs defect from their constituency, they leave tribal citizens bewildered and defenceless and this can be paralysing for them. The intensity and abruptness of the alienation is comparable to the way a sudden and total blackout in a room renders its occupants temporarily blinded by the loss of light.

The collaboration between the state and the chiefs is very useful and effective and is doing an adequate-if not excellent- job of stimulating consilience between customary law regimes and the Constitution. But it cannot be denied that it is also causing the chiefs to be more preoccupied with staying on the right side of government than on preserving the way of life of which they are supposed to be the ultimate custodians.

3.2. Bicameralism as a preserver of diversity.

Botswana has been written about as an ‘African miracle’,⁸² ‘an African success story’,⁸³ and ‘an ‘African wonder’.⁸⁴ It was once one of the poorest countries in the world. From 3% of children attending school in 1966, nearly 90 % were in school in 2014.⁸⁵ The nearest health post is less than 5km away for at least 84% of the population and healthcare is free.⁸⁶ Public education is free.⁸⁷ These are significant achievements. Certainly, the collaboration between chiefs and state has succeeded on the economic front. But even as one reads the foreign-authored texts eulogising Botswana, one cannot help but notice how thoroughly they have subscribed to the idea either of a monolithic Botswana⁸⁸ or a Botswana in which minority and majority have equal power and the gains are distributed evenly.⁸⁹

⁸² Abdi ismaili Samatar, *An African miracle: state and class leadership and colonial legacy in Botswana* (Heinemann 1999)

⁸³ Hamilton Wende ‘Botswana: From dusty bowl to sparkling success story’ <https://www.bbc.co.uk/news/world-africa-37274670> last accessed 18 September 2021

⁸⁴ Abdi Ismaili Samatar, *An African miracle: state and class leadership and colonial legacy in Botswana* (Heinemann 1999)

⁸⁵ UNICEF, *Botswana Basic Education Public Expenditure Review 2019*, available at < <https://www.unicef.org/botswana/reports/2019-public-expenditure-review-basic-education-sector-botswana> > last accessed 10 September 2021

⁸⁶ Botswana budget brief health fiscal year 2019/2020 <<https://www.unicef.org/esa/media/5461/file/UNICEF-Botswana-2019-Health-Budget-Brief.pdf>> accessed 5 June 2021

⁸⁷ UNESCO, *Botswana*, in *World Data on education* 6th edn, 2006-07 available at <<http://www.ibe.unesco.org/sites/default/files/Botswana.pdf>> last accessed 10 September 2021

⁸⁸ Tobias Wutke comments on this in his blog piece, Tobias Wutke, *Botswana – An African Economic Miracle?* <https://blogs.lse.ac.uk/internationaldevelopment/2020/01/28/botswana-an-african-economic-miracle/>

⁸⁹ Andreas Wimmer. *Nation Building: Why Some Countries Come Together While Others Fall Apart*. (PUP 2018)

In theory, the representation of difference allows the standardisation of the citizenship experience to also be respectful of difference. So, this image of an equal or at least equitable society should have been true. But in practice, what the collaboration between the more powerful chiefs and government has done is to unite political majorities in both state and tribal polities against the minorities thereby increasing the power of the majorities to ride roughshod over the minorities. Federalism, at least, offers minorities the opportunity to cry out to the federal government for redress. Bicameralism in a unitary state unites all the representative authority so that where a government policy is beneficial to a majority or a powerful tribe, it becomes even easier to sacrifice a minority to achieve it.

This has been the experience of minority tribes like the Khoisan Bushmen of Botswana. River Bushmen were forcibly resettled away from their ploughing land by the Batawana without compensation.⁹⁰ That land is now the Moremi Game Reserve - one of the major earners of tourism income for Botswana. The Bushmen were never compensated for their loss. Nor are they mentioned in the narratives on the establishment of the reserve offered the public.⁹¹ Even the name of the reserve is Batawana;⁹² completely excluding them from the history of the region. This total exclusion has been made possible by the collaborative relationship between the Tswana chiefs and the state. So, though the *Ntlo ya Dikgosi* acts to preserve tribal identity and culture and therefore should have safeguarded diversity and minority rights, it has rather

⁹⁰ Robert K. Hitchcock & Diana Vinding, A Chronology of Major Events Relating to the Central Kalahari Game Reserve II: An Update, (2001) 33 Botswana Notes & Records 61

⁹¹ See eg the Game Park's official homepage. <https://www.moremi.com/>

⁹² Named after Batawana chief Moremi III, whose wife was led the preservation effort.

led to the entrenching of the power disparity between political and economic Tswana majority and other polities, making minority tribes even more peripheral in and to the state than they would have been without the *Ntlo ya Dikgosi*.

The Tribal Lands Act provides another example of how bicameralism, even in the uniquely African form Botswana has, can endanger diversity. Botswana is divided into districts. These districts (known in colonial times as tribal territories) are lands recognised by the state as belonging to the tribes. But, as the naming has been conflated with ownership, each district is treated as the tribal lands of the tribe after whom it is named.⁹³ All the districts are named after the eight Tswana tribes, giving them user and ownership rights. Botswana's rich mineral resources (in particular, diamond and oil) and highly desired grazing lands are thus owned by the Tswana tribes to the exclusion of minority tribes who have been at best subsumed by the Tswana and whose use of land is at their sufferance.

This has naturally bred resentment and tension between the Tswana and non-Tswana tribes, and between the state and non-Tswana tribes. For example, Maun -the city which is the highest earner in the tourism sector is treated by the state as 'the tribal capital of the Batawana', though in fact, it is inhabited predominantly by the Wayeyi, Herero and Mbukushu. This is naturally a source of discontentment for these minority tribes. The determination to be seen and acknowledged by the state led the Wayeyi to court when the state refused to recognise their designation (ie appointment) of their chief.⁹⁴ There continue struggles by non-Tswana tribes for equal status with the Tswana

⁹³ The Chieftainship Act of 1987, and the Tribal Territories Acts; sections 77 and 78 of the Constitution

⁹⁴ *Kamanakao v AG* 2002 (1) BLR 654 (HC)

and equal participation in the state. It seems clear then that bicameralism does not necessarily protect diversity or minority rights.

In the interest of economic development, tribal interests in land and the minerals they carry, had to be transferred to the state and managed for the national good.⁹⁵ There is nothing wrong with the idea of the wider country benefitting from the mineral resources in specific parts of its territory. Indeed, the economic transformation of Botswana has benefitted the rural Botswanan- even the Khoisan bushman.⁹⁶ To the extent that the Tswanafication has facilitated the provision of this standard of living, one could say that the alignment of traditional leadership with the state apparatus is a justified approach to nation building in the heterogeneous societies of post-colonial Africa.

However, if one takes seriously the idea that there is more to a good life than material condition, then one must ask if the improvement of the physical conditions of the non-Tswana numerical majority of Botswana really does outweigh the loss of identity, sense of self and self-worth, and the difficulty of interpreting life through the

⁹⁵ Werbner n39, 38

⁹⁶ The state has provided even in the Game Reserves, water and basic services which did not form part of their original way of life which they had sued to protect but to which they had become accustomed. In an unsuccessful class action, subsequent to their victory in the Moremi Park case, the bushmen brought an action to compel the state to provide resume these services to them within their reserve. It failed because it was held that it was not unconstitutional for the government not to provide services that were not organic to the lifestyle they had fought to preserve. See *Matsipane Moseithanyane & Ors v. AG [2011] CivilAppeal No. CACLB-074-10 (Bots.)*.

lens of Tswanism (which is no less foreign than the lens of Britishness that was the colonial burden).

The answer must necessarily be no. The Bushmen who were resettled in permanent developments outside the Moremi Game Reserve are not thriving, contrary to Government expectations. They have not shown themselves better off for having been forced to give up their natural hunter-gatherer way of life to “live in modern times”.⁹⁷ Out of the nature reserve they have lived in for centuries, they lack skills to make meaning of the sedentary life the government has forced on them and have become dependent on state welfare. Alcoholism and depression plague their bewildered communities.⁹⁸ The joy with which the small group of Bushmen who successfully sued the state for the right to return to their original home⁹⁹ left that seemingly better, more advanced life behind, attests to that. While homogenous societies are easier to push forward from a systems management perspective, that push is meaningless if it does not allow all citizens to deploy it toward making something of themselves. The notion must be rejected that a person is better off well fed, at all costs.

⁹⁷ The Minister for local government in a letter to Ditshwanelo, the minority rights think tank wrote: “We as government simply believe that it is totally unfair to leave a portion of our citizen undeveloped under the pretext that we are allowing them to practice their culture.” CCJ 2006, Bundle 1A 104 (ExP32)- Letter from Minister Margaret Nasha to Ditshwanelo, dated 7 January 2002- cited in Jeremy Gilbert, ‘Litigating indigenous peoples’ rights in Africa: Potentials, challenges and limitations’ (2017)66(03) ICLQ 657

⁹⁸ The intricacies of this case are well explained in Olivia Jane Winters, ‘The Botswana Bushmen’s Fight for Water & Land Rights in the Central Kalahari Game Reserve’ (2015) 13 Consilience 285.

⁹⁹ *Roy Sesana vs. Government of Republic of Botswana*, 2006.

The belief that poor self-government is better than even objectively good government by another is the most fundamental premise of democracy. To be a free people consists, in sum, of self-rule.¹⁰⁰ Self-rule implicates a life lived by making choices informed by one's own values, by one's own processes, in pursuit of one's own ambitions, which ambitions are shaped by one's own personhood which is in turn carved by means of one's societal culture's tools for making meaning. For minorities, being forced to live as Tswana, even if comfortably turned out, demeans them and the experience of living. Every independence movement in human history has been fuelled by and offers empirical proof of this truth.

In an interview with Lydia Nyati-Ramahobo, a thirteen year-old boy who was asked what he would say to President Mogae if he met him, responded "I would tell him that I would like to be *mayeyi* because my parents are *wayeyi*."¹⁰¹ The boy articulates by this, a fundamental need in humans that tswanification is depriving minority tribes of in Botswana—roots, continuity, the ability to connect one's own life to a past and future continuum. Joseph Weiler calls this belongingness. As Weiler says, belongingness inheres in cultural identity and its role is to insulate its members from devastating 'existential aloneness.' By linking us to the infinite past and the future beyond the horizon, cultural identity helps individuals to 'transcend our mortality. Thus, through membership in distinct cultural groups, the individual derives his or her sense

¹⁰⁰ Richard Ekins, 'How to Be a Free People', (2013) 58(2) American Journal of Jurisprudence 163.

¹⁰¹ Nyati-Ramahobo, n42, 4

of what is truly meaningful in life. It is a person's "context of choice,"¹⁰² through which she makes meaningful decisions about her life.¹⁰³ While the collaboration between chiefs and state is preserving Tswana identity, it is eroding rather than preserving minority identity.

In Botswana, land certificates state the tribal territory in which the parcel of land is situated. Nyati-Ramahobo explains the impact of this on minority identity with an example. 'A land certificate for land in the central district will state "Situated in the Bangwato Tribal area'. In so doing, she explains, 'Tswana identity is projected and preserved even though over twenty other tribes reside in the Central district. These other tribes are not recognized but are sub-classified under the Bangwato tribe.'¹⁰⁴

One Kalanga headman describes the impact on his people of having land in their ancestral home registered to them under another tribe's name thus: 'We are regarded as aliens in our own country, it makes me feel like a non-citizen when I look at my land certificate.'¹⁰⁵ The headman is expressing in that statement, a feeling of disruption, of

¹⁰² Kymlicka, *Freedom and Culture*. In *Multicultural Citizenship: A Liberal Theory of Minority Rights*. : Oxford University Press.p 82-84

¹⁰³ I agree with the criticism that Kymlicka does not contemplate a single person belonging to two such societal cultures. (See Karmis, Dimitrios and Jocelyn Maclure. 2001. Two escape routes from the paradigm of monistic authenticity: post-imperialist and federal perspectives on plural and complex identities. *Ethnic and Racial Studies*, 24, 361–85 at 370; de Shutter n.. at 174) I do not agree that it weakens his argument. Many Ghanaians belong to more than one societal culture. This does not hamper the argument that their societal cultures should be accorded the respect it or they deserve as controlling, self-referential forces in their subjects' lives.

¹⁰⁴ Nyati- Ramahobo, n42, 3

¹⁰⁵ Interview with Nyati-Ramahobo cited in Nyati-Ramahobo, n42, 3

uprooting-in essence, existential aloneness. If the value in a house of chiefs within the legislature is to prevent the modern state from creating existential aloneness for some of its parts in the course of pursuing its ends, then the lesson Ghana can draw from Botswana is that the bicameral arrangement may not succeed.

Under majoritarian tyranny, vulnerable minorities become even more vulnerable and unfairly face existential threats that do not exist for majorities and that need not exist for them either. For example, Botswana has a very high HIV/AIDS infection rate.¹⁰⁶ But educational campaigns on the pandemic have been conducted almost entirely in English and Setswana;¹⁰⁷ effectively leaving out rural peoples such as the Basarwa who speak neither English nor Setswana, and thereby exposing them to the pandemic in ways Tswana tribes are not. The *Ntlo ya Dikgosi* itself admitted its failure to lead in the fight against the pandemic.¹⁰⁸ If perhaps, it had pushed for local language education, the scourge may have been less impacting on Botswana.

Again, the areas with the lowest education attainment rates are also areas with low rates of native Setswana speakers. As education is only in Setswana and English, this is not surprising. But it is unprofitable for the state as much as for the minorities. The exclusion makes these areas incapable of becoming economically self-sufficient

¹⁰⁶ MG Alwano and others, (2019) Increasing knowledge of HIV status in a country with high HIV testing coverage: Results from the Botswana Combination Prevention Project. PLoS ONE 14(11)

¹⁰⁷O Ntshebe, JMN Pitso, & AK Segobye, 'The use of culturally themed HIV messages and their implications for future behaviour change communication campaigns: the case of Botswana', (2006) 3(2) Journal of Social Aspects of HIV/AIDS 466

¹⁰⁸ Sharma, n 81, 476

and they become almost entirely dependent on the state for all their needs and resources.¹⁰⁹ This is a heavy and unnecessary weight on the state's shoulders.

For these peoples, the disempowering effect of these structural obstacles cannot be overstated. They create a real struggle to believe in oneself, and one's equality to the higher performing, structurally advantaged groups. The greatest blow any societal culture can suffer is hopelessness. Unable to rely on their native frame to 'try and try and try again to live a decent life'¹¹⁰, members of societal cultures that are devalued in their larger community lose hope and give up on the grand 'decent life' mission. Kgosi Banika laments this state in one of the tribes under her rule in which dusk-to-dawn drinking by couples is the norm.¹¹¹

Conclusion

In this chapter we have studied Botswana's uniquely African twist on bicameralism. We have engaged with the arguments offered in the academic literature to the effect that bicameralism protects diversity by paying especial attention to minority viewpoints through its second, specially composed chamber. We have also engaged with the idea that bicameralism creates a collaborative relationship between the state and chiefs which will more efficiently synergise the rights regimes between the tribal polities and

¹⁰⁹ Ibid, Sharma, 478

¹¹⁰ JHH Weiler, 'Europe: The Case Against the Case for Statehood' (1998) 4(1) European Law Journal 43, 61

¹¹¹ Sharma, n81, 478

the state. By preserving cultural diversity while facilitating a collaborative relationship with the state, bicameralism eliminates the rivalry between state and tribal polity rooted in a struggle over sovereignty.

The discussion showed that the argument for constitutional convergence is more borne out by Botswana's experience than those on diversity preservation. For even without Tswanification, the absorption of customary law into state apparatus through customary law courts has given the Constitution centre place in the development of that body of law. Thus, even though the two legal orders continue to exist separately, they no longer exist independently. The state's legal order achieves its ends through the customary law order's methods and structures and the customary law orders exert their authority by participating in governance as determined by the state legal order. But while the collaboration has indeed created a synergy between state and Bogosi that has improved the delivery of services and rights; it has also elided the boundaries between state and tribal polity in ways that erase the distinct constitutional identity of the tribe. Tribal leaders are either co-opted into the state because they must agree to measures or are excluded from decision-making because they are always in a minority.

The problems bicameralism has generated in Botswana are not attributable to factors unique to that country. They would occur also in Ghana if she adopted that configuration. Ghana's tribes too are not equally positioned. As chapters 4 and 5 showed, Asante is extremely entrenched in Ghana affairs, while tribes like Isale and Vagala are barely acknowledged to exist. The Chieftaincy Act of 2008 contains a list

of chiefs that begins with Asantehene.¹¹² Although Paramount chiefs are listed at the same rank in the hierarchy, it cannot be overlooked that Asantehene is mentioned by name while all other heads of tribes are grouped together as Paramount Chiefs. Asantehene is named President of the Ashanti Regional House of chiefs. That position is elected by the membership from among their number in all other regions. Asantehene is also the only Chief for whom there is a definition offered in the interpretations clause.

A House of Chiefs fashioned after the *Ntlo ya Dikgosi* in Ghana, would, like the former, contain pronounced power disparities that would similarly exacerbate the marginalisation of the multiple minute tribes in northern Ghana. ‘Asantification’, which already exists informally and through the judicial application of Asante customary law to non-Akan groups happens,¹¹³ would receive institutionalised support from the state and become its *de facto* posture. It can hardly be doubted how difficult this would make life for the 50% of the country who are not Akan. The diversity which should have been safeguarded by the elevation of the National House of Chiefs into a second chamber will rather be even more gravely endangered.

Again, similar to the Botswana case, the House of Chiefs in Ghana cannot expect to be more independent of the state if they must be supported with stipends. Nor can they resist the widening of their vision and mission to include the state if they are

¹¹² §58(a)

¹¹³ Eg *Vanderpuye v Botchway* 3 Sel. Judg. Ct. App. W. Afr. 164 (Gold Coast 1951);

to collectively legislate for every part of the country rather than their own corners of it. With Ghana's position of influence in the region and on the continent, there is a society-wide consciousness of and desire to be held in high esteem by other states. Thus, it is very likely that the second chamber would be far more concerned with the economic and political development of the nation-state than the parochial welfare of their peoples.

The collusion that was evident in the Botswanan example would be a concern in Ghana also. To develop the country in line with the liberal democratic goals and current international trends with no thought to the cultural frames of reference that give meaning to life for nearly all Ghanaians and certainly the sixty percent of its population who are rural citizens, a second chamber is not required. The unicameral legislature Ghana currently has, suffices. As Abbe Sieyes declared long ago, if the second chamber agrees with the first it is redundant.¹¹⁴ A second chamber in Ghana, being under the circumstances discussed above, so likely to be in accord with the first, does seem redundant.

More worryingly, the compromise of Asantehene and the National House of Chiefs is unlikely to be maintained if the latter is promoted to a second chamber of the legislature. In that case, it is incompatible with Asante's constitutional ethos that Asantehene stay outside the forum. But as noted above, his presence in that forum automatically equates with his permanent presidency of it. Asante would, by its

¹¹⁴ Abbe Sieyes, cited in D Shell, 'The History of Bicameralism' (2001) 7(1) *Journal of Legislative Studies* 5, 13

dominance of the chamber, become unavoidably more formally powerful. In that event, Asante's rivalry with the state over sovereignty could actually be intensified, increasing thereby the potential for destructive conflict.

Still, the bicameral arrangement has done much to underwrite the growth of Botswana and the syncing of the customary law regimes of its member units with the 1966 Constitution and each other. Bicameral government in Ghana would significantly simplify the quest for constitutional convergence. Thus, at least, in regard to the 'national integration' articulated as a constitutional aspiration in the Directive Principles of State Policy,¹¹⁵ bicameralism would be an efficient tool for its pursuit. A second chamber is justified if it can support the state to produce legislation that is sensitive to the context of choice of its citizens of many, varied stripes. But the lesson Botswana offers us is that it cannot. Despite its very strong showing regarding constitutional congruence, bicameralism is not the way for Ghana; for that congruence seems to be at the very great cost of the diversity that makes the people of Ghana who they are.

