

**The Politics of Traditional-Federal State Formation  
and  
Land Administration Reform in Ghana: 1821-2010**