¹¹⁵ Chapter Six, Constitution of Ghana 1992

Chapter 8

Constitutional Pluralism

Introduction

European states have, paradoxically, both looked to the European Union to create greater integration of its peoples and resisted the erasure of difference that seems the inevitable cost of integration. Constitutional pluralism was born of the struggle to make sense of these two equally strong urges in European states. In this, they are not unlike the tribal polities found within all postcolonial African states which exist within yet independently of the state. Though alive to the benefit of being part of the state, they are nevertheless deeply fearful of being subsumed into it and thus act consciously to thwart any action of the state that they interpret as doing so.

Ghana has over eighty tribes- some with more fixed and centralised political identities than others. The state has since its birth had to contend with these non-state, yet, state-like polities operating within its territory and challenging its sovereignty in consequential ways. The tension resulting from the state's need to impose; and the tribal polities urge to resist the state's sovereignty puts the two on a collision course. As I argued in chapter 5, each side performs such vital functions in the lives of citizens that a destructive conflict would be a loss to them, whichever side won.

What is needed then is a solution which preserves both sides. If, however, the preservation of state and tribe were the sole concern, no need for a more nuanced

approach would arise and constitutional pluralism would be nothing more than a synonym for federalism. But it is not. The tension which simmers over the sovereignty struggle is, in fact, a good thing. From the accounts of the state of Ghana and of Asante in chapters 3 and 4, it can be discerned that neither entity is, or, at least, has been entirely benevolent to its ordinary citizens when it has had unchallenged authority over them.

The lot of the citizen has been much improved since the 1992 Constitution reined in the state's executive power enough for tribal authority to recover from the effects of the previous totalitarian orders. To resolve the tension by removing it would return the winning side to the omnipotence that has historically proved unkind to ordinary citizens. We saw in chapter 7 how over-collaboration between state and tribe corrodes the constitutional character of the tribe; depriving the subject of tribal leadership that is both loyal to and facilitator of tribal life and values. In our discussion on sovereignty (chapter 2), I noted that while the sovereign state ought always to have the citizen as the beneficiary of its actions; it does not actually need to do so in order to pursue its chosen agenda or to do so effectively. An all-powerful state can- and, indeed, tends to- get consumed in its own sustenance or the maintenance of every iota of power it has accrued.

Removing the tension is certainly not the way. But from our study of federalism in chapter 6, it cannot be overstated how important it is not to allow the tension to remain unmanaged. Even where that does not lead to the worst-case scenario of a violent explosion, it tips the balance too firmly in the tribal polities' favour and erodes

-almost to extinguishing- the state's ability to establish the lifestyle the Constitution envisions for its citizens. As our illustration with the constitutionally guaranteed human rights (FHRFs) demonstrates, the chasm between what the tribal polities offer and what the state is supposed to provide is so wide that unless the state can effectively deliver an appreciable degree of what it has committed to, it will be incapable of maintaining its internal sovereignty.

Again, as chapter 2 noted- of the four different aspects of sovereignty, internal sovereignty is the most foundational. The conundrum of postcolonial states, then, is that they must accommodate the tension between themselves and the tribal polities within their boundaries, and yet they must not let it explode. But by its nature, it is a tension that tends to march toward resolution in favour of one side. What is needed is a philosophic approach that keeps the tension taut but the conflict latent and thus maintains in an equilibrium of sorts. It is my view that Constitutional Pluralism (CP) holds the best promise of such a balance. In this chapter, I consider how CP will, by guiding the state to rethink how it assesses its sovereignty, enable it engage differently with tribal polities, and, averting conflict without removing the latent danger thereof, hold the citizen's dual identity in equilibrium and empower her to apply them toward her self-actualisation.

The chapter is in two parts. In the first part, I discuss the primary tenets of CP to elucidate the construct. In Part II, I explore some prominent strains of CP in search of insights upon which I can build a CP model for Ghana. For these, I look to the work

of Neil Walker, Neil MacCormick, Miguel Poaires Maduro and Joseph Weiler. The chapter does not claim to be an exhaustive review of all aspects of constitutional pluralism. Such a work would hardly fit in a single chapter. Rather, it is a limited review of CP focused on its potential to reimagine the state-tribe competition over sovereignty such that the ordinary citizen is able to access and enjoy her identity as a citizen-subject; belonging in equal measure to the state as to the tribal polity.

I argue that CP empowers a state not to see its sovereignty as dependent on being the unchallenged ultimate source of authority. That old posture, rooted in Westphalian beliefs, made sovereignty a zero-sum game. The existence of any independent authority site within a state's territory stripped it of sovereignty. Thus, a state like Ghana, faced with self-referencing sites of authority within its boundaries, became committed to eradicating them or compelling them to route their authority through its (the state's) legal order. It would thus address its sovereignty claims to these polities. These polities would, naturally, refuse to negate themselves and the self-referentiality of their authority. This impasse would result in the state expending copious amounts of energy and resources trying to force a subordination to its sovereignty.

CP arrests this vicious, pointless cycle of state asserting, tribe refuting sovereignty tussle which we discussed in chapter 5. It permits both state and tribe to push simultaneous, incompatible sovereignty claims as they did before. But rather than address this claim at the competitor polities, CP teaches the state to direct the claim at

its own citizens. Thus, rather than try to force an admission of its supremacy from its competitor orders, the state will focus on expanding the scope of the effectiveness of its claims.

By concentrating its resources on establishing itself as the source and continuing vehicle of authority in increasing areas of life within the territory, the state asserts a sovereignty that is affirmed by the citizens. Thus, CP reshapes the friction between legal orders from a full-frontal conflict in which the order left standing is proved sovereign because it is left standing, to a high stakes bid for citizen compliance wherein the more obeyed order is sovereign because no other order commands comparable compliance. This chapter equips the reader to engage with the Ghanaian CP theory I construct in the next chapter.

Part 1-Explaining Constitutional Pluralism

1.1. What is Constitutional Pluralism?

Constitutional pluralism is most simply explained as a situation wherein a plurality of constitutional, norm-generating systems co-exist, and overlap and which systems, though asserting their own superiority, tolerate similar assertions made by other norm-generating systems within the same territory. But what exactly does this mean? What counts as a ‘plurality’ or ‘constitutional order’? How can they overlap but continue operating independently? Why and how would any -never mind, all- of them arrive at

such a counter-intuitive position as to tolerate existential rivals? It is with these questions I engage in this Part.

The Westphalian ideal of the state has, as a fundamental block, the idea of a perfect match between constitutional order, citizenry, and territory. Whether or not that ideal was ever met anywhere in Europe at any time is not relevant for this thesis. It is with the effect of its existence that we are concerned. From this ideal of perfect alignment (in constitutional order, citizenry, and territory) flows the notion that there is in every sovereign state a single paramount legal order from which all authority flows; from and through whom every norm-creating office or institution is derived and validated. This way of viewing the world as a single, ordered, even uncontested, hierarchy is a monist perspective.

The pluralist perspective has the opposite viewpoint. It addresses a world in which multiple legal orders operate in the same space. They are not merely neighbours, sharing common spaces, but living discrete lives. Rather, these legal orders interact and overlap. ie the jurisdictions, citizenry and territory they claim coincide. By implication therefore, in a pluralist world, a given territory has neither a single nor an ordered nor an uncontested hierarchy in its legal order framework. From this premise of overlap and contention, CP then interprets fundamental constitutional facts so as to enable the multiple sites of autonomous constitutional authority to coexist, if not entirely peaceably, at least, sustainably.

The term ‘constitutional pluralism’ is generally credited to Neil MacCormick and his 1999 paper *Questioning sovereignty*¹. But it is not self-explanatory. Indeed, it is, as Neil Walker notes, almost oxymoronic because ‘constitutionalism’ is traditionally conceived of within the context of a single, unrivalled power source. ‘Pluralism’, on the other hand, invokes the idea of multiple norm-creating systems² within the same polity. Thus, it is often thought that a multilateral power system cannot fit within the framework of a Constitution.³ Like Barber, I disagree that the two ideas are inherently incompatible.⁴

Reflecting on the efficaciousness of EU institutions, and EU-member-state relations in the 1990s, MacCormick concluded that the EU was no longer subordinate to or dependent on the member-states for its authority⁵. He posited that the EU had developed or was developing an independent constitutional order. That is to say, it had ceased to (or was in the process of ceasing to) depend on the authority of the member states for its own authority. It had now begun to assert an authority that was rooted in the treaties of its birth rather than by reference to the constitutions of the member-states. In other words, although the will of the member states had brought the EU into being, its continued existence was no longer because they willed it to continue to exist; but

¹ Martin Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3(1) *Global Constitutionalism* 9; Dimitri Van Den Meerssche, ‘European Perspectives on Constitutional Pluralism(S): An Ontological Roadmap’, (2018) 9 (1) *Transnational Legal Theory* 1

² Neil Walker, ‘Constitutionalism and Pluralism in Global Context’, in Matej Avbelj & Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, (Hart 2012), 19

³ Eg Matej Avbelj, & Jan Komárek, ‘Four Visions of Constitutional Pluralism’ (2008) 4(3) *European Constitutional Law Review* 524.

⁴ NW Barber, *The Constitutional State*, (OUP 2010).

⁵ Jakllic Klemen, *Constitutional Pluralism in the EU* (OUP 2014), 13

because it willed itself to continue to exist.

Further, and more crucial, in his view, the self-referentiality of an independent constitutional order is underwritten but also triggered by an appreciable degree of efficacy⁶. This efficacy is found in ‘some amalgam of legitimacy in the eyes of those whom the putative norms of the order regulate; and, power or influence over the conduct of the human beings to whom the norms are addressed.’⁷ Thus, for MacCormick the increasing ability of the EU to implement its executive, legislative and even judicial decisions without recourse to the power of member-states was evidence of the EU’s evolution (complete or continuing) into a self-standing constitutional order.

MacCormick’s two criteria for assessing a self-standing constitutional order may not be definitionally synonymous with our working definition of sovereignty. But it inevitably identifies as self-standing legal orders only those entities which meet, to a significant extent, the requirements of sovereignty in our definition. Thus, it is safe to say, that notwithstanding his repeatedly voiced dismissal of sovereignty as a now-obsolete philosophical construct⁸, MacCormick accepts the continued importance sovereignty plays in inter-legal order relations⁹.

⁶ Neil MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1 ELJ 259, 262

⁷ Neil MacCormick, ‘Questioning Post-sovereignty’ (2004) 29 EL Rev 852, 861.

⁸ Neil MacCormick ‘Beyond the Sovereign State’ (1993) 56 MLR 1

⁹ Indeed, it may be necessary for CP scholars to assume so, for as Dimitri Van Den Meerssche points out, absent the element of sovereignty, why should MacCormick’s thesis apply only to state-supra state entities. Why can it not apply to WTO-state relations for example? Van Den Meerssche, n1.

The upshot of the EU's new status was that the old constitutional understandings no longer served. In fact, in MacCormick's view, they had been redundant and inaccurate for a good while¹⁰ and had long needed to be replaced with new constitutional understandings. The way forward was to think of the EU and member-state orders as horizontally rather than vertically placed in relation to each other.¹¹ The old way of vertical relations created a hierarchy of constitutional norms; with one constitutional order (the member-state orders) occupying a more fundamental role than the other (the EU order). The new way of horizontal relations creates a heterarchy of norms. All the participating legal orders are of equivalent status and force. They each-independently of the other- have a direct link to the people circumscribed by terms specific to that interaction and oblivious to any other. Each such order therefore deserves a place at the constitutional table.

MacCormick argues that once heterarchically positioned, the rules of interaction between the legal orders change. Each order has to make some concessions if conflict is to be avoided. These concessions relate to the normative claims they make. Thus, they are not just concessions, they are *constitutional* concessions¹² and they flow from each order's acceptance that the other legal orders in the shared space are there both legitimately and independently of it. They are, in essence, peers. The starting point of this paradigmatic shift is conceptual. MacCormick invites us to engage with the idea of

¹⁰ MacCormick n9, 1

¹¹ MacCormick, n9, 8.

¹² Ibid

diffused political and legal authority. He asks:

‘Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap?’¹³

If, according to MacCormick, this vision is feasible both conceptually and practically, then it is possible to speak of a configuration in which political, constitutional, and legal power are diffused, and, which, therefore, requires a relatively substantial degree of willing cooperation and a relatively low degree of undisguised coercion to operate effectively. That configuration is the objective of constitutional pluralism.

1.2.Explanatory Pluralism

Implicit but underemphasised in MacCormick’s work is the idea that the multiple constitutional orders already exist and contend in the shared space. He builds a normative theory on this unexplored state of affairs. In so doing, he neglects to engage critically with the descriptive elements of the scenario he is theorising and so assumes that a space which would profit from his theory is recognisable on sight, i.e. that what makes the space constitutionally, rather simply legally pluralist or even just decentralised and semi-autonomous is obvious. The absence of greater clarity on the situation he is theorising limits the theory’s audience to those already familiar with the

¹³ MacCormick, n9, 17

space. It is little wonder therefore that while CP is well-known in Europe, it barely appears in legal scholarship from North America and the non-western world. This section therefore focuses on the circumstances that create the need for a normative theory of CP.

This gap in MacCormick's theory is filled by Neil Walker, whose scholarship provides some helpful descriptors for thinking about the state of affairs that require CP theorising. He treats CP as a two-tiered construct comprising explanatory and normative tiers¹⁴. The first tier is the explanatory. It describes the factual state of affairs; i.e. the existence in a jurisdiction of multiple constitutional orders, all of which stake a claim to be the ultimate source of authority within that territory. The second tier, which is the normative tier, is prescriptive. This section will focus on this first tier, leaving the next to focus on the normative tier. Walker is speaking of a resultant reality which John Griffith had, two decades earlier, disapprovingly described as a

rather unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation, morally and aesthetically offensive to the eye of the liberal idealist, and almost incomprehensible in its complexity to the would-be empirical student'.¹⁵

Though, empirically verifiable, this first tier is nevertheless contested. Each order makes the double layered claim that there is a hierarchy of norms in that jurisdiction and that *it* is the source of authority that sits at the top of that hierarchy.

¹⁴ Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) MLR 317

¹⁵ John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) The Journal of Legal Pluralism and Unofficial Law 1, 4

Explanatory pluralism plays a critical role to the functioning of normative CP. Unlike federalism or bicameralism, CP does not speak a state of affairs into being. A federalist governance structure is established by a deliberate act of political actors, acting for the express purpose of creating a federal structure. The explanatory tier of constitutional pluralism cannot be brought about quite so intentionally. That is to say, the agents of the legal orders act intentionally, not mindlessly. But their aim is purely to make or prove their legal order's sovereignty claim. With each order's agents acting intentionally to push its sovereignty claim, the territory is filled with competing claims.

Then, because every citizen being claimed by these competing orders, herself claims 'more than one "particular place" and community of political attachment'¹⁶ the claims overlap. Explanatory CP, though not the end goal, becomes the end result of the acts of the orders' agents. Thus, the explanatory level of constitutional pluralism is or is not. Although it can be encouraged, there is no way to force a state of explanatory CP to exist.

But, by the same token, it cannot cease to exist solely because the state so wishes. Explanatory pluralism is rarely ever transient. CP as a constitutional posture is therefore first and foremost the acknowledgment of the factual. This candour removes the need for the contending orders to dissipate energy in a futile quest to be or be seen as the

¹⁶ Neil Walker, 'Constitutional Pluralism Revisited', (2014) 22(3) *European Law Journal* 333, 354

only source of ultimate authority in the territory. Then, as a next step, CP permits and shapes the discussion on sustainable co-existence. Neil Walker puts it thus:

The dimension of value in constitutional pluralism lies in viewing this changing landscape not as a threat to the maintenance of the traditional template of constitutionalism but as a welcome opportunity to integrate what in conventional constitutional wisdom tend to be treated as contrasting and even opposing modalities of normative thought. The constitutional pluralist, in short, seeks to make a virtue out of necessity.¹⁷

Understanding that a pluralist state of affairs is a *potential* rather than an inevitably realisable threat to statehood (though not to constitutionalism,) opens up the discourse to the possibilities and value CP can add to the public life of the polity and the experience of its citizens.

Not every norm-creating system in each territory is capable of contributing to a factual state of constitutional pluralism (ie explanatory CP). A legal order which is able to do this will meet seven standards, which Walker assures are so basic that few legal orders in a position to even allege supremacy would fail to meet.¹⁸

The criteria are organised into three categories: constitutive, governance and societal. I explain briefly what each of these entails. The constitutive criteria are that,

¹⁷ Walker n2, 19

¹⁸ Walker, n14, 343ff

firstly, the polity seeking recognition must possess a constitutional self-awareness. A mature constitutional self-awareness leads to the second constitutive requirement: the existence of a foundational legal authority or sovereignty. The constitutional consciousness becomes the source of the self-referentiality of the polity's foundational legal authority. Thus, the polity's constitutional discourse both constitutes and is constituted by it and gives its claim the plausibility to make the polity worthy of a seat at the table of constitutional discourse.

The governance criteria Walker identifies are as follows: self-delineated jurisdictional sphere, interpretive autonomy, constitution, and internal structure to govern the polity. No polity can be geospatially limitless and effective. Therefore, jurisdictional scope is a necessary detail for every institutionalised powerholder. Any entity that purports to hold power must have clear parameters for the exercise of its power. But if it claims to hold a *constitutional* power, then the scope of its jurisdiction must be self-delineated. If the limits of jurisdictional competence are not by its own choice, its power is derivative, not self-referencing, and, in that case, it is not a constitutional creature.

Interpretive autonomy is, in Walker's words, the 'power to have the last, and so, constitutionally decisive word on the meaning of a mandate.'¹⁹ Even where a body has decided to let another body's decision stand, it has interpretive autonomy if it had the power to overturn that other body's decision. By deciding that the other body was right in its understanding of the mandate, that first body has given a constitutionally

¹⁹ Walker, n14

decisive explication of the mandate. Interpretive autonomy is, simply put, kompetenz-kompetenz. The polity must assert that it is the definitive voice on what it is and what it means to participate in its life.

Like any other aspect of sovereignty, it must be backed by an appreciable degree of effectiveness. Nevertheless, it is important to note that this assertion is made from a purely internal perspective. So that even if from an external viewpoint, the authority of the polity's institutions and officers is not exclusive, it does not cost the polity its interpretive autonomy.²⁰

A constitution and internal governance structure are prerequisites for constitutional status in a polity. Indeed, a constitution is the articulation of the polity's self-awareness and is therefore a natural consequence thereof. A polity that seeks recognition as constitutional must have clear rules on membership ie it must determine who is a citizen and what its bundle of incidents will be. It must also create avenues by which ordinary members can engage with it, enforce their incidents, and collectively control how they are governed. An entity that possesses all or at least most of these criteria is a constitutional order.

A space that is in a state of explanatory pluralism contains more than one such constitutional order. But the mere existence of multiple constitutional orders does not

²⁰ Ibid, Walker, n14, 349

alone make a space explanatorily pluralist. The orders must intersect in respect of citizenry and this intersection should contain also a tug-of-war for the citizens. It is this that builds the disaffinity that makes an explanatorily pluralist space explosive. Thus, at this first prerequisite level for a normative CP theory, there must be a bitter contest for citizen loyalty which births the tension that the second level is required to resolve.

1.3. Normative Pluralism

It is in the explanatory level of pluralism that the potential for destructive collision lies. It is therefore unsurprising that views like Griffith's which treat explanatory CP as an unattractive defect to be eradicated are prevalent in the scholarship on African statehood. Normative CP, the second tier of the theory argues that explanatory CP is, in certain circumstances better than the tidy hierarchy of monism. This thesis argues that the postcolonial African state is exactly such a circumstance.

CP yields at that second, philosophic level, a helpful clarity which, as Maduro notes, allows for coherence absent the clear-cut hierarchies of the past²¹. It accepts the identity each participating order has chosen for itself to the extent that such identity is not dependent on negating the identity chosen by any other order participating in that space. CP, as noted earlier, proposes that the orders relate heterarchically. In other words, the state and its rival authority sites should interact horizontally, rather than vertically as the state is accustomed to doing. That answer begs the question, however.

²¹ Avbelj & Komárek, n5

What does it mean or require for orders of different strengths, values and maturity levels to interact horizontally? This is my focus in the remainder of this section.

CP engages with the concept of sovereignty to furnish the participant orders with the tools to encounter each other in the new paradigm. Despite the rhetoric of some of its strains, CP does not argue that sovereignty is no longer a useful concept²². To the contrary, it is clear from the criteria for attaining constitutional order status, that CP assumes sovereignty or at least a sovereignty claim in such a legal order and therefore within the constitutional discourse. Rather than undertake the significantly more difficult (and likely ill-fated) task of changing the definition of sovereignty, CP offers the state a new way to compute it.

In the pluralist model, the state is its own source of authority and the final authority in the spheres it factually determines. The other legal orders- in the case of Europe, the EU, and, in the case of Ghana, Asanteman and other tribal polities- standing as self-referencing authorities, also operate as the absolute and final power in all the spheres of their individual dominance.²³ As MacCormick puts it, the state has ‘a new sovereignty that is old sovereignty restricted as to the topics of its possible or permissible exercise.’²⁴ In other words, it is not a redefinition of sovereignty *per se* that is required; but a revision of how it is assessed. As Barber has said, sovereignty need not be viewed only in absolute terms²⁵. It can exist in degrees. Indeed, it always does.

²² Eg, MacCormick, n7

²³ Ibid

²⁴ Ibid, 863

²⁵ Barber, n21, ch2.

For no state has ever been able to perfectly match the effectiveness of its sovereignty claim to its normative absoluteness. Further, as I argued in chapter two, the sovereignty claim is always partially true and partially false. This is because it is always partially aspirational although the claim is never articulated as originating in a future time. Sovereignty claims assert supremacy from the past into the present and stretching into the future. The current degree to which the claim of ultimate juridical authority is responded to by the audiences is the degree to which sovereignty presently exists.

Thus, CP does not attack the absoluteness of a sovereignty claim. Instead, it admits the factual incompleteness of the match between normativity and effectiveness and, critically, tolerates the effectiveness of other claimants in the spaces where its own normative claim is not backed by effectiveness. The existential tension persists because each side continues to aspire to expand the scope of its effectiveness in a never-ending bid to arrive at that place of perfect match. But, rather than expend energies trying to force other orders to recant their claims, CP focuses each order on the proof and expansion of its own effectiveness. It seeds a belief in each system that once they attain perfect match all other claimants will cease to exist or at least cease to be self-referential. In this way, it sustains the existential tension that I argue later insures the citizen-subject against the tyranny of either side (state and tribe). For in reliance on this belief, legal orders not only act to control the conduct of the shared citizens, but they are also mindful to avoid, by excessive harshness, pushing citizens into the arms of another legal order.

This pluralist view of sovereignty does not overthrow our working definition from chapter 2. It merely changes the standard for testing the effectiveness of a

sovereignty claim. Instead, therefore, of gauging effectiveness of the discursive claim (to author and sustain the lifestyle of a polity) in regard to the totality of that lifestyle, it gauges it in respect only of the totality of those aspects of life within its competence'. Thus, on the constitutionally pluralist reading of sovereignty, a plausible sovereignty claim remains a discourse between the authority site and the people it claims, in which it makes the normative claim that it is the absolute and final source and channel of all authority; which normative claim it can back with a sufficient degree of effectiveness in respect of those aspects of their life within its competence. In the result, there is created a new type of constitutionalism; a non-unitary constitutionalism consisting not of a single, all-powerful sovereign, but of a composite sovereign comprising 'heterarchically interlocking legal and political systems'²⁶. Collectively, under the aegis of the constitution, they give the polity its identity *qua* polity.

But it is important to note that in this view of pluralism, the tolerance shown by the state does not increase the sovereignty of the other order(s). The major concession CP requires the state to make is that the other order which, *for the moment*, is effective in certain spheres of life within the scope of the state's own claim does not take its validity from the state; does not rely on the state to enforce its decisions; and should not be asked to. CP does not ask the state to cede any part of the authority it factually (ie legally and politically) holds to a different site. CP is not an acceptance by the state of the other legal order's sovereignty claim; it is a mere and, at least, in its belief, transient toleration thereof.

²⁶ Walker, n2

This is important because some of the resistance to constitutional pluralism in the EU is based on the misunderstanding that to hold that the EU is sovereign is to say that member states are not and are subordinate to it.²⁷ Neither legal order is capable of being, in a pluralist order, a sovereign in the archetypal Kelsenian sense. For any such arrangement (regardless which order is assigned that status) would entail a hierarchy of authority; which is precisely what CP seeks to avoid.

In short, CP disaggregates authority, state, and sovereignty²⁸ which monism bound together so tightly in the Westphalian era. So that a state can be sovereign without being the only source of authority and an order can have authority but still be neither a state nor sovereign. Though a polity may not currently- or even ever -be capable of maturing into or standing alone as a state, it may well be capable of articulating a claim of sovereignty sufficient to defeat the efforts of the more mature legal order to impose a hierarchical relationship upon it. Disaggregating these three concepts allows us to recognise constitutional phenomena that are 'polity-bound', which do not, -or do not necessarily- follow a development trajectory towards statehood, but which nevertheless register in terms of some of the criteria specified and so are worthy of consideration in constitutional terms.²⁹ In this way, CP enables a fuller, richer consideration and understanding of the small-c constitution of a territory.

²⁷ Eg often manifested as anti-integration sentiments. These were especially obvious in the Brexit debates. For a discussion of this issue, see Susanne Schmidt, 'No match made in heaven. Parliamentary sovereignty, EU over-constitutionalization and Brexit', (2020) 27(5) *Journal of European Public Policy* 779.

²⁸ Walker, n14

²⁹ Walker, n14, 342

1.4.The Normative Value of CP

CP is normatively attractive for a number of reasons. Firstly, it provides an accurate way of understanding the world.³⁰ As noted above, monist ideas and understandings of Westphalian Europe no longer reflect that continent's present realities and are therefore no longer useful for modelling, defending, justifying or critiquing the state. Obstinate clinging to them, Walker holds, only defeats the effort to reach accurate or useful insights for Europe's present and future³¹.

Walker's view is as true from a non-European perspective. Owing to colonialism, the origins and therefore models of African states are rooted as much in Westphalian theory as European states. Equally shaped by monism, but containing a multitude of functional, politically autonomous entities; our states have struggled to make sense of their realities through inadequate monistic lenses. At the explanatory level, CP provides a truthful and therefore illuminating description of the world the states are navigating. The normative level gives the reassurance that the picture yielded by the explanatory level need not overwhelm the state, by teaching the state a different way to respond to that reality. In this way, CP protects the longevity and integrity of the state objectively and-which is critical- subjectively.

Another but related benefit of CP is identified by Mattias Kumm who points out that liberal democracy and its principles are bound up in Hobbesian monist thought. Thus, where the reality has ceased to conform to a Hobbesian state, liberal democratic

³⁰ Walker, n16

³¹ Walker, n14

principles lose traction in their ability to provide a comprehensive and satisfactory framework for governance, or, at the citizen level, ‘the pursuit of happiness’³². Constitutional pluralism, in Kumm’s words, ‘allows the basic commitments of liberal democracy to be articulated in a way that divorces them from the Hobbesian statist conceptual framework into which they had to fit.’³³ This then enables us to make sense of legitimate authority and institutional practices outside of the idea of the state.³⁴

This particular virtue of CP is central to the mission of this thesis. The challenges facing the state in Ghana are typified in the actualisation of the FHRFs enumerated in the 1992 Constitution. As noted from the discussion in chapter 3, the 1992 Constitution is imbued with liberal democratic values and ideals. If these ideals are only achievable in a monist setting, the state must, of necessity, be committed to a monist viewpoint or fail. CP’s ability to give the state an accurate understanding of the milieu in which it functions without rendering it incapable of fulfilling its constitutional mission makes it extremely attractive as a constitutional philosophy for Ghana.

The strongest selling point of CP, however, is that it enhances efficiency in the small-c constitution of the territory. Constitutional self-deception is energy-intensive and therefore costly. Because CP assuages the sovereignty concerns of the state, it frees up the resources it once wasted in perpetuating its self-deception for nobler purposes.

³² Quoted from and meant in the same vein as the Preamble of the American Constitution.

³³ Matthias Kumm, response to question asked at European University Institute Symposium, 11 January 2008 quoted in Avbelj & Komárek (eds.) *Four Visions of Constitutional Pluralism*, EUI Working Papers LAW 2008/21 2008, 34.

³⁴ Walker n16, 34

Additionally, the horizontal interactions of a heterarchy pit the orders against each other; but in thoughtful, strategic ways; and, in the end, birth a tense competitive-collaborative relationship between the participating orders. This ‘frenemy’ relationship compels the orders to be reflective in the deployment of their resources toward greatest impact and relevance.

The rivalry will intensify whenever the orders sense a chance to gain the upper hand in the citizens’ loyalties. But self-interest will rein in the aggression where joining forces will be advantageous to both. Where, non-collaboration would be advantageous to one order only because the other is not positioned to compete, the second order will act to impede the first order for the purpose of frustrating that advantage. Thus, the stronger order will, despite its position of strength, see value in collaboration. In this way, the citizen of a CP state is given the best of both orders. Where there is competition; she acquires options. Where there is collaboration, she receives more efficient care and because there’s always potential for existential conflict, she remains valuable at all times to each order.

This Part of the chapter has introduced the reader to constitutional pluralism. I have shown that CP is an empowering way for the state to interpret an inconvenient constitutional reality. It allows the state to be strategic in its dealings with the rival legal orders with whom it shares territory and citizens. I noted that it does this by, first, compelling the state to admit the true state of measuring sovereignty so that a sovereignty claim can be made or proved even in the presence of plausible competing

claims. CP thereby fosters a heterarchical dialogue between all the participating legal orders. I discussed the normative value of CP as a constitutional posture. Finally, I explained the important between constitutional pluralism and legal pluralism *simpliciter*. In the next Part, when I explore more specifically what the selected philosophers consider a well-structured CP ethos to look like, the knowledge garnered from this Part will enable the reader to appreciate the implications of their theories.

1.5. The Distinction Between Constitutional Pluralism and Legal Pluralism.

Before delving into the CP models upon which my own insights will be based, it is important to clarify an oft-misapprehended distinction: that between constitutional pluralism and legal pluralism. Firstly, because the term ‘legal pluralism’ long predates CP, it is necessary to avert the reader’s mind to the critical points of departure between the two ideas. Otherwise, in the effort to fit it into existing legal pluralism arguments, the reader is apt to misunderstand this CP discussion.

Secondly, and more importantly, legal pluralism, when used in the African context, invokes a copious body of literature that, underpinned by imperialist thought, is normatively geared toward suppressing and compressing non-western legal orders into a western-style overarching order. The validity and superiority of the western model is assumed in this literature; as is the undesirable and inferior nature of the non-western orders.

Besides having pushed African states into a futile, costly battle to eliminate tribal polities, this idea of legal pluralism exhibits a deep-seated contempt for the tribal identity that renders it incapable of guiding the African to embrace and access the complex identity that being African is. Its purpose is actually the converse; to minimise the African's access to her tribal identity and amplify her statal identity. As this thesis is focused on African states, it is important to extract this study from that body of work. This section explains both why CP operates at a more fundamental level than legal pluralism and why the old Africa-related understandings of legal pluralism are not relevant for the resolution of the challenges identified in chapter 5.

Constitutional pluralism differs from legal pluralism *simpliciter* in that the latter can occur peaceably within a state. Legal pluralism simply means that multiple legal systems are operating in a given polity. It can take various forms³⁵ and there might be overlaps in the demographics over which the orders assert authority; or there might not.³⁶ But the existence of this plurality does not result in intractable confusion.

Kelsen claims one reason for this is that there always exists in the state's order, a ranking rule by which the authority and reach of rules can be determined. That rule will, *inter alia* create a pecking order and locate rules of other legal systems whenever such are applied. By so incorporating them, the rules cease to be imports and when

³⁵ See Griffiths n15

³⁶MG Smith, *Institutional and Political Conditions of Pluralism in Corporations and Society* (1st edn, Routledge 2007)

applied by state courts, are applied as domestic rules.³⁷ This view was the normative pillar of the Africa-focused legal pluralism literature of the twentieth century³⁸.

Kelsen is mistaken. If this were so, Ghana, which is now in her sixth decade of postcolonial existence would no longer be a pluralist space because the end goal of the ranking rule is to amalgamate all authority in one site. So that regardless of the originating sources of the rules within the legal order, their validating source will all be the same. In the end therefore, legal pluralism would not result in conflict because there would not really be pluralism; there would instead be something closer to decentralisation. The real reason legal pluralism does not result in confusion is because in a space of legal pluralism, all the other legal systems are not by their existence claiming sovereignty and though they may generate their rules independently, they still look ungrudgingly to the single constitutional order to imbue their rules with legal validity.

Legal pluralism, divorced from its colonial imperiousness, is in some situations more desirable than the monocular perspective of the homogenous, monistic westphalian states. The heterogeneity of the postcolonial African state offers an example of such a situation. CP concerns the overlap of states or state-like entities asserting plausible claims over the same people and territory through independent legal

³⁷ Kelsen, n60,24-28.

³⁸ Ibid, 243-248

systems.³⁹ Critically, these systems must contain both the presence of inconsistent rules of recognition and the absence of a definitive arbiter to resolve the inconsistency⁴⁰ for if any order's rule of recognition is compatible with the supremacy claim of another, there is no sovereignty challenge and therefore no CP. The inconsistency of the rules of recognition and the absence of a final arbiter is the root of the combusive tension. The distinction between legal pluralism and CP while always important, is especially so to this thesis because it affects the scope of the material I discuss. I do not therefore consider the literature on the various other forms of pluralism which though legal in nature, are not matters for constitutional discourse.

Part 2- Insights for an African Model of CP.

Among pluralists, there is little contestation about the double layered nature of CP. But the question of what a heterarchy requires reveals a deep divide between its most ardent supporters on the substantive features of a constitutionally pluralist constitution. This Part delves beyond the existence and attractions of CP to consider how, in real world situations, CP can be accommodated. I examine the CP theories of Joseph Weiler and Miguel Maduro; whose postures, nearly opposite in direction, have a taming effect each on the other and together provide a robust guiding frame for my own theoretical contributions to Ghana's jurisprudence.

³⁹ NW Barber, *Principles of Constitutionalism* (OUP 2018)182

⁴⁰ Ibid.

Given how foundational MacCormick's earliest thoughts on CP have been to the development of its scholarship, it would not be unreasonable to expect any study seeking to craft a new strain of the thought to begin with his work. However, his CP assumes, on the part of the participating orders, the sort of agency that parties to the creation of a federal state have. Thus, in his CP, member states can renounce their membership of the EU and pull out of the pluralist space. To follow the thought to its end, if all member-states renounced their membership, the EU would cease to exist and Europe would return to its monist past. This implies that the pluralism is a choice and is justified by reason of being the choice of the *demoi*.

Though he acknowledges the superiority of the normatively pluralist model, MacCormick does not think it should be imposed on Europe. Rather, he thinks European states should retain the power to renounce their EU membership and in the non-exercise of that power, positively subscribe to the model.⁴¹ As Brexit has shown, this idea of choice is not as hypothetical as was widely believed less than a decade ago⁴². Brexit proves that Europe's CP at the explanatory level is not as problematic as it might at first sight seem because it shows that the conflict need not be destructive of either order. More than a year after Brexit, both the EU and the British constitutional orders continue to exist but no longer overlap.

⁴¹ Neil MacCormick, "The Maastricht-Urteil: Sovereignty Now" (1995) 1 ELJ 259 at 265; "Questioning Post-sovereignty" (2004) 29 EL Rev 852 at 863

⁴² Before Brexit, the power to leave the pluralist space was written about almost as if it were hypothetical. Literature as recent as Jaklic Klemen's 2014 discussion of MacCormick's CP adopts this tone. See Klemen, n5, 24-25

The irony of MacCormick's victory is that it also suggests that a normative CP is not necessary in Europe's case. Not only is Europe's pluralism caused by voluntary association, it is also one in which the sovereignty of the participating orders was never in question. It is the EU's sovereignty that is contested. The EU does not, for its part, negate the sovereignty of the member-states and continues, even while it asserts a separate and sovereign existence from them, to acknowledge the voluntary nature of participation and therefore compliance. Thus, even outright acceptance of the EU sovereignty does not, in fact, deprive the member-states of theirs. This again suggests that the situation in the EU is more one of legal pluralism than of constitutional pluralism. MacCormick's model of pluralism is simply not strong enough for the situation in Ghana. If it proves anything, it proves how permanent and conflictual Ghana's pluralism is at the first, (i.e., descriptive) level.

As a previously colonised state, Ghana's pluralism did not occur by the choice of any of the participating orders, nor does it remain so by their choice. Save by declaring war on the state, no tribal polity could remove itself from the pluralist constitutional space. Citizens have inexorable ties with both the state and their customary law polities, and, as evident from our discussion in chapter 5, the continued existence of these ties is a matter of necessity rather than of choice. So, the power to withdraw from the pluralist arrangement is simply not one any participating order- the state included- could have, or even pretend to have.

The pivotal pillar of MacCormick's theory is that the choice to participate in the pluralist setting engenders the obligation to dialogue. In Ghana there is clearly no choice to provide this pillar. It could be argued that the referendum on the Constitution evinces just such choice. But that argument would be misconceived. When citizens cast a vote in the referendum, they were doing so only as citizens of the state of Ghana; not as citizens of Asanteman deciding a matter for the state. In any case, the tribal polities *qua* polities did not and were not eligible to participate and therefore could not have ratified it *qua* polities such as to be bound to dialogue with the state it created. Consequently, lacking the pivotal pillar of choice, a CP theory for Ghana cannot rest on MacCormick's model of pluralism. We must look elsewhere for guidance for our African theory of pluralism.

2.1. From Mortal Enmity to Toleration

From our discussion of MacCormick's work, we have concluded that the normative CP from which we draw our guidance must be able to absorb a factual state of pluralism (explanatory pluralism) that did not originate in the choice of the participant orders and yet is able to accomplish the diversity preservation that a truly CP space has and yet also make it possible for the state to deliver a similar set of rights to all its citizens across the country. Despite his own vociferous rejection of the label of constitutional pluralist⁴³, Joseph Weiler's work fits well with the CP scholarship. His work in this vein focuses on sustaining diversity without conflict in the construction of a unified

⁴³ J Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G. De Búrca & J. Weiler (Eds.), *The Worlds of European Constitutionalism* (CUP 2011), 12-13

entity. In this section, I set out the insights from Weiler's work on tolerance that I will draw on in the next chapter in the formulation of my own theory.

Weiler advocates what he terms the principle of constitutional tolerance. When positioned as the overarching principle of the unified legal order, constitutional tolerance enables the multiple legal orders to interact respectfully as peers and thus avert conflict. Constitutional tolerance rests on two seemingly contradictory pillars: essential humanity and national identity. Weiler argues that both these concepts contain many noble elements that should be integrated into a unified legal order. However, they both also have ignoble elements that render a people abusive. Weiler suggests that a bridging of the two concepts will trim them both of their excesses and result in an equilibrium of their best parts. It is in this equilibrium that Weiler's CP lies.

Essential humanity, the first pillar of the principle of constitutional tolerance, is the idea that humanity is the common cause all citizens (of Europe in its original formulation) share and by virtue of which they possess an inherent dignity. That dignity entitles each to respect from others, regardless how differently each nation manifests this dignity. It was introduced into European literature and relations after the Second World War to counter the virulent national identities of post-Westphalian Europe that culminated in the disastrous war. It was to be the common ground from which all inter-European interaction would proceed. The resulting entity -the EU; its structures and institutions- would act on behalf and with the approval of the now unified but not identical European *demos*⁴⁴. For Weiler, the appeal of essential humanity is its

⁴⁴ JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in J. Weiler & M. Wind (Eds.), *European Constitutionalism beyond the State* (CUP 2003)

inclusiveness. At its best, it teaches acceptance of the alien by identifying in ‘him’ that which he shares with ‘us’.

But essential humanity also carries the temptation to increase that commonality by erasing all difference. From the EU experience, Weiler concludes that without what he calls a taming principle, essential humanity edges towards forced consonance. If stretched too far, it mutates from a common cause creating lens to a uniformization agenda that is aggressive and oppressive; inflicting on the citizens the trauma of the single, over-centralised state to forcibly enforce the resultant homogeneity. Furthermore, the artificial homogeneity is repulsive because it destroys belongingness and originality - the two chief virtues of nationalism.

Belongingness, according to Weiler, inheres in nationhood;’ and is in fact a form of it. It is the experience of having ‘a social home’ in which one’s place is assured, and one is accepted, independently of their achievements—by just being.” The value of belongingness is that it insulates its members from devastating ‘existential aloneness.’ Weiler defines originality as the power and confidence to be different. He asserts that it is fostered in the nation-state whose boundaries create a departure point from other humans from which the citizen can begin her own authentic articulation of self.

At the same time, however, Weiler is firmly opposed to an excessive focus on difference and national identity. Maintaining identity boundaries is not *ipso facto* a bad thing. But fixating on the boundaries between ‘them’ and ‘us’ and defending each one

without thoughtful reflection on the purpose that boundary serves puts states in a perpetually belligerent adversarial stance. A nationhood-obsessed state is thus susceptible to perpetuating abuse against another nation or its own citizens or a section thereof.

In the pluralist space, the dilemma is this: if the component parts dominate, the space becomes hostile and tense. Legal orders compete at every turn; using every opportunity to negate each other and rushing stubbornly towards collision. If the unifying legal order dominates, a single, 'correct' identity is forcefully imposed on the entire territory. The peoples, unable to evolve organically in their new clothes, are left bewildered and bereft of initiative.

Weiler's solution is to propose a pluralism in which the two constitutional authorities remain at par. The component orders pursue the interests of their peoples according to their identity and create an enabling environment for them to be original and belong in. The composite legal order, guided by essential humanity, draws out the common ground between the orders and creates the structures for the attainment of those interests mutual to all. When the nationhood bias tries to expand undesirably, it will encounter the unifying order's essential humanity ethos and be contained. When the unifying legal order tars too liberally with its standardising brush, the component orders will resist. In that constant dance of resistance and assistance, the balance is maintained and the citizen, confident in her belonging, but accepting of the alien, is enabled to 'try and try and try again to live a life of decency'.⁴⁵

⁴⁵ Weiler, n45

Constitutional tolerance requires a redefinition of both national identity and essential humanity; the former to exclude its aggressive tendency, the latter to exclude whitewashing the continent. Weiler puts it thus:

We can erode all the differences of the alien and make him one of us by being us. Or 'the alternative strategy is to acknowledge the validity of certain forms of bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference (and what is special and unique about ourselves as individuals and groups) and yet we reach across differences in recognition of our essential humanity of being all born in the image of God'.⁴⁶

Thus, in Weiler's pluralism, no matter how synchronised the EU gets, it remains a Europe of individuals and nations who notwithstanding their discernible differences, own their common cause in joint membership of the EU.⁴⁷

Additionally, Weiler believes that no constitutional pluralism is possible without both a pillar of hierarchy and a pillar of heterarchy.⁴⁸ In his argument, the composite unit must exert some control over the component units of society. He argues that unbridled liberty for the component unit (for him, the individual; for our purposes, the tribal order) leads essentially to the return to a Hobbesian state of nature. The only way a polity can guarantee rights to the individual, is for it to have the practical and

⁴⁶ JHH Weiler, 'Europe: The Case Against the Case for Statehood' (1998) 4(1) *European Law Journal* 43, 61

⁴⁷ *Ibid*, 62

⁴⁸ Weiler, n44, 14-18

normative authority to enforce them. This level of hierarchy is according to Weiler, imperative to a constitutional project.

2.2. The Strengths Of Constitutional Tolerance

Weiler's worries about the dangers of the artificial homogeneity are not unfounded. The Scandinavian perception of its society as 'folkhemmet' has been hailed for its inclusiveness and the social justice and equality it fosters⁴⁹. But there exists also a significant strain of worry about how the forced and forceful homogeneity impacts individual self-agency and the ability to be different in Scandinavian society⁵⁰.

The noticeable differences between peoples are not simply aesthetic. Rather, they are the product of profound distinctions in the way they make sense of the world. For example, a religious outlook and a laic posture do not differ only in the cuisine, or music they generate. They express radically different understandings of the scope and role of human agency. To tamper with the practices is therefore to tamper with their adherents' tools for making meaning. Difference is not all benign, but it is not *ipso facto* bad either.

From the perspective of a native of a pluralist society, the greatest strength of Weiler's constitutional tolerance is that it provides a compelling argument against the

⁴⁹ John Pratt & Anna Eriksson, *Contrasts in Punishment: an explanation of Anglophone excess and Nordic exceptionalism*. (Routledge 2013), 3-23

⁵⁰ Vanessa Barker, 'Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-faced Penal Regime'(2013) 17(1)*Theoretical Criminology* 3

overemphasis on coherence and consistency that monism and historical legal pluralism fixate on. In Ghana, where the participating legal orders are so varied, a conscious effort at consistency and coherence is required if the FHRFs are ever going to be truly shared values. However, the ‘nationalisation’ of these FHRFs is pointless if it is attained at the cost of the citizens’ sense of self and power to deploy those rights in the journey to self-actualisation. The call to deal thoughtfully with diversity that constitutional tolerance injects into the discourse protects the citizen’s dual identity (Asanteni and Ghanaian) and in so doing empowers her to live her best life.

Understanding, however, that the right to difference must be carefully reined in strengthens the appeal of constitutional tolerance. As Weiler rightly notes, national, or in our case, tribal identity unfettered is a runaway horse that inevitably becomes destructive. So that without a consciously unifying focus in the coordinating order, abuses are sure to happen in some degree in the jurisdiction.

In the context of non-state legal orders, the unifying role of the coordinating order becomes even more vital. These legal orders which speak and are spoken of so frequently in terms of tradition, identity, cultural uniqueness etc can be even more rigidly unsupportive of originality. All talk of traditional values and cultural ways are really just assertions of the correct way to be or live within the identity embraced by the tradition/culture. By respecting the identity of the tribal orders yet offering a supplementary order with values that may not be intrinsic to the tribal order, the national order provides a space where ‘us’ is ‘them’ too and thereby offers a space for the citizen to be different within the tribal identity.

Finally, Weiler's introduction of a pillar of hierarchy boosts the appeal of constitutional tolerance. His term 'pillar of hierarchy' is unfortunate, for it only confuses. Too much effort has been deployed to explain and sketch out the concept of a heterarchy for it to be muddled by inserting within it (i.e., the concept of a heterarchy), the very notion of hierarchy it is supposed to be antithetical too.

But if the term is ill-advised, the concept itself is not. An organising principle for the heterarchy is a fundamental necessity of the egalitarian inter-order legal discourse. The challenge, when a group is comprised entirely of equals, is always the choice of direction. For where all members are equally worth listening to, west is as justified a direction for the group as north. The multiplicity of direction options can result in paralysis rather than power for the collective. Thus, it is important for some sort of understanding to be achieved in respect of coordination: ie the processes and methods by which directional choices are made, reviewed, protested and enforced. The 'pillar of hierarchy' is the infrastructure by which this critical role is fulfilled. It is a meta-constitutional value that circumscribes the discourse and, excluding certain options, enables the orders to act and interact as they choose within its parameters.

The 1992 Constitution is that organising principle in our CP. It circles the discourse and excludes certain options, leaving it to the legal orders themselves to make their way forward but along its path. Unfortunately named though it is, Weiler's 'pillar of hierarchy' elucidates the relationship the legal orders within a CP space should have with the Constitution of that space (where there is one) and so makes the operationalisation of normative CP in an explanatory CP space more attainable.

Weiler's argument can be profitably applied to our understanding of the relationship between the Constitution of Ghana- that composite unit of legal orders - and the constitutions of Asanteman and other customary law orders. Indeed, the opening premise of this thesis is that the rights in the 1992 Constitution should trump the rights regime of every other unit within its body. That is undeniably a declaration of hierarchy. But at the level of legal orders, where the composite Ghana subdivides into legal orders, I argue that the state should interact heterarchically with other tribal orders.

It is only a conflation of the state with the Constitution that would lead to the position that no hierarchy of any sort is desirable in Ghana. Such a position would lead to the disintegration of the composite collective or, at least, significant confusion and inefficiency in the provision of goods to the individual members of the component and composite unit. Constitutional tolerance harmonises pluralism with constitutionalism, so the apparent contradiction is removed; and, working together, CP and constitutionalism enable citizens to achieve what Weiler calls the true end of any constitutional construct which is 'to try, and try again, to live a life of decency, to honour our creation in the image of God, or the secular equivalent.'⁵¹ It is for exactly this purpose that constitutional rights exist.

2.3. Constitutional Tolerance Criticised

Klemen's criticism of Weiler's pluralism is that its base premise - essential humanity- imposes its justification as a principle of the European venture on Europe's non-

⁵¹ Weiler, n 47 Against statehood, status quo

transcendental members. It takes the position that it (essential humanity) is a justified principle because all humans share their status as the image of God. For those Europeans who do not accept their or any other human's status as a godly reflection, that principle must be accepted without being subscribed to and that is an imposition at the very level of identity that Weiler argues against.

The criticism is valid. Besides, his own religious inclination, Weiler does not offer any real reason why the Judaeo-Christian outlook should be imposed on Europe's non-transcendentalist citizens. The criticism is as true in the Ghanaian context as in the EU's. In truth, however, it does not touch on any fundamental premise of his theory. By including the 'secular equivalent', he leaves to those who do not share his religious premise the option of determining by their laic parameters what the 'decent life' looks like.

The greater failing of constitutional tolerance is that it does not appear sufficiently clear on how the desired state of balance is to be achieved. Perhaps because Weiler develops it in the context of the EU, he assumes the agents by which the redefinition of essential humanity and nationhood is to be done are already known. The result is that it reads more as an exhortation than as a theoretical guide to statecraft.

For this reason, it is insufficient as a lighthouse for my theorising effort. However, as I am seeking from this study, not so much a step-by-step guide on CP to apply to Ghana, but a set of perimeter principles that will keep me mindful of the strengths and dangers in the available directions, the lack of clarity in Weiler's work

does not defeat its utility to me. In the next section I turn to the scholarship of Miguel Poaires Maduro to supply some of the clarity that Weiler's work lacks and thus help me organise my thinking around the outcomes I seek to achieve with my theory.

2.4. Operationalising CP: Methodological Insights

The articulation of the actual steps to be taken to infuse a normative CP ethos into an explanatory CP space is the focus of the scholarship of Miguel Poaires Maduro. Assessing the viability of these steps, as he envisions them is therefore the heart of this section. Maduro promotes a form of CP that pushes for each legal order to respect both the self-determined identity of the other(s) and the pluralism itself.⁵² Mutual respect means each order accepts that every order within the polity, has the right to determine its own identity, and, flowing therefrom, accept whatever that identity is.

Constitutional actors must therefore, in taking decisions, make some accommodations for the identities and constitutional claims of other legal orders participating in the space. He puts it thus:

Borrowing the language of systems theory, we may say that the problem of compatibility between different legal systems or sub-systems is presented as a problem of coordination whose only answer can be found in each system adapting its own set of

⁵² Miguel P Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed.) *Sovereignty in Transition* (Hart 2003), 526; Miguel P Maduro, 'European Constitution: What if This is as Good as It Gets?' in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003) 99.

perspectives to the possible contacts and collisions with other systems.’⁵³

The EU is the coordinating order, and its job is to integrate all the orders into a coherent single legal order without dismantling or impeding the functioning of component orders within the larger legal order. It is not necessary for a coherent legal system that there be a single theory of law to which all orders subscribe. Even with competing determinations of the law, it is possible for a coherent legal order to be formed if the participant orders are committed to creating one and are willing to make some necessary concessions.⁵⁴ Proper coordination will yield a unity in the legal system.

Maduro argues that for CP to achieve that single coherent overarching legal order knitted from the constituent legal orders, there must be a set of ‘framework principles’ which create coherence and integrity without eroding any participant’s authority claims and thus act as a common basis for discourse⁵⁵. They are meta-constitutional values, which, being inherent in the very idea of law, are already extant in all legal orders, and can act as common ground on which the CP discourse can be based.⁵⁶

Their function is to erect a perimeter wall around judicial decision-making across legal orders so that, while the premise of each polity’s decision may be different,

⁵³ Maduro n53, contra 525

⁵⁴ Miguel Poiars Maduro, ‘In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in times of Pluralism’ (2013) 2 Wisconsin Law Review 541.

⁵⁵ Maduro n53...Contrap 524

⁵⁶ Maduro n53...Contra p 524

the output is a generally compatible body of work spanning all participant orders. He calls these principles contrapunctual law. In what follows, I set out Maduro's constitutional pluralism, which is one of the two pillars upon which I build a model for Ghana. Because I draw on the European literature to inform my crafting of a version of the philosophical principle that, like its European counterpart, is unique to the circumstances for which it is developed, I focus on those of his proposals that apply to the situation under study. Any prong of his theory omitted is done, not to distort his European model, but to build an African one.

2.4.1. The Principles of Contrapunctual Law

The meta-goal of Maduro's constitutional pluralism is inclusion and participation.⁵⁷ He argues that this is best achieved by enhancing the democratic processes that generate and sustain the constitutional discourse so that the circle of those who can access and contribute to that discourse widens increasingly⁵⁸. The overarching purpose of the principles of contrapunctual law is to form a framework within which the competing legal orders can act pursuant to their self-chosen identity while participating fully in the coordinating legal order and without breaking the unity of that larger legal order. In this section, I extract the import of the principles from Maduro's Eurocentric discussion and set them out in context-neutral form to filter out those insights which can apply beyond Europe.

⁵⁷ This idea runs through all his writings on CP. See eg M. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in Neil Walker (ed.) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501

⁵⁸ Miguel Maduro, "How Constitutional Can the European Union Be? The Tension between Intergovernmentalism and Constitutionalism in the European Union" in J. Weiler and C. Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper No 5/04, 2004

2.4.1.1. Pluralism

The first contrapunctual principle he calls pluralism. It comprises a foundational and a participative dimension. The foundational element is the premise that each order's self-chosen identity is valid and that there is value in the multiplicity of orders -ie in the pluralism itself.⁵⁹ In order to protect the pluralist arrangement and yet keep the common basis for discourse, every participant order must be mindful when changing a norm shared with the other legal orders to change it only in a way that can be accommodated by the other norms.⁶⁰

The participative dimension stresses the importance of wide participation in the coordinating order. This is both at the level of individual citizens and of participant orders. Mechanisms must be put in place to enable orders with less bargaining power to also discourse with the larger order.⁶¹ Unless the constitutional discourse lets in as many voices as possible at both levels, it becomes undemocratic and loses some of its legitimacy.⁶² The fewer the voices in the discourse in a pluralist setting, the harder the coordinating order will find it to hold on to the political sovereignty it needs to relate heterarchically to the other orders. If ordinary citizens are locked out of the coordinating order, they will lose interest in it and withdraw from direct interaction with it. The coordinating order will then become dependent on cooperation from the participant-orders to reach the populace. Such a state of affairs negates the first-level pluralism (ie

⁵⁹ Maduro, n53 526

⁶⁰ Maduro n53 526

⁶¹ Maduro, n53, 527

⁶² Maduro, n53, 527

explanatory pluralism). The two dimensions of the contrapunctual principle of pluralism are therefore complementary and essential.

2.4.1.2. Consistency And Coherence

This principle synchronises both how participating orders interact with the coordinating order and how they interact with each other. It demands consistency vertically (i.e., between coordinating and participating legal orders) and horizontally (i.e., between participating orders). Thus, each order determines issues within its competence according to its own identity and constitution. Yet there is such commonality in the reasoning that over time the body of work that emerges collectively is coherent and consistent. Participant orders must make their decisions fit prior decisions by the courts of the coordinating order and also that of other participant orders. Participant orders must adapt their local rules and apply them in line with contrapunctual principles.

This allows for discourse between the participant orders; a discourse which is critical to the maturity of the common ground on which the wider constitutional discourse is built.⁶³ Though it may perhaps sound counter-intuitive, the idea of consistency and coherence is fundamental to dispensing justice and the rule of law, at least within the common law tradition. Without consistency and coherence, judicial outcomes are unpredictable. This breeds injustice because it means different parties with similar problems may have different outcomes. It also means the larger public is

⁶³ Maduro, n53, 527-8.

unable to draw any reliable data to inform their decisions from judicial outcomes. That ability is, as Finnis says, the core of the value of the rule of law⁶⁴.

2.4.1.3. Universalizability.

The aim of this principle is to nudge the orders closer in posture so that citizens in different participating orders can have a similar experience of the affected matters. The core of universalizability is that the decisions of all member orders should be argued in universal terms. In other words, the judicial reasoning of participant orders must not be in such parochial terms that no other order can apply it without feeling its identity eroded. Instead, all judicial reasoning should be grounded in doctrines that other participant orders can apply. The coordinating order plays a crucial role in the participant orders' inclination to do this. If the participant orders are assured that their decisions have greater reach when argued in universal terms, they are significantly more likely to commit to doing so and will be mindful of the impact of their decisions on future disputes within other parts of the coordinating order.⁶⁵ In the long term, if universalizability is observed, it will lead to palaces feeling bound by decisions of other palaces on a matter.⁶⁶

⁶⁴ John Finnis, *Natural Law and Natural Rights*, (Clarendon 1980), 272

⁶⁵ Maduro, n53, 530

⁶⁶ Maduro, n53, 530

2.4.1.4. Institutional choice.

Pluralism offers forum shopping options for citizens. This means that the institutions of each legal order must constantly reflect on their own methodology, strengths, and weaknesses. They must assess the institutions of other orders similarly. As Neil Komesar's work has shown, comparative institutional analysis is not intuitive to institutions. But their self-centredness is actually detrimental to their efficacy and legitimacy.⁶⁷ The contrapunctual principle of institutional choice requires the actors of each participating order to reflect both internally and comparatively and thereby foster greater awareness each of their limitations and virtues.

The value of this awareness is that it makes each order less likely to take intractable but self-destructive positions and makes each more inclined to parry when faced with a potential conflict in which it is the weaker party. Thus, by acquiring greater awareness of its own limitations and the virtues of the other participant orders, each order, though maintaining its identity and asserting such sovereignty claim as it chooses to, will work to avert conflicts it cannot win. The knowledge that another order is stronger in some space will make the order which is stronger in a given conflict disposed to be gracious and allow the for-the-moment-weaker order to retreat without surrender. In the long term, an intricate dance of power will be learnt by all orders which will keep some form of equilibrium between the competing claims.

⁶⁷ Neil Komesar, *Imperfect Alternatives Choosing Institutions in Law, Economics, and Public Policy* (UCP 1997)

These principles offer me useful touchstones for my own thought. I do not intend to adopt them *in toto* as Maduro envisioned them. In fact, I am alive to the danger of monism inherent in the successful application of contrapunctual law as articulated by Maduro. Therefore, by assessing the weight of the critiques levelled against contrapunctual law in Europe, I hope to refine them to provide Africa-appropriate, really pluralist set of guiding principles for my work in chapter 9.

2.4.2. Critiques of Contrapunctual Principles.

In the EU context horizontal universalisation means that the decisions of each member's court, must be based on its estimations of what would be best for the EU and all its members. So, for example, a decision on, say, Sunday trading by the *BfVerg*, though rooted in the German Basic Law must be reasoned such as to be capable of being applied by the British courts whose decision would not be based in the German Basic Law. It is easy to see why this contrapunctual principle meets with resistance and criticism. Klemen argues that it erodes the respect for the identities chosen by both itself and the other orders and the value of self-determination when actors of each legal order make their decisions not with their own identities at the core, but with an eye to securing the collective, cumulative identity.⁶⁸ There is force in this objection. The decisions of the courts of one order do much to vindicate the normative claims made in the content of constitutional rights of that order. To determine the implications of those rights so as to arrive at a conclusion that will fit with the identities chosen by other legal

⁶⁸ Klemen, n5, 106. See also ch8

orders is to create over time an identity for each of them that does not reflect the identity they originally chose.

However, the objection falls in on itself because including the perspective of another entity in one's decision-making is only incompatible with self-determination if it is not by choice. If it is voluntarily done, then the mere fact that one's decision is designed to fit into another order does not by itself remove control over one's identity. Such inclusion is done deliberately, thoughtfully. The deciding order picks which angle and to what extent it adjusts to the 'greater good'. It accepts or rejects a view from another order as it deems fit and carves new principles that though not incompatible with those other orders are in fact suited to its core identity.

The most forceful objections to Maduro's CP, for my purposes, lie in the degree of coherence and commonality he seeks in the unified legal order. As Walker observes, too much insistence on consistency and coherence leads back to a hierarchical setup; in which case we have returned to the monism from which we fled.⁶⁹ It is not unfair to say Maduro's CP is a method of managing explanatory CP until it disappears. Unmitigated, Maduro's CP leaves little space for difference, or idiosyncrasy in the unified legal order.

Even in the EU, whose members, it could be argued, are at present, somewhat homogenous in philosophy- underpinned as they tend to be by liberal democratic ideals; the elimination of difference is a traumatic event for citizens. Brexit,

⁶⁹ Matej Avbelj & Jan Komárek, 'Four Visions of Constitutional Pluralism' (2008) 4(3) *European Constitutional Law Review* 524, 526

and other anti-EU sentiments owe a good part of their traction to the sense of loss engendered by this erasure. In a country like Ghana, where the constitutional ideology and therefore (cultural) identity of the tribal orders span a dizzying range; the uniformity sought by Maduro's CP will be nothing short of devastating for citizens.

Furthermore, it is not clear that it is possible for legal orders so differently premised to understand what would be best, each for the other. Maduro's CP imposes a huge burden of knowledge on each legal order. Even in its native EU, the horizontal consistency requirement places quite a burden on each member state to know other members' statute and case law, and jurisprudence to a degree significantly more than it would have, even in conflict of law cases, and certainly in any other case. Put in the Ghanaian context, that burden becomes herculean. Asante, for example is matrilineal and the Ga are patrilineal. To understand Ga-ness enough to align its decision-making to the best Ga interests, would require Asante customary adjudicators to undertake extensive study of Ga culture and constitution. The payoff just does not seem worth it.

These criticisms would defeat my interest in the contrapunctual principles if I were looking for a theory to apply *in toto* to Ghana; or if I subscribed to them in the full form that Maduro conceived them. But, as I have noted several times before, applying European solutions to African situations is not my mission. Furthermore, while I am impressed by the strengths of Maduro's principles, I part with him on important points of their scope and utility. In my view, the second and third principles (i.e. consistency and coherence, and universalizability) need not be opposed to difference between systems. It is sufficient that they are opposed to unintelligibility. That the pluralism is

or can be a virtue does not mean it is not chaotic. But the virtue is lost if the chaos is completely eradicated. Maduro's preoccupation with consistency and coherence heads towards the tidying away of the pluralism. This not being my purpose, I accept the importance of seeding some consistency in the shared jurisprudential space without needing it to be the central object of courts or palaces in their decision-making.

Again, I do not think universalisation should entail courts treating as binding decisions made by another member-order's courts. The point should not be for the systems to arrive at exactly the same decision at all times. It is to provide judicial principles that can guide decision making across different systems with shared interests but distinct identities. I think that universalisation only requires that member-orders abstract the principles upon which their decisions are made in every dispute in terms accessible to other member-orders. So that a cross-polity discourse that spawns jurisprudence rooted in palace-court-academy interactions can be meaningfully had. Constitutional theory concepts are informed by the experience and realities of the particular systems philosophers study. Nevertheless, they are able to produce universalizable theories that are studied, applied, refined, rejected by different systems within the constitutionalism discourse across the world. There is no reason why such a discourse should not be possible across systems within the boundaries of Ghana.

Even a rejection requires an engagement with the rejected principles; a discussion of why they ought to be rejected by a particular system. This reflective act purifies the reasoning upon which contradictory courses of action may be taken by

components parts of one coordinated space without leading to confusion. Reasoned disagreement improves the quality of the public reasons of a people. This is the value that incorporating universalizability, and consistence and coherence bring to the space. It would be very difficult for a Ga palace to apply certain Asanteman decisions *mutatis mutandis*. But having 'Asanteman reasoning extracted from 'Asanteness' allows other systems to look to Asanteman decisions for guidance, even if only to find reasoning it cannot endorse and have to articulate why it cannot participate in such reasoning. That articulation itself becomes part of the larger discourse and creates a vessel for the differences in reasoning and as well sustaining the tension bubbling between systems vying for greater respect of their methodology.

A major flaw of Maduro's CP is that it sees no value at all in disagreement of any sort and so does not allow for it. This is unfortunate, for disagreement is in itself valuable. It develops public reasoning by involving multiple perspectives in a society's discourse on its morals, direction, and principles. As Bernard Williams noted, 'disagreement does not necessarily have to be overcome. It may remain an important and constitutive feature of our relations to others⁷⁰, I would go further and argue that the right to disagree underlies many human rights and freedoms including the freedoms of association, religion, conscience, and the right to equality. Thus, to so focus on coherence and consistency that inter-order agreement becomes an overriding value is to wipe out the very pluralism Maduro seeks to preserve.

⁷⁰ Williams, Bernard, and A. W. Moore. *Ethics and the Limits of Philosophy*. (Routledge, 2006), 133

Another, less persuasive critique of Maduro's pluralism is that it focuses on the sphere of 'how' rather than 'what' or the 'who decides who decides' that is the heart of constitutional pluralism theory.⁷¹ That is to say, it focuses on the principles by which the decisions should be made - whichever those may be and whoever might end up making them.

It is not clear to me why this is a demerit. The lack of engagement with the question of what the concessions should be does not *ipso facto* undermine the coherence of its argument on how the concessions should be made. It seems to me that one way to approach constitutional pluralism normatively is to attempt to work out what spheres should belong to which order. But another, equally legitimate, equally normative approach is to determine how the orders might take their decisions to reflect that mutual respect. The question of who decides who decides becomes less pressing because the negotiating stance created by the concessions made to the methodology of decision-making sets a negotiating posture in each legal order.

In the Ghanaian context, the focus on 'how' is in fact much more capable of achieving a feasible normative position than is a focus on substantive concessions or the identity of the definitive arbiter. The state's usually and intractably monist posture has been centred on and manifested in 'who decides who decides' struggles. It is unlikely that it will examine its sovereignty tensions with customary law orders through the same frame as it always did and yet arrive at a different answer. Changing the frame from an issue of kompetenz-kompetenz to one of methodology recasts the

⁷¹ Klemen n5 241-249

manifestation of sovereignty away from the Schmittian model that affirms the state's monist urges.

The criticisms of Maduro's principles are not frivolous. Unmitigated, his theory leads to a place that is not terribly dissimilar to Griffith's legal pluralism. It seems to suggest that pluralism is, in the long-term, undesirable and is therefore to be disciplined until it effectively disappears. I do not accept this position. My own view is that pluralism is desirable and should be preserved. But that is only possible if method is brought to the madness. Because of its focus on method, Maduro's contrapunctual principles offer some very apposite insights for my theorising endeavour in the next chapter. Thus, mindful of the excesses of his work and alert to on the fork in the road between our views, I extract the value from his theory without endorsing it in full.

2.4.3. The Strengths of Maduro's CP

Having studied both Maduro's theory and its reception in the European academy, we now know what not to take from it. But what exactly is there to take? This section digests the value to be found in the contrapunctual principles and enable us to prepare to tap into that value in the next chapter. Because the tensions between the entities are focused on sovereignty, much of the discourse on the practicalities of constitutional pluralism in the EU is focused on conflict between EU law and national constitutions⁷². But as Maduro points out questions of ultimate authority do not arise solely in the

⁷² MacCormick and Kumm for example focus much of their CP writing on this sphere of conflict.

context of kompetenz-kompetenz or legal sovereignty. They arise also, and intensely, in respect of political sovereignty.

The approaches that focus on the kompetenz-kompetenz issue have the weakness that they are designed only to respond to that unlikely, or at any rate infrequent, occurrence. They cannot guide the ordinary state of affairs⁷³. To me, this is a critical weakness, not only because the possibility they focus on is rare, but also because the ordinary state of affairs is ever more likely to generate conflict, and it is in this continued state of conflict that cankers fester into an ultimate conflict moment. The contrapunctual principles, by contrast apply to judicial decision-making at all levels and about all constitutional matters. Thus, it is suited to the everyday challenges of coordination thrown up by the explanatory CP. This makes it a helpful set of thinking points for the factual situation in Ghana.

Furthermore, an approach such as Kumm's liberal legal pluralism⁷⁴ creates an artificial line between the rules of the coordinating order and the rules of the sub-orders. According to that theory, derogations by participant-order courts do not form part of the body of law of the composite order. Their effect and impact remain at the participant-order level. This artificial line serves no real purpose because the

⁷³ Maduro, n53, 532.

⁷⁴ See eg Matthias Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351; ^[1]_[SEP] Matthias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,' (2005) 11 ELJ 262.

derogations, though unacknowledged by the coordinating order, continue to affect lives within its boundaries. With enough derogations over time, there will be no synchrony between the laws of the different participant orders and therefore between the experience of their citizens. In that case, liberal CP would have made no impact on the coordinating order's viability. Contrapunctual law rewards cooperation by extending the influence of each order's thinking through universalisation of decisions and consistency across orders. Thus, it allows the coordinating order to interact with citizens even in those spheres dominated by the participant order through shared decision-making values and therefore outcomes.

Another strength of Maduro's CP, for our purposes, is its position that, despite their assertions otherwise, the courts of neither legal order -ie coordinating or participant- is, in fact, the final arbiter of where the boundary between the competencies of the two legal orders lies. This may be viewed in the less fraught context of the EU as a weakness; but in the Ghanaian context, it is precisely the indeterminate nature of that boundary that makes CP able to accommodate the tension peaceably. In the competitive prong of the model of constitutional pluralism I build, the people collectively, but demonstrated through individual choices are the arbiter of 'who decides who decides.' Citizens are able to forum-shop for remedies; using the state courts to enjoy a right they could not possess under their customary law order and the palaces to quickly and comfortably assess those rights which they possess under both.

The value of institutional choice is obvious here. As the spaces within which the citizen's willing preference of state options widen, the palaces will, out of existential necessity, review their own remedies and create an option within its order for the result the people seem keen on. But unless the palaces have reason to worry about their continued relevance, they will, as is the way of monopolies, be intractable about changing and the powerful demographics within their spheres (such as males and the elderly) will grip firmly the privileges and rights they enjoy at the cost of weaker demographics (such as women and children).

In the early twentieth century, the colonial government in Kumasi began entertaining civil actions in damages for adultery brought by women. In Asante customary law, damages for *ayerefa* (wife-taking) could only be awarded to the husband of the adulteress against the adulterer. The wife of the adulterer was not deemed to have been wronged.⁷⁵ When the colonial Native Tribunals⁷⁶ awarded damages to a wife against her husband's married paramour, the flurry of similar cases that followed caused the Asanteman *Nhyiamu* to consider how to address this concern within Asanteman's authority.⁷⁷ The CP state will compete with traditional power in the sphere of FHRFs, and offering real alternatives to customary law remedies, compel

⁷⁵ JB Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (Routledge 1928)

⁷⁶ The chief's palaces became converted to Native tribunals under the Native Jurisdiction Ordinance. But as colonial supervision changed the terms of their authority, they were no longer able to enforce punishments unapproved by the colonial authorities. This really altered the enforceability of efisem decisions and gave women the opportunity to opt-out of the passive third party role *ayerefa* traditionally offered them.

⁷⁷ Jean Allman and Victoria B. Tashjian. "I Will Not Eat Stone" a Women's History of Colonial Asante. (Heinemann 2000Ch5. Admittedly, the Council's posture was to try to crush this new insubordinate attitude in women by with edicts like the Women's Fidelity Declaration Order. Nevertheless, my example is still valid. For had colonial British sensitivities not been patriarchal, the output of that self-reflective moment in Asanteman customary law would have surely been different.

the tribal orders to reflect and reform their own institutions. Being mindful of the value of institutional choice will empower the state to act thoughtfully to expressly trigger such institutional introspection within the customary law systems.

Lastly, Maduro's CP focuses on carving out a coherent unified legal order, plurality notwithstanding.⁷⁸ It is understandable that this mission has met with resistance in the EU; where the coordinating order derived its initial existence from the participant orders. It is unsurprising therefore that the participant orders are hostile to the idea of being incorporated into the coordinating order operating as a self-referencing order. States do not easily accept the authority of a non-state. In Ghana, the situation is reversed. It is not states resisting incorporation into a non-state, but non-states resisting *complete* integration into a state. Because the component units possess, to varying degrees, traits of sovereignty, they too offer resistance. But unlike the fully sovereign states of Europe, their resistance is to a complete incorporation rather than the idea of incorporation.

The problem arises because a state is simply not capable of letting another entity determine the scope of its agenda. It would cease to be sovereign if it did. A coordinating order that is both a state and born completely independently of the member polities is even less likely to do so. But as the 1992 Constitution both proves and requires, a unified legal order to exist, the effort to create one in Maduro's theory is a

⁷⁸ Miguel Maduro, 'The Heteronyms of European Law' (1999) 5 ELJ 160,

strength rather than a weakness. Thus, while the overenthusiastic focus on coherence must not be heeded, the call to keep an eye on coherence within the composite order should.

Conclusion

In this chapter, I have explored a selected range of constitutional pluralism literature extensively. The aim of this study was not to find a strain of CP to import into Ghana and apply *mutatis mutandis* to that constitutional discourse. Rather, it was to draw insights from some of its most well-articulated strains that I can reflect on as I produce a theory of CP built on the facts of the Ghanaian reality and therefore authentic to the Ghanaian sovereignty challenge; a theory that will deliver to the citizen-subject equal access and enjoyment of both her statal and tribal identities.

In that mission, Joseph's Weiler's principle of constitutional tolerance has resonated well with me. But finding that it is vague on how the relationship between the participating orders will be regulated, I looked to Maduro's contrapunctual principles for methodological meta-principles to shape the theorising exercise of chapter nine. However, it is so focused on unity within the legal order that its final destination is the erasure of difference and disagreement. Thus, while I learn much from them, I take them merely as thinking points rather than as the theory to apply directly in Ghana.

Based on these insights, the key result our CP theory must produce is a space in which competing legal orders continue to compete for supremacy yet do not destroy each other nor leave the citizen paralysed by conflicting loyalties making irreconcilable

demands of them. The way to achieve this elusive goal is for the state to reposition itself to foster and also participate in a heterarchy with all other legal orders. With no order conceding the supremacy of another, the space continues to contain tension. But, with a new focus on proving its sovereignty claim instead of the westphalian focus on disproving another order's claim or forcing them to renounce it, CP prevents that tension from resulting in destructive collision.

However, it must be remembered, the aim of CP is not to eliminate the tension, but to turn it into motivating device that nudges legal orders to give a better deal to their citizens/subjects in order to get them to respond more strongly to their sovereignty claim than any other legal order's. In crafting a CP theory, one must bear in mind that, on the one hand, a heterarchical relationship requires all participating orders to accept the identity of the other participating legal orders and their right to choose that identity for themselves. But on the other, free rein on what that identity will be can lead to excessive focus on nationhood which will either tear apart the state, as each of the participating orders pushes their chosen identity to its absolutist form; or force a single standard identity on all citizens across legal systems.

Systems like Asanteman have the means to pose the former kind of danger. But weak, and/or impoverished orders like some Guan groups⁷⁹ face the great danger of

⁷⁹ Many Guan groups already struggle to preserve their distinctness from their larger neighbouring tribes. The Obutu have been subsumed by the Ga. See Paul Ozanne, 'Notes on the Early Historic Archaeology of Accra' (1962) 6 Transactions of the Historical Society of Ghana 51, 53, 64; the Esti and Aowin have been swallowed by the Fante. See Richard Gray (ed) The Cambridge History of Africa: From c. 1600 to c. 1790 (CUP 1975) 297, and so on.

being recast into the mould of the larger, more powerful Asante identity. In chapter 7, we saw how this remoulding- in that case *Tswanification*, though it has been economically advantageous for the people of Botswana at large, has been very traumatic and diminishing for the Kalanga, Wayeyi and other small minorities. The variations in customs are defining strokes of the many communities that make up Ghana. Erasing one community's distinctiveness to make them resemble a larger group is distastefully reminiscent of ethnic cleansing. Even if it were not morally wrong; it is discriminatory and therefore unconstitutional under Ghanaian law.

The theory of Ghanaian CP that I propose in the next chapter, seeks to balance difference and common experience to create of Ghana a place that is familiar, yet constitutionalist. It does this, the reader is reminded, because the mission of the thesis is to help the state restructure its relations with the tribal polities within her boundaries so that, the tensions generated by their conflicting sovereignty claims neither explode nor dissipate. In this taut but peaceful state, the citizen-subject will find an empowering ability to partake equally in her identity as a subject of her tribal polity and a citizen of her nation-state. With this power, the citizen-subject -especially the rural one, can craft and pursue a vision of self-actualisation aided not impeded by both authors of her frame of reference.

Chapter 9

Ghanaian Constitutional Pluralism- theory and practice

Introduction

In the last chapter we found helpful thinking points for our Ghanaian CP in the work of JHH Weiler and Miguel P Maduro. In this chapter, I draw together those insights and articulate an original CP strain that will speak to the situation in Ghana and similarly positioned postcolonial African states. The chapter is in two parts. In the first part, I construct my theory of Ghanaian CP. In the second part, I explore some practical ways in which this CP posture can be more fully infused into the Ghanaian small-c constitution.

Part 1- A Ghanaian Theory of CP

In the previous chapter, I chose to be guided by Weiler's principle of constitutional tolerance and Maduro's principles of contrapunctual law. In this section, I draw on the insights from those two theories, and, examining the Ghanaian constitution as epitomized by the state and Asanteman legal orders, I articulate an indigenous CP theory.

1.1. What does the theory aim to achieve?

It is important to keep in mind the objective of this theorising effort to ensure that the theory which emerges is actually fit for purpose. I therefore set out in this section the aims of the theory as a guide to its evaluation. Tribal polities provide for their subjects a frame through which to make meaning of the world. It is this critical role they play in

the life and experience of the citizen-subject that justifies the effort to preserve rather than destroy the pluralism that inheres in Ghanaian society. The ideal constitutional situation for Ghana is, therefore, one in which all the following are true:

- a. different citizens belonging to different tribal polities, can hold, enjoy and take pride in their identities as members of those polities and also as citizens of the state.
- b. citizens can continue to interpret the world through the frame of their tribal customary law.
- c. all citizens enjoy the same FHRFS regardless of where in the country they live and to which tribal polity they belong.

A successful theory of Ghanaian constitutional pluralism will achieve this difficult task, or, at least, come closer to achieving it than any other option available.

1.2. The Theory

The way in which Ghana can achieve the objectives stated above is to become a constitutionally pluralist state in the normative rather than explanatory, ie merely descriptive, sense. To do this, the state must cultivate a two-toned relationship with the tribal polities within its boundaries. At one end, it must collaborate with them to achieve mutually beneficial ends. In the collaboration, areas of commonality are identified, admitted, and developed. At the other end, the state must compete with the tribal polities to become the citizen's preferred avenue for vindicating her rights. The question of which spheres are for competition and which for collaboration is one with which the state must continuously engage. Where the aim of competition is achieved in a

particular sphere, it should then be redefined as a sphere of collaboration. The state can then direct its competitive energies towards a new sphere in which they are required.

By identifying a sphere as one of competition, the state essentially draws a line indicating what it will (not) tolerate and where it will (not) intervene. In this way, the state participates in the constitutional discourse as both a participating order and the coordinating order. In the former role, it engages with other legal systems as peers. In the latter, it engages as *primus entre pares*; mediating, directing, and supervising the discourse itself and the participating orders translation of that discourse into their policies and practices. In the judicial sphere, this collaborative-competitive relationship will entail courts collaborating, in some instances, with the palaces to deliver a FHRF in a culturally resonant way, and, in others, competing with them to offer FHRFs that do not exist in customary law.

It is critical to the effectiveness of this theory that the collaborative-competition result in a delicate balance in which the sovereignty related tension neither evaporates nor explodes; for it is in this balance that the welfare of the citizen -and in particular the rural poor citizen- is best secured. As noted in chapter 8, eroding the resonance of the tribal orders strengthens the state into a potentially abusive entity. Given Ghana's lengthy history as a tyrannical state and the 1992 Constitution's ineffective limitations on executive power which we saw in chapter 3, it would be disastrous for citizens if the state were able to shrug off the restraining hand of competing tribal power. At the same time, the worrying illiberal strains discernible in the human rights regimes of tribal polities that we saw in chapter 5 suggest that tribal power unfettered is no less

oppressive for vulnerable populations such as women and children who are placed in positions of little or no power in these polities.

The competitive-collaborative relationship advocated here pits the two sides against each other enough to avoid a perfect alignment between them in which the tribal polities are sure to be subsumed by the state. The collaborative prong tempers the competition and consequent tensions by providing each side an incentive to limit the virulence with which its sovereignty claims are articulated. By sometimes striving against sometimes working with tribal polities, the state will be empowered to shape the direction in which customary law evolves. Importantly for the pluralist discourse, it will do so without imposing its way on the polity. Asanteman may choose to innovate rather than replicate and, thus, create a solution which, though competitive is undoubtedly more Asante. In so doing, Asanteman would have moved from its original position, at its own instance, but, in line with the Constitution's parameters. Though its understanding of sovereignty makes it resistant to the idea of externally instructed change to its legal order, Asanteman could in fact respond to the need to affect that change, if it is able to assign to itself the decision and direction of the change.

From the perspective of the functionally illiterate majority,¹ the collaborative aspect brings a simplifying synchrony to those spheres of life it affects; allowing the

¹ Per the Census 2010 'A person was considered literate if he/she could read and write a simple statement with understanding.' Ghana Statistical Service, 2010 Population and Housing Census, Summary report of final results, 2012 at ix. With this definition, it assessed the literate population of Ghana at 71% (table 17). It hardly needs to be pointed out that being able to read 'I live in Accra.' With meaning does not make one functionally literate. The functional literacy rate is obviously much lower than 71%.

citizen-subject to retain the frame through which she makes meaning of the world, while participating in and enjoying the incidents of belonging to the state. As was argued in Chapter 5, Asanteman performs important roles in the citizen's life which allows her to pursue her chosen goals. Beyond rooting her in a firm identity from which all her ambitions begin, Asanteman also supplies the goods the state is sometimes unable to provide including security, sanitation, and civic education. The spheres of collaboration increase the efficiency with which these goods are delivered. In chapter 7, it was seen how the state uses the *Kgotla* hosted by the chiefs to explain policies and programmes in Botswana. AIDS education, sanitation and sustainable agriculture campaigns were all successfully implemented in a collaborative effort between the state and the tribal polities of Botswana. Both sides win in these collaborative efforts and therefore have reason to rein in the hostility that could impede them.

Meanwhile, the competitive facet will allow the citizen to opt out of the archaic and now unconstitutional aspects of customary law; thereby inducing customary law orders to engage in reflective reform in line with the aims of the 1992 Constitution. The Domestic Violence and Victim Support Unit (DOVVSU) of the Ghana Police was established to provide especially battered women a means of enforcing their constitutional right to non-interference with their persons.² As we saw in chapter 5, the customary law right husbands have to discipline their 'errant' wife is responsible for a significant portion of the domestic violence issues that Ghana has. With the establishment of DOVVSU, the state provided a forum in which women may resist the continued validity of this rule of customary law. Given the degree of power that men

² Ghana Police <<https://police.gov.gh/en/index.php/domestic-violence-victims-support-unit-dovvsu/>> accessed 1 September 2021.

wield in customary law systems, wife-beating is one of the rights that will, without external pressure, continue to enjoy pride of place among men's rights at customary law.

By providing this forum of resistance, the state has given women leverage to push back against this right and eventually see it repealed. DOVVSU's presence has not yet achieved this end. The absence of specialised courts and processes to deal expeditiously with such reports has also slowed down this line of evolution. But there has been progress³. More widespread and consistent education on the state's offer to women to opt-out of being beaten by their spouses will in time have such an impact on customary law hierarchies that the polities will be forced to engage. Already, a 2014 study recorded that the better educated a woman was, or the more frequently she absorbed mass media (TV, radio, newspapers) the less likely she is to accept wife-beating⁴. An aggressive campaign by the state to provide speedy redress for battered women will eventually cause customary law systems to revisit their position on wife-beating. This is the value of competition.

Being the order entrusted with the implementation of the Constitution to which all the orders are subject, the state must see itself as a coordinating order. In this role, it will facilitate the creation of a heterarchy by acknowledging the self-referentiality of

³ From 9393 reports in 2018, DOVVSU received 16,586 reports in 2020. <https://www.myjoyonline.com/913-emotional-abuse-cases-77-economic-abuse-cases-were-reported-in-2020-dovvsu/>

⁴ KS Dickson, EK Ameyaw, & EKM Darteh, 'Understanding the endorsement of wife beating in Ghana: evidence of the 2014 Ghana demographic and health survey'. (2020) 20(1) BMC Women's Health, 25, 7

the tribal legal orders and thereby accepting and respecting their chosen identities. In this way, the state will be able to guide the evolution of a CP constitutional order in which all citizens are empowered to be full members of both the state and polity. An order wherein, by continually engaging in positive forum-shopping, citizens cause their polities to develop the valuable aspects of customary law while trimming off the unconstitutional practices; resulting eventually in the constitutionally guaranteed FHRFs becoming tangible, national values, but nuanced to reflect the differences in the constitutional ethos of the multiple polities.

I.3.The Theory Explained

Long-time rivals, such as the state and Asanteman, cannot be expected to collaborate without some measure of reconciliation being achieved- even if, as in this case, it is only to the extent of accepting that some interests are shared and are best collaborated on. This is where the principle of constitutional tolerance comes into play. From our discussion in the previous chapter, we know that the principle of constitutional tolerance is a framework principle. I.e., it acts as an overarching constitutional principle which, framing the relations of the rival constitutional orders, both limits and empowers them to act, interact and counteract. Thus, it makes a number of demands of a would-be CP theory such as ours.

Firstly, it requires the identification of the common cause around which all the participating orders can congregate. This is how we find the ‘us’ in ‘them’. Secondly, it must contain a pillar of hierarchy which, while coordinating the legal orders, does not

establish a hierarchy among them. Finally, it must appreciate and cultivate the valuable aspects of difference present in the jurisdiction. I take each of these prerequisites in turn below and show how they can be met in the Ghanaian constitutional discourse.

1.3.1 Principles of Commonality Between The State And Asanteman

At first blush, there might seem to be little by way of common cause between Asanteman so focused on the collective, and a state order infused with a liberal democratic ethos. But on reflection of their constitutions discussed in chapters 3 and 4; shared constitutional principles begin to emerge. To be sure, the manifestations of these principles are unlikely to resemble each other in any appreciable degree. But their presence is indisputable, and they offer uniting threads that can successfully underpin dialogue at the constitutional roundtable.

The first of these shared principles I will call the principle of the valuable citizen. It is the idea that each individual within the polity possesses an inherent worth that the polity must acknowledge, respect and preserve. A polity that holds this principle as a constitutional value provides each citizen with avenues of participation in its public life, which avenues are neither tokenistic nor merely formal. Rather, they enable each citizen to meaningfully contribute to the polity's cause. Participation connotes several positive things: membership, and beyond that ownership; responsibility (from polity to citizen and also from citizen to polity), and investment.

As a democracy, the state in Ghana is built on the principle of the valuable citizen. It is the premise underlying the universal adult suffrage and other political rights enshrined in chapters 5 and 7 of the 1992 Constitution. Asanteman too offers each

citizen opportunities for participation in the collective's life. While those opportunities are unequal in scope, they are universal in existence. As noted in chapter 4, even the stereotypically drunken and 'useless' gong-gong beater is the official palace announcer. A town square announcement proceeding from the most revered *ɔkyeame* would be not only be non-binding; it would bring the judgment upon that *ɔkyeame*. The hereditary-elective nature of all public offices at all corporate levels accords each line, however humble, public acknowledgement of its worth, and a protected space for individuals within the line to participate, contribute and demonstrate their desert of that public dignity.

As mentioned earlier, the state and Asanteman manifest their subscription to the principle of the valuable citizen very differently. The former does it by allowing unrestricted competition for public office, and individual say in choosing public officers. The latter limits bands of citizens to specific levels but allows each greater access to the public offices of their assigned band. Despite the divergence in method, it is undeniable that each order believes in the value of the individual citizen and this offers some of the commonality needed to support a CP posture based on constitutional tolerance.

The second shared principle for our purposes is access to public adjudicatory platforms. As we saw in chapter 3, the state judicial machinery is a multi-tier system with authority flowing downwards in decreasing portions, but in such a way that each stratum of society, and every aspect of life is within the jurisdiction of one of its courts. In Asanteman, adjudicatory power, like all other forms of authority in that polity, flows outwards from Asantehene in concentric circles. Every matter is subject to multiple

jurisdictions. Here too authority is devolved so that all authority-holders, (including Asantehene) are supervised by a higher authority. While the state invests in the independence of the judiciary; Asanteman uses its *ntam* system to give disputants control over the choice of adjudicators. Both methods aim to shore up citizens' faith in the justice (or at least fairness) of judicial outcomes. These elaborate systems of dispute resolution demonstrate that both polities treat justice, peaceful cohabitation and goodwill within the collective as fundamental goods that must be provided and protected by the collective. This shared understanding of the import of institutional dispute resolution enlarges the common grounds on which Ghanaian CP can be constructed.

Finally, the two polities share a commitment to the idea of rights and the sanctity of those rights they bestow on citizens as a virtue of membership (ie constitutional rights). The state provides FHRFs, which are entrenched provisions of the 1992 Constitution and can only be changed by a convoluted methodology. They are enforceable through the High and Supreme Courts, and their violation can even ground the impeachment of the president. Asanteman does not take rights lightly either. Even Asantehene cannot take over land belonging to a citizen or their line. As the power to withdraw allegiance from a chief who commits adultery with his subjects' wives demonstrates⁵, rights acknowledged by the polity are defended by it. Again, the similarity of the two sides' relationship to rights is a link to 'usness' that can support a constitutional tolerance infused constitutional dialogue.

⁵ Under any other circumstance, an attempt to withdraw allegiance is treason and in pre-colonial Asanteman was punishable by death. RS Rattray Ashanti Law and Constitution (OUP 1929) section 313

The two polities express each of the principles discussed above in radically different ways. This, of course, reflects the difference in their constitutional ethos. Nevertheless, these shared principles: the valuable citizen, the importance of access to justice, and the sanctity of constitutional rights; permeate each polity and operate as meta-constitutional values. It then becomes possible to draw on these meta-constitutional values as the common ground; the ‘usness’ of our pluralist order and foster kinship based thereon. This will enable the two polities to coordinate their actions and thereby nurture a collaborative relationship between them.

1.3.2. The ‘Hierarchical Pillar’ of Ghanaian CP

Liberal theories of state see the birth of the state as a result of sovereign individuals coming together and voluntarily contributing- if you will- some of their sovereignty to a pool which then creates a state whose purpose is to facilitate each one of its member’s use of their sovereignty to achieve their dreams. The state is therefore the coordinating authority and members defer to it not as subordinates, but as principals who trust their agent to have ordered affairs in line with their mandate and whose instructions are therefore beneficial.

The pillar of hierarchy in CT occupies a similar space in CP theory. Although central to the idea of CP is a heterarchy in which all legal orders are treated with equal respect; there cannot be any meaningful evolution without a moderator guiding the discourse along the lines of the Constitution. The mutual respect between orders may create an enabling space for a constitutional dialogue, but it will not alone ensure or

guide one. As every negotiation requires a mediator and parameters, so the creation of a functional heterarchical space requires a moderating and containing force.

The question of which legal order should play that role can itself generate explosive tension. In Ghana, every so often, there springs up a movement whose mission is to get the country to use a local tongue as the official language. Each time, the movement is broken by disagreement just when it has gathered enough traction to raise the question of which of the myriad native tongues should be so elevated.⁶ As a result of the competition between tribal orders for supremacy or at least equality as between themselves, the state's – or more specifically for our purposes, the courts' - role as the coordinating legal order is not especially contentious. As discussed in chapter 5, one of the ways in which the state offers value to Asanteman and other rival systems is to mediate when hostilities arise between tribal polities.

In the absence of the state, there would be no pluralism in Ghana. There would be no Ghana; just multiple tribal polities of varying strengths and sizes. It is a pluralist space because there exists a legal order which shares citizens with all the other legal orders and generates the necessity for them to interact with it and in interactions with each other, act peaceably. Indeed, it is by the state's existence that the borders of the space are even delineated to produce a pluralist space. Thus, the state's legal order, in its role as the coordinating legal order, brings the 1992 Constitution which is the pillar of hierarchy of into the CP space, by undertaking to ensure that the heterarchical discourse is contained within the boundaries of the Constitution.

⁶ SKB Asante, 'Musings of a Ghanaian Chief', Ephraim Amu lecture 2018, (GAAS 2018)

The final prong of constitutional tolerance we must incorporate into our CP theory is that it must cultivate difference. Our study of Botswana teaches that too much collaboration can become collusion. As Weiler argues, overemphasizing us-ness tends to lead to a progressively aggressive agenda to expand the common grounds until no difference is discernible. By becoming integrated into the state legal order, the leaders of the tribal legal order become increasingly more attuned to the legal order into which they have been co-opted than the one for which they were appointed.

In Botswana, where the palaces have been absorbed into the state structure as customary courts, the uniformizing urge is strong. The minister can by executive order instruct a customary court to apply a named piece of legislation to a particular dispute⁷. This setup sometimes leaves little room for cultural perspectives. The federalism of Nigeria results in the opposite outcome. Customary law courts are separate from palaces but also from state courts and can only apply customary law rules. To the extent that they are not actually unconstitutional, customary law rules cannot be overruled by the customary law courts. The positive part of the result is that the differences between the multitude of customary law systems are preserved. The negative part is that it preserves them with no distinction between the good and the constitutionally suboptimal.

The competitive facet of this CP theory is the anchor for the cultivation of valuable difference. It prevents the excessive degree of alignment bicameralism creates and ensures that the different methodologies of the various tribal polities are respected.

⁷ Bogosi Act 2011, section 17

By its nature, the competitiveness will only be triggered in respect of areas where customary law change is necessary. Having to persuade citizens to prefer them over the courts pressures the palaces into positioning themselves as the more authentic forum in which the citizen's identity is understood and appreciated. The innovative responses Asanteman will have to come up with will maintain the core values and methods of Asanteness. The new solution will thus be both constitutionally compliant and decidedly Asante. The idea of competition, which will be further developed below, supplies the third pillar of constitutional tolerance. At the same time, inculcating constitutional tolerance in our composite constitutional order stimulates the conditions for competition and collaboration to thrive.

1.3.3. The three Cs of Ghanaian CP: Conflict, Competition and Collaboration

Beyond creating competition and collaboration between the participating legal orders, the CP theory must, crucially hold them in a delicate equilibrium. In this section, I explain why collaboration and competition are each desirable. I also explain how the danger of conflict is crucial for the attainment of this paradoxical equilibrium.

1.3.3.1. What is the value of conflict?

It seems counterproductive to produce a theory to manage a fractious relationship expressly to avert conflict and then, within that theory, extol the virtue of conflict. But there is actually nothing contradictory in it. The very idea of accommodating rival sovereignty claims implies an appreciation for the value of inter-order friction. CP retains the existential threat that the other orders pose to the state within the tempered

relations of collaboration and competition. It aims not to eliminate it but rather, to manage it.

This is important. If either side were to actually accept the sovereignty of the other, it would remove the friction in their relationship and revive the possibility of a collusion that is very disadvantageous to the citizens. For example, in *Ramantele v. Mmusi & Others*⁸, the Attorney-General of Botswana, though admitting it was discriminatory, defended the Tswana customary law rule of male ultimogeniture on the grounds that Botswana was not ready for gender equality. Had there been the sort of taut tension underpinning a CP order, the state would have been more likely to use its resources to attract loyalty to itself from citizens. Conflict rooted in the cross-purpose nature of their individual sovereignty claims, keeps the competition from being amicable even as the collaboration keeps the enmity from being all-consuming.

1.3.3.2. Why Should The State Collaborate?

There are both normative and pragmatic reasons why the state should collaborate with Asanteman. At the normative level, collaboration diminishes the legitimacy deficit the state suffers in the eyes of significant portions of its population. One major source of the EU's legitimacy deficit is its elite agents.⁹ The cost and information demands of participation in the EU's courts exclude many demographics while allowing over-

⁸ [2013] BWCA 1

⁹ MP Maduro, 'Contrapunctual law: Europe's Constitutional Pluralism in Action' in Walker N (ed) *Sovereignty in Transition* (Oxford University Press 2003) 527

participation by multi-national companies who are able to assemble cross-national legal strategies¹⁰. This is, in some measure, true of the courts in Ghana as well. Courts have requirements and methodologies that are so dissimilar to the palace system that citizens who live primarily under customary law are often excluded from participation in the courts.

As our study of Asante showed in chapter 5, the palace adjudicatory processes are oral. Literacy is not required. No lawyers are permitted, and the process is not always adversarial. For those citizens who order their affairs primarily in line with customary law, the palace system is familiar, friendly, and personal. Their mastery of the processes and modes of decision making; and their familiarity with the power hierarchies give them real access to the forum¹¹.

Additionally, palaces resolve disputes in their native tongue while courts operate in English¹² – providing a translator when needed. There is a profundity to the legitimacy enjoyed by a native tongue forum simply in virtue of the use of the native tongue. Kymlicka has argued that language- being the means of perpetuation of its values, procedures, and general ethos-, is the single most important support of a culture's survival.¹³ Rural citizens, with their literal and metaphorical fluency in the

¹⁰ Ibid

¹¹ Brian Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (2011) 3(1) Hague Journal on the Rule of Law 1.

¹² There doesn't seem a feasible alternative however. The choice of English as the state's official language has no constitutional backing. But, as SKB Asante has pointed out, it is meant to give all tribal orders equal footing before the state. He asserts, plausibly, that disagreements over which one could degenerate into war should we attempt to replace English with a native language.

¹³ Kymlicka, n... ch6

language of the adjudicators, feel an ownership of palaces that encourages participation in the order that validates them.

By contrast, the courts with their common law ethos and documentary bent are neither familiar nor friendly. This leads to an ‘othering’ of the users of courts and therefore of FHRFs¹⁴. Collaborating with the palaces enables the state to borrow the legitimacy of the palaces and create an access point for its excluded citizens to explore what it offers them. Over time, this association will make courts both more familiar and more trusted and less daunting to those currently excluded from it.

On the pragmatic front, the state simply does not have the resources to achieve all its goals on its own. With over eighty tribal polities within its boundaries, the state will find it exceptionally difficult to adjust its form to every single group and resonate with their subjects while retaining a coherent legal order. Even if it could indeed replace the palaces with its own courts, it would be injudicious and inefficient to channel its resources to dismantling the extensive infrastructure that provides tribal dispute settlement avenues.

Moreover, such a move could only be received as a threat to the identity of the tribal polity and would be too reminiscent of the arbitrary state of pre-1992. The

¹⁴ Tamanaha observes that the foreignness of the state's tongue adds to a perception that it is ‘alien or inscrutable’. Tamanaha n11, 3

resultant distrust and resentment would hasten rather than avert destructive conflict. Collaborating with the palaces allows the state to tap into the existing infrastructure and thereby arrive at its goals more expeditiously.

1.3.3.3. Why Should The State Compete?

Competition historically leads to friction. Therefore, it seems counterproductive to ask the state to expend energy fostering a cooperative spirit within the composite order in one breath. Then in the next, urge the state to reintroduce tension and friction into the same space it has been working to bring goodwill. This section explains the benefit of cultivating competition in the same relationship into which collaboration has had to be consciously inculcated.

There are, once again, sound normative and pragmatic reasons for the state to be in direct competition with Asanteman. The state guarantees to all citizens an extensive and impressive array of rights which are designed to improve the quality of their life. But, as already discussed in chapter 5, many of these FHRFs do not exist in customary law. Indeed, in chapter 5, we saw that such acts as banishment, group religion and corporal punishment remain elements of tribal law. The state cannot expect Asanteman to willingly eliminate these elements of its regime just because they are incompatible with the 1992 Constitution. Nor can it forcibly compel it to do so without imposing an unsustainable hierarchical relationship upon it.

But by competing with them, the state creates alternative avenues of redress for citizens. This new choice breaks the monopoly of the tribal polities on the delivery of rights. Patronage of the courts' regime by subjects will compel tribal polities to either cede those matters to the state's jurisdiction or amend its unsatisfactory regime to offer a competitive alternative. That alternative will necessarily be geared in the same direction as the courts' remedies and thus, the FHRFs. Over time, the tribal rights regimes will become increasingly similar to the state's and therefore more aligned with the Constitution. As each tribal order competes in similar ways with the state, the experience of FHRFs across the country becomes increasingly equivalent. Normatively then, competition compels change, but does not disrespect the self-chosen identity of participating legal orders or erode the power to self-determine of the tribal polities.

It could be argued that enforcing judicial decisions in customary law strongholds amounts to the state forcing Asanteman to honour these decisions and that is much the same as forcing Asanteman to change. That argument while not frivolous, does not hold water. In enforcing its FHRFs decisions, the state will most frequently be offering remedies to citizens against other citizens, not against Asanteman. This means that the state does not necessarily encounter Asanteman *qua* polity when enforcing its FHRFs decisions. As both parties are also citizens of the state and not just subjects of Asanteman, there are no questions of the state's jurisdiction over them or their dispute. Indeed, as noted earlier, Asanteman judicial culture fully accepts disputants' right to choose their adjudicator(s). The challenge the state faces in the judicial realm is getting its rural citizens to opt to use its courts. So, by offering options that do not exist in customary law, the state incentivises them to use the courts. But it does not do so by

addressing the polity and therefore does not issue its instructions to the polity. Thus, in citizen-to-citizen disputes, the state does not by its competitive remedies, impose its identity on Asanteman.

In the rare area that the court will encounter Asanteman *qua* polity, it will have to be strategic, avoiding full frontal confrontation and instead achieving change indirectly and incrementally. So, for instance, where a citizen has taken an action against a chief for a public caning inflicted on her, the court can award damages personally against the palace official who executed the judgment. This will force the palace to redeem the debt or be seen to desert its subjects. In either event, the palace will be less inclined to issue corporal punishment and eventually, corporal punishment will cease to be a practice of customary law. Unlike statutory law that remains legal even when not used, the key trait of customary law is that its legality is proved by and consists in observance¹⁵. Thus, when corporal punishment falls into desuetude, it will have fallen into repeal. In this way, the competitive prong of this theory of CP can both stimulate and direct the evolution of customary law.

As I argued earlier in this thesis; the differences in constitution speak to the ways in which the two polities interpret the world and these life frames empower those who depend on them to act, determining for them the direction which is ‘forward’. Overemphasis on what unites the polities leads to an erasure of what divides them and

¹⁵ Antony N Allott, *Essays in African Law, with Special Reference to the Law of Ghana*. (Butterworth 1960), 89

sponsors a uniformizing campaign that is traumatic and disempowering for citizens. By competing with the polities, the state nudges Asanteman to draw boundary lines of ‘themness’ to exclude non-Asante values and practices. But because the courts’ appeal lies in meeting needs neglected by customary law, those boundary lines will have no rallying power unless they are drawn around those matters in which the state does not make a more attractive offer; and these will necessarily be the best aspects of customary law. Thus, competition will preserve the best part of the customary law systems.

Inherent in pitting their best aspects against each other is tension and this tension will act as a lid on the collaborative layer of that relationship. For example, the Ubink study of Ejisu Besease showed that *Asantefoɔ* who no longer subscribe to Asante’s constitutional gods nevertheless believe the homage paid to them ought to continue. What that finding implies is that it is now no longer compulsory for every Asanteni to subscribe to Asante religion. This individual level decision-making can be contrasted with Asantehene Kwaku Dua I’s refusal to let Asante youth be christianised.¹⁶

The current optional status of Asante religion can be credited to the state’s provision of the freedom of religion. By providing safe passage out of Asante religion, the state creates greater loyalty toward it in those *Asantefoɔ* who take up its offer. Asanteman’s toleration of non-Asante religiousness is intended to retain within the polity, those citizens who practice other religions under the protection of the state. Thus, the competition for authority between Asanteman and the state has yielded greater consonance in the scope of religious freedom provided for in the 1992 and Asante

¹⁶ In 1848, Otumfuo Kwaku Dua I executed two royals and their followers for becoming Christian. Ivor Wilks, *Asante Forests of Gold* (OhUP)

constitutions. Several scholars of Asante consider the exclusion of religion from public life of Asanteman beyond the imagination of the polity¹⁷. But continuing competition between the two polities could see further evolution in the scope of religious freedom in Asanteman.

Finally, given the mutual incomprehension circumscribing state-tribe relations, Asanteman cannot see or be made to see the value of the rights which are foreign to it or the untenability of its 1992-incompatible practices. In fact, even if the latter were to be achieved, it does not follow that Asanteman would then subscribe to the FHRFs as set out in the 1992 Constitution. Like their collectives, citizens who live under customary law also do not understand the worldview and therefore values or methods of the state. Introducing the FHRFs to the citizenry as an alternative and more appealing set of remedies frames those values in a way that invites, first, participation, then, eventually, comprehension and normative buy-in from the citizens who can then pressure their political mechanisms to adopt them.

¹⁷ YS Agyemang, 'Crisis of Legitimacy: Secularisation and the Authority of Asante Traditional Rulers in Ghana's Decentralization', (2011) 10(2) *Perspectives on Global Development and Technology* 300; Emmanuel Akyeampong and Pashington Obeng, 'Spirituality, Gender, and Power in Asante History' (1995) 28(3) *International Journal of African Historical Studies* 81; Louise F. Miiller, *Indigenous Religion in Ghana, An explanation for the persistence of Asante chieftaincy in Kumasi*, unpublished PhD thesis (Edinburgh)

Both collaboration and competition are geared towards increasing participation in the state's legal order. Thus, the state in deciding whether to compete or collaborate on a specific issue or project should hold as its principal consideration the degree to which that choice will enhance citizen participation in its legal order's life. It should also keep an eye on the ability of weaker orders to participate as a corporate entity in its legal order. This will greatly increase the democratic credentials of the state's legal order and give it more legitimacy and political sovereignty.

1.3. Creating the Collaborative Prong.

The first three of Maduro's contrapunctual principles are a helpful guide in generating the collaborative layer of the competitive-collaborative relationship. In the rest of this section, I draw out how each of those principles contribute to the creation of the collaborative facet of the new, CP-framed state-Asanteman relations.

1.4.1. Pluralism

Much of the state's historical antagonism towards the Asanteman and other tribal polities has stemmed from it refusing to admit that Ghana is a constitutionally pluralist space. This refusal can, in turn, be traced, as argued in earlier chapters, to the monist tilt of its understanding of sovereignty. Because it could not, in its own understanding, both accept that other constitutional orders operate within its space, and continue to consider itself sovereign, it has had to be intractable in its resistance to the truth of the

territory's pluralism. The principle of pluralism is essentially a gentle way for the state to overcome this fearful obstinacy. By articulating pluralism as compatible with sovereignty, CP enables the state to admit the facts without feeling threatened existentially.

Acknowledging the pluralist nature of the society reassures tribal legal orders that the state's mission in appointing itself as a coordinating order is not to replace them, but to work with them. The principle of pluralism therefore brings the constitutional discourse into the explanatory level of CP. As noted in chapter 8, explanatory CP is a description. Yet it is also an admission. Therefore, it is a conscious act that amounts to a retreat by each order from a position it has implacably held for a long time. As Walker argues, without this admission, it is impossible to account adequately for the constitutional realities with which we must contend. Thus, this first contrapunctual principle is a building block of our CP. It is only upon its attainment that any other CP step can proceed.

1.4.2. Consistency and Coherence, and Universalizability.

As noted earlier, several tribal polities contest the existence or autonomy of another tribal polity. Thus, the acceptance of the state's constitutional identity and other tribal orders' identity is critical to the CP effort. The state must foster discourse to bring all polities to the table to establish a heterarchical, mutual respect. There already exists infrastructure the state could fall on to initiate this dialogue: the National House of Chiefs (NHoC). This forum was created by the 1992 Constitution precisely to liaise

between the state order and the tribal orders.¹⁸ The NHoC has not been optimally engaged and does not even have an office. The neglect is in no small measure due to the state's historically antagonistic stance towards chiefs as an irrepressible rival power. However, the state should, in the light of our amended understanding of sovereignty, reconsider this animosity. By according that body greater respect and autonomy, the state can, through it, initiate the dialogue of heterarchy and tap into chiefly legitimacy and deliverables at no cost to its sovereignty claims.

Secondly, the courts must treat all palaces as dissimilar but equivalent adjudicatory fora. In *Huago v Djangmah II*,¹⁹ the Court displayed an encouraging ability to treat tribal polities as heterarchical peers. By focusing on the reasoning supporting an Asante custom, it was able to apply it to a Ningo dispute as general principle developed by Asanteman, rather than as an Asante custom. This respectful and respect-generating approach enables palaces to adopt each other's reasoning without appearing to have conceded another's superiority. Since only palace decisions that advance the 1992 Constitution will be endorsed by the courts, palaces will, in the competition for greater prominence, work to articulate their reasoning as principles that fit within the Constitutional parameters. In this way, the courts will instigate and mould

¹⁸ I use 'created' in the Kelsenian sense here. While the body appeared for the first time in the 1969 constitution, it is not in existence now by virtue of that constitution, but rather as a creature of the 1992 Constitution. Several other creations of the 1969 constitution are buried in that document's grave.

¹⁹ 1997-98] I GLR 300.

a continuous line of jurisprudence that has enough common applicability to be national in character and enough nuance to be culturally accurate to each tribal polity.

Even within the ambit of collaboration, tribal polities will jostle for greater recognition at the constitutional roundtable. Universalizing palace decisions offers opportunities for greater relevance and so will be a natural interest of the tribal polities -if the courts properly superintend the coherence and consistency of the legal order as discussed above. For a powerful polity like Asanteman, taking a leadership role in the creation of a single body of jurisprudence offers the chance to preserve its preeminent position in Ghana. For less powerful tribal polities, the idea of another – perhaps greater- order, and, as well, the powerful composite order applying its reasoning thereby validating its values and therefore its identity will be a powerful motivation to universalize their judicial reasoning. Over time all customary law regimes synchronise in terms of the FHRFs, the underlying principles of this universal framework.

Of course, derogations will occur. But the strength of peer relations is that an order's prestige is greatly diminished by the disapproval of the peer circle. The moral authority to remain within the heterarchy and contribute jurisprudence binding on others will provide the leverage needed to reduce the occasions of untenable derogation. EU human rights jurisprudence provides an encouraging example of how that inter-order quest for respect incentivises participating orders to produce universalizable jurisprudence. Even the United Kingdom, which was historically staunchly against judicial review, has, over the course of the ECHR's

life allowed its courts to patrol the compatibility of UK law with EU law. This change to British judicial culture need not have been the outcome. It was as easily open to the British legal order to leave EU law compatibility to the ECHR. But that would have diminished Britain in the EU peer circle. For, in no collective is the most deviant of group ideals its leader. Thus, a legal order as mature as the United Kingdom's was nudged into a momentous cultural change by its consciousness of its place in the constitutional dialogue. The peer circle will exert sufficient soft pressure to make derogation an act of last resort.

1.5. Creating Competition

1.5.1. The Role Of The Principle Of Institutional Choice

When citizens have forum shopping options, participant orders are compelled to engage in a constant search for a competitive advantage and so assess their own institutions and those of competitor orders. In copying, adapting and innovating mechanisms and processes to augment their appeal, they will increase the efficacy, constitutionality, and justness of their rights regimes. Without the threat of citizen desertion nipping at their heels, orders are unlikely to see value in the emotionally, politically, and resource expensive process of institutional and cultural reform.

As Maduro notes, institutional choice is not a habit that monopolies have. The contemplative engagement with strengths and flaws required is often at odds with the

constitutional myths of nation-building. Reform is always an admission of failure. Because customary law practices spring from the constitutional thought of tribal polities; their reform is an admission of failure, not only as a regulatory matter, but as a constitutional matter. This is a very hard and painful truth for any polity to swallow. Therefore, without imperative cause, institutions will avoid engaging in reform-triggering introspection.

By offering remedies to those disenfranchised in customary law, the courts prevent the palaces from ignoring the failure of their unconstitutional practices to meet the needs of citizens. Having already lost in their culturally resonant forum, such citizens have nothing to lose from trying the state's forum for a better outcome. In our study on Nigeria, we found that despite still having palaces, state customary law courts were not redundant. Their patrons, though customary law subjects, do not want palaces involved in their dispute. By providing culturally absent remedies, the state highlights that absence. When its subjects are opting out of its regime *en masse* in favour of the state's regime, the palace will feel an existential angst that it will cause it to study the point of attraction in the state's order and replicate or innovate to compete. The innovated or replicated remedy will invariably be compliant with the 1992 Constitution.

Having a rival for subjects' loyalty is the most effective, least confrontational way to trigger that introspection and self-improvement in a self-referencing polity such as Asanteman is. Because the competition is focused on the state's order, its principles (ie the 1992 Constitution) will direct the reforming effort. In this way, the competitive

prong of the Ghanaian CP will use the principle of institutional choice to coordinate the direction of evolution of customary law. Since this evolution will be internally initiated, and internally decided, Asanteman's constitution will not be overthrown. Rather, it will expand to absorb it, and this will mean that the evolution will be achieved without erasing the core traits of Asanteness.

Part 2- Practical Steps.

In this Part, I identify some practical adjustments that can be made to Ghana's constitutional ethos to fully infuse a collabo-competitive CP character into our small-c constitution. I propose two sets of adjustments the state can make. In each set, I make one proposal that will foster collaboration and one that is geared toward creating competition. The first set does not require legislative action to implement and are therefore easily and immediately practicable. The second set require constitutional amendment; but being entrenched provisions will take longer to achieve.

I choose the provisions in the second set because they meet my three determinative criteria. First, they are capable of being implemented within the judicial sphere. Second, they are attainable- i.e., the political consensus required to complete the complex amendment process is reasonably achievable. Third, and finally, they are efficient, since the cost of operationalizing them is both manageable and far outstripped by their impact on the competitive- collaborative inter-legal order ethos I propose in this thesis.

2.1. Changes Not Requiring Constitutional Amendment.

2.1.1 Creating Collaboration

The courts of the 1992 Constitution are empowered to pronounce authoritatively on customary law rules. Several problems arise from this arrangement. Firstly, the courts' decisions immediately affect only the litigating parties. A rule as lived may therefore diverge significantly from what the state, relying on court records considers it to be. In *Vanderpuye v Botchway*,²⁰ the court held certain Ga polities were matrilineal. In practice, they were and have continued to be patrilineal.²¹ The result is a dichotomy Woodman summarises as 'lawyer's customary law' versus 'sociologist's customary law',²² and which greatly impedes the state's ability to superintend access to FHRFs.

Additionally, the methodology of common law courts when applied to customary law leads to an atrophying of lawyer's customary law; again, leading to a misinformed or at least underinformed state. To remain valid as customary law, a rule needs to be notorious or easily verifiable. Unlike codified law that can be both valid and forgotten, customary law depends on observance. A rule of customary law "if not fortified by established usage is not law".²³ Therefore, customary law is quite easily

²⁰ 3 Sel. Judg. Ct. App. W. Afr. 164 (Gold Coast 1951).

²¹ See eg Edward Kutsoati, and Randall Morck, 'Family Ties, Inheritance Rights, and Successful Poverty Alleviation: Evidence from Ghana' (February 29, 2012). Available at SSRN: <https://ssrn.com/abstract=2020542>; EVO Dankwa, 'Property Rights of Widows in Their Deceased Husbands' Estates', (1982-85) 16 U. GHANA LJ 7, 530

²² Gordon Woodman, 'Some realism about customary law-the West African experience', (1969) Wisconsin Law Review 128; GR Woodman, 'How state courts create customary law in Ghana and Nigeria', in B.W. Morse and G.R. Woodman (eds.), *Indigenous Law and the State*, (Dordrecht 1988), 181

²³ AN Allott, *Essays in African Law, with Special Reference to the Law of Ghana*. (Butterworth 1960)

accessed as is evidenced by how frequently cross-tribal transactions: marriages,²⁴ pledges,²⁵ alienations²⁶ are successfully conducted. Common law courts require litigants to trigger a reconsideration of a previous decision. Therefore, a court's decision on a customary law rule can remain binding long after the relevant tribal order has in effect repealed it.

This sub-optimal situation is a function of the state's struggle with the self-referentiality of tribal orders. As we noted earlier, this is largely because the state wrongly sees its sovereignty as dependent on being the only source of ultimate authority in the jurisdiction. But proceeding from our CP premise, the state will be empowered to see itself as the ultimate source of authority in certain spheres and as the coordinating legal order of those other aspects of life not under its control. In the role of coordinator, the state should find my first recommendation easy to accept and implement.

2.1.1.1. Closer Collaboration With the Houses of Chiefs

To create the collaborative prong of the relationship, I propose that the courts work more closely with the Houses of Chiefs in the course of litigation in the following way: a custom pleaded before the court should be referred to the House of Chiefs to confirm its existence or otherwise. The court can then uphold those parts which align with the Constitution.

²⁴ Sanghamitra Bandyopadhyay, & Elliott Green, 'Explaining inter-ethnic marriage in Sub-Saharan Africa' (2021) 33(4) *Journal of International Development* 627.

²⁵ See EVO Dankwa, 'The End of Pledges in Ghana?' (1989) 33 *Journal of African Law* 185

²⁶ *Ghassoub v. Sasraku*. [1961] *GLR* 496

This idea is a slight twist on an existing practice and should not cause much inconvenience to the state to implement. Section 55(5) of the Courts Act 1993²⁷ empowers the Court to refer a matter to the House of Chiefs or directly to a palace or *to any other person or body* (emphasis added) to ascertain whether such a rule exists. The power was given to them undertake the fact-finding required to administer justice across so many different tribal polities after the (unwarranted) indignation with the repugnancy test led to its repeal. But the error in its crafting is that it is discretionary.

I propose that the referral of a purported rule for confirmation should be, firstly, mandatory and, secondly, only to the relevant House of Chiefs or Palace. No other body or person, however knowledgeable, should be able to decide finally whether a rule of customary law exists or not. The existence of a rule is a question of identity for the root constitutional order. For someone who, within that order, is not entitled, to participate in the confirmation of that order's rule is to disregard that order's chosen identity. Regardless, therefore, of proof offered or the judge's personal knowledge, the affected order ought to be respected as the authoritative voice on its rules. If *Manhya*, to ascertain whether, for instance, the criminal offence of chewing gum after dark existed under state law, turned to a publication by Jamaican law deans, the state would hardly feel itself bound to prosecute persons committing this act. Similarly, a customary law system has little motivation to uphold decisions about it made by another without reference to it.

²⁷ Act 459 as amended by Act 620

Admittedly, my method adds one more step to the duration of a suit. However, it creates exactly the sort of dialogue CP seeks to yield in a pluralist territory. By asking the chiefs to confirm a rule, the state, in its capacity as coordinating order, is asking the tribal polity what identity it chooses. When the state then applies the latter's decision to the problem it is, as a co-equal participating order showing respect to the tribal order whose norm it is. If the rule or any part thereof is deemed unconstitutional, a copy of the court's decision and explanation of unconstitutionality should be served on the NHoC, thereby updating both legal orders the opportunity as to the current state of both customary and case law. By involving chiefs in the process, the state has doubled the likelihood that chiefs will act to align ensure practice and law.

Moreover, no customary law precedent older than ten years should be applied by the courts unless its continued force has been confirmed by a Palace/House of Chiefs. As noted above, customary law is not stagnant. A refusal to verify if, after such a lengthy period, a rule of law continues in force is a wilful negation of the power of that order to choose its identity. Eventually, the resulting bifurcation between law and practice will push the orders away from each other and erode the CP ethos.

Furthermore, where the traditional authorities themselves advise the court that they no longer recognise a particular rule as binding in their polities because of its unconstitutionality, the court must not purport to assess the accuracy or otherwise of the House of Chiefs' assessment. It must respect the tribal orders' ability to interpret their own law in light of the Constitution to which all participating orders are subject.

2.1.2. Creating Competition

An easy adjustment that can be made to develop the competitive prong is for the state to locate more District Magistrate courts in remote places, and customary law strongholds. Offering alternative remedies, these courts will attract those who are disenfranchised by customary law. In 2018, Sophia Akuffo CJ noted after her national tour that several chiefs complained to her of violence against women in their jurisdictions. From chapter 5 we know that men's customary right to, 'discipline' their wives is at the root of much of the domestic violence in Ghana. But chiefs are often helpless to intervene because as a customary law forum, palaces can only offer customary law remedies.

Chiefs, according to the then Chief Justice, requested more courts nearer their populations so that battered women would have geographical access to their FHRFs²⁸. As noted earlier, access to a different legal order's remedies can trigger institutional introspection and compel institutions to improve their offer in order to compete for the loyalty and patronage of citizens. Courts offering relief from abusive husbands will propel the palaces to review their offer and predispose them to reconsider perpetuating rights that increase the courts' patronage.

Because customary law is changed by observance and because chiefs can be destooled if they become unpopular, it is hard for chiefs to initiate change to old and now unconstitutional customary law rights that benefit socially dominant and powerful demographics (such as men, and the elderly). The increased activity of the coordinating

²⁸ Speech by Sophia Akuffo CJ at Judiciary @60 conference hosted by GIMPA Law School, February 2018.

legal order within the jurisdiction will affect the status and influence of these demographics, giving them impetus for a reflection and evolution of the repressive rules, while insulating a progressive chief from destoolment for initiating or pushing a reform agenda.

2.1.2.1. Restoration of (an Improved and Intentional) Lay Magistracy Programme

In the 1990s, the Judicial Service ran a lay magistrate programme. Members of communities who had reached middle level seniority or better in public service before retirement were given limited legal training and set up in magistrate courts in their communities. It was abandoned after the 1992 Constitution entered into force for reasons that remain unclear. Reviving the lay magistrate programme will make it easy for the Service to staff these many extra courts I propose at an efficient cost.

As coordinating legal order, the courts will identify the FHRFs that are most lacking in particular districts and set them as the specialism of the lay magistracy of that district. If the CP-minded state is especially intentional about its lay magistracy programme, it will match lay magistrates to jurisdictions whose native language they speak, so that rural citizens need not be overwhelmed by the unfamiliarity of the forum. Court records should, of course, remain in English to make their reasoning available to others and amenable to supervision by higher authorities. This will allow the state to cost-effectively position itself to compete with the palaces.

2.2. Constitutional Amendments

2.2.1. Encouraging Collaboration

Article 273(5) and 274 (3)(d) render some useful traditional dispute mechanisms such as the *ntamkese* of the Asantehene of shaky legal validity. But, as self-referencing authorities, the tribal legal orders are impervious to this form of attack. Thus, rather than subordinating palaces to the courts, as the drafters intended, these two articles have created a situation where palaces simply disregard the state, and this takes away from the state its ability to corral all tribal orders around the Constitution. Rather than the state taming tribal excess with the Constitution, it is now the courts which must do nimble footwork to avert conflict when the tribal order violates the state constitutional order. The case of *Republic v Judicial Committee of the Brong Ahafo Regional House of Chiefs, Ex Parte Obaapanin Amma Mansa* provides a powerful illustration of the awkward position the court have been put in by articles 273(5) and 274(3)(d). The facts are set out in *extenso* to aid appreciation of the difficulties the case presented.

The appellants, in their fourth appeal, asked the Supreme Court to overrule the Court of Appeal's decision affirming the High Court's decision upholding the decision of Brong Ahafo Regional House of Chiefs (BARC) dismissing their application to vacate the award of Asantehene and Asanteman Council in a chieftaincy dispute. The appellant had contested a stool within the jurisdictional limits of Asantehene but not within the administrative borders of the Ashanti Region. On proving unsuccessful, 4th appellant invoked the *ntamkese* to the effect that the Queenmother (to whom he himself had presented his candidature) was not royal and neither was the candidate she chose. From our study of Asante in chapter 4, it will be remembered that the Queenmother is the office with the constitutional duty to nominate a new chief when a stool falls vacant.

It will also be recalled that eligibility to stool occupancy is limited to specific families. The appellants' charge therefore was that neither the nominator nor the nominee were constitutionally eligible for the roles they played in the respondent's enstoolment.

Again, as learned in chapter 4, the *ntamkese* automatically invokes the jurisdiction of Asantehene and Asanteman Council. If the other party swears the oath in return, as the Queenmother in this case did, Asantehene becomes seised with jurisdiction over the matter. The appellants were unsuccessful before Asantehene and his Council; fined for reckless invocation of the oath; ordered to apologise to *Otumfuo* and *Asanteman* Council, and offer '*debim*' - a customary right of apology and goodwill - to the respondents.

They then brought a petition to the BARC essentially, reopening the litigation. On opposition by the Queenmother, the BARC dismissed it on grounds of *rem judicatem*. The appellants sought a certiorari from the High Court, contending that under article 274(3)(d) of the Constitution and section 28 (1) & (2) of the Chieftaincy Act, it is the Regional Houses of Chiefs, in this case BARC, that have jurisdiction in a chieftaincy dispute, not *Asanteman* Council. Therefore, the *Manhyia* proceedings were void. Appellants argued that initiating action by oath was 'an unknown principle' the BARC had introduced into Ghana law.

The Supreme Court made the following interesting pronouncements:

1. The action was not commenced under the Constitutional provision and so the provision could not have been violated by a procedure it did not envision being adopted.

2. Asantehene's authority stretches beyond the geographical limits of the Ashanti Region and that cannot be interfered with,
3. That the Manhyia hearings were procedurally unimpeachable and so could not be interfered with.

Statement 1 implies that unless a person purports to act under the authority of a constitutional provision, their act cannot conflict with the Constitution. This untenable position is obviously an attempt by the court to avoid overruling Asantehene. Article 2 (1)(b) states that judicial review covers 'any act or omission of any person'; not merely those that named the provision they invoked. Doubtless this new principle of the 'action commenced under the Constitution' will never be applied to an ordinary citizen-subject. It is very clearly a case of the court sidestepping a battle it cannot win.

Statement 2 acknowledges that Asantehene's authority has survived the administrative boundaries the state imposed on it. The court does not explain what the character of his authority is. Again, this was to avoid having to admit that Asanteman possesses an entirely separate and self-standing legal order.

The final statement suggests that, had the proceedings at Manhyia violated natural justice rules, the court would have vacated the award. This is highly doubtful. The court that distinguished a constitutionally rooted suit from a 'necessary customary

practice’,²⁹ may have difficulty pronouncing *Otumfuo* unjust. Nevertheless, the court refused to cede power to Asanteman. Appearing to have subjected the Manhyia proceedings to state judicial standards preserves the monistic perception of sovereignty on which the state has been raised. In the end, though the court avoided the conflict that would surely have followed a direct overrule of Asantehene; it did so at a loss of face and legitimacy.

If the collaborative-competitive relationship urged by this thesis had been present, the court would not have had to contort its reasoning to reach the results it did. In the first place, a CP posture, whereby the state is positioned as the coordinating legal order would have allowed it to admit the patently obvious fact that Asantehene’s authority is not regulated by state sanction and at the same time hold up the state’s own wider authority as the supervisor of compliance with the 1992 Constitution.

Articles 273(5) and 274(3)(d) are responsible for the courts’ predicament. As the appellants rightly argued, the Constitution did not assign Asantehene any jurisdiction by means of his oath. But as Asantehene’s authority source remains capable of granting and enforcing that jurisdiction, the state was forced to attempt to make the act of Asanteman, done with no thought or reference to the state, fit within a narrative of monist- style sovereignty.

These provisions should be removed. The Constitution’s silence will make it unnecessary for the state to articulate a view on the tribal polities’ sovereignty claims.

²⁹ Judgment of Adinyira JSC, 22

There is some urgency in respect of this suggested repeal. With the creation of six new administrative regions within the territories of strong, centralised tribal polities including (once again) Asanteman, and Gonja, more instances of awkwardness, where tribal polity jurisdiction extends into a different region and therefore the statal judicial jurisdiction of a different House of Chiefs, have been created.

This exponentially increases the chances for cases like *Ex parte Obaapanin Amma Mansa* to occur. As the discussion above shows the Supreme Court is in such cases forced to adopt equivocal reasoning for which the state pays a hefty price. For, faced with unwinnable battles the state carves areas out of the applicability of the 1992 Constitution. If this continues, the supremacy of the Constitution will become a laughable concept.

2.2.2. Towards Competition

Article 272(b) empowers the NHoC to codify customary law ‘with a view to evolving, in appropriate cases, a unified system of rules of customary law’. Firstly, since the NHoC has no obligation to review previous codes, this article sets Ghana up for the sorts of problems codification of customary law has caused in South Africa.³⁰

³⁰ Including: causing customary law to ossify (AJ Kerr, 'The reception and codification of systems of law in Southern Africa' (1958) 2(2) JAL 96); codes lack credibility to oral originating culture (TW Bennett & T Vermeulen, 'Codification of Customary Law' (1980) 24(2) JAL 207); and the expertise of witnesses objectively unverifiable (AN Allott, 'The Judicial Ascertainment of Customary Law in Africa' (1957) 20 MLR 248).

Codification is not the natural methodology of tribal polities and is therefore the imposition on them of a character that will simply get their backs up. If Asantehene Osei Tutu II repealed some rules contained in a predecessor's code by proclamation, what entity would have the authority to bind him to observe the previously issued code or even to repeal it by express recodification? Article 272(b) sets the two sides on the sort of collision CP seeks to avert. In any case, the mandate to evolve a unified customary law does not automatically mean that the FHRFs will be the guiding parameter of that chiefly endeavour. Chiefs may well decide to codify unconstitutional practices.

To create the salutary competition my CP theory requires, Article 272(b) should be repealed. When the Constitution allots a burden to one institution, it automatically divests all other institutions of the power to do that act. Therefore, by making it the unique preserve of the NHoC to evolve a unified body of customary law and codify it, the Constitution deprives the courts of the power to nudge evolutionary congruence around the FHRFs. Since the NHoC is the definitive authority on customary law, the courts will only be able to aid in the evolution of customary law by express override of NHoC on grounds of unconstitutionality.

In that event, there are two outcomes: both negative. First, it results in a situation where the court faced with a rule of customary law which is not actually unconstitutional, but is not in line with the constitutional aspirations, must endorse it as having legal force and must apply it, as Brobbery JSC, resignedly did in the *Dede Paulina case* discussed in chapter 3.

Secondly, the express override methodology is sure to generate acrimonious tension rather than competitive tension. It is far more likely to trigger a defiant rather than competitive stance in the customary law legal order. Defiance may take the form of deliberately public indulgence in the very behaviour overruled by the court or by the palaces shielding subjects when they commit the proscribed acts. The state must in such instances respond with crushing force or admit a lack of power. Neither is beneficial. By repealing this article and leaving the Constitution silent on the matter, the state will be empowered to position itself as the more attractive legal order in rights' affairs and so bring the citizens closer to it, thereby increasing its political sovereignty.

The NHoC has not made much use of this codification mandate since the Constitution entered into force³¹. As noted above, by entrusting it to NHoC alone, the Constitution has given the courts no reason to seek to generate a unified body of customary law rules. The importance of the collaborative-competitive relationship is that it keeps the tension born of pluralism from either exploding or dissipating completely. This provision dissipates the tension completely when it is not working at all; and stokes it to explosive levels when it does. Thus, it does not serve in a CP order and must be repealed. Without constitutional provision on this matter, the competitive aspect of the court-palace relationship will drive the courts to trim the unconstitutional practices of customary law. Customary law systems will in self-defence work to reform their practices to remain in charge of their own reform and therefore identity.

³¹ It has issued only a handful of such compilations, generally about very small areas and extremely hard to find. Though I have previously seen one such compilation for the Peki area, I have been unable to locate a copy in any library in Ghana.

Conclusion

The monistic understandings of sovereignty bequeathed by colonialism have brought Ghana to a precarious place where destructive collision between the state and the tribal orders present in its territory seems to be only a matter of time. In this thesis, I have argued that this destruction is only inevitable if the sovereignty-related tension is left unmanaged. But I have also argued that latent, the tension is actually valuable. Therefore, what Ghana needs is, not the elimination of the tension, but rather a strategic management philosophy to shape it. To find it, I have explored federalism and bicameralism, which are often hailed for their ability to manage diversity-rooted tensions and resolve sovereignty challenges.

We have seen how federalism allows (some) citizens to fully embrace their tribal identities. But we also saw how that leads to defiant competition with the state, driving it (the state) to admit powerlessness or assert itself with force against its own citizens. In either event, the state loses legitimacy and political sovereignty.

Therefore, while federalism may well preserve the best of tribal culture, it does little to motivate the multiple tribal orders within the state to collaborate towards the creation of a common experience of rights. Therefore, it prioritises the tribal identity over the statal identity of citizens. Federalism has worked well enough for Nigeria and may, in fact, be that state's best chance at survival. Still, it is not the way forward for Ghana. Its tendency to equip dominant tribal polities with state resources and thereby sponsor a discriminatory regime against smaller tribal polities makes it incapable of achieving a similar experience of FHRFs for all citizens. Furthermore, with its emphasis

on tribal identity at the cost of the state, federalism could easily tear apart the state of Ghana.

Bicameralism prioritises in the opposite direction. By putting tribal authority on the same team on all fronts as the state, it prioritises the citizen's state identity at the cost of her cultural mooring. Our study of bicameralism demonstrated the socio-economic and political benefits of collaboration between constitutional orders in a pluralist state. But the lesson we learnt from Botswana is that the danger of an entirely collaborative relationship is erosion into nothingness of the tribal polity's sovereignty and consequently tribal identity. As this is not the aim of the 1992 Constitution, bicameralism is not Ghana's solution to her state-tribe sovereignty challenges.

Thus, I reject both federalism and bicameralism for Ghana. Instead, I advocate a constitutional pluralism ethos that will tackle the problem at its root, by first resolving the sovereignty challenge and then by carving a path within CP for Ghana. Guided by JHH Weiler's principle of constitutional tolerance and by Miguel Maduro's principles of contrapunctual law, my CP theory holds that the state should collaborate with the tribal polities in some spheres but in others compete with them. In so doing, the state will be able to both assert its sovereignty without negating the degree of sovereignty tribal polities possess.

The two-tone relationship advocated in this thesis is a critical step towards achieving a true heterarchy in Ghana. The collaborative efforts will increase efficiency across orders and legitimacy for the state legal order. The spheres of competition allow each order to retain control over its identity without being able to refuse to engage with

the aspirational goals of the 1992 Constitution. Over time, this collabo-competitive CP ethos will establish a constitutional order which values the diversity of its members but offers them substantially equivalent experiences of FHRFs. Through the mutual benefits of collaboration, collabo-competitive CP will temper the rivalry; keeping it from building until it ignites a terrible fire. But by promoting a forum-shopping culture in citizen-subjects, it will generate competition that will culminate in reform on the part of the customary legal orders, and sensitivity on the part of the state.

Consequently, collabo-competitive CP achieves the extremely difficult task of balancing the dual identities citizens of a postcolonial African state possess. It does not force them to choose between the statal and tribal identities that are theirs by right. Whatever the social, political, or economic benefits of having to make such a choice, they do not outweigh the cost in belongingness, and originality. It would be a transcendental uprooting that is contrary to the constitutive purposes and aspirations of the 1992 Constitution.

The changes argued for in this thesis are no magic wand changes. The theory developed in this thesis will require a paradigm shift that while critical is not intuitive. It entails rigorous engagement and commitment. The examples of potential areas of operationalisation identified in this chapter are laborious ventures. They will need time to take seed. Battered women who come from a culture that allows them to be beaten will not overnight queue outside the courts seeking redress. They will, naturally, be cautious about triggering potential punishment from the customary law order if it turns out the state order does not, in fact, protect them.

Siting the courts within reach and having magistrates who can speak to locals and understand the hurdles they face in opting out of unfavourable customary law rules will not, without more, create greater participation. As noted throughout this thesis, the difference in their world views leads to real mutual incomprehension between the two sides. That means that citizens who are not already participating actively in the state's legal order are not necessarily able to discern unaided what the benefit of such participation might be.

The state must relentlessly educate citizens on what it can offer them. One successful case began the slew of actions that culminated in an *Asanteman Nhyiammu* meeting expressly addressing the exclusion of wives from compensation for seduction. Similarly, one bruised wife pecuniarily compensated will bring more wives in search of redress. When that trend becomes overpowering, the customary legal orders will respond. But patience, and thoughtful action are required if the state is to successfully guide Ghana into a collabo-competitive CP ethos which can eventually position all participating legal orders in a parallel rather than perpendicular track from the state in respect to FHRFs. But it is absolutely worth the wait and the work. For both participating legal orders, and citizen, nothing could be more destructive than a combustive collision.

The cost to the legal orders is obviously mortality. The cost to the citizen, though less obvious, is no less existential. The dual identities persons who are simultaneously citizens of a state and subjects of a customary legal order possess are of equally deep-seated importance to the lives such persons are capable of living. Both identities are

integral to their ability to make meaning of their circumstances, and accomplishments of their resources. There is therefore no question of uprooting or terminating one. Both orders are therefore correct- to differing degrees- about their sovereignty claim. Both of them can show that at least in some spheres of life, they author and sustain the citizen-subject's experience.

In preserving the valuable aspects of customary law, collabo-competitive CP maintains the native lenses that tribal subjects rely on to make meaning of the world. In instigating change, it gives the subject the quality of life guaranteed her by the 1992 Constitution. Using collaboration to enhance the resonance of the state and competition to reform the customary law, it creates an intricate dance of power between the two orders shaping the identity of the Ghanaian citizen, and, in that dance, both improves her outcomes and empowers her to interpret her world to pursue her vision of self-actualisation. This, after all, is the central goal of a constitutionalist state- to create space and opportunity for the self-actualisation of the least of its citizens.

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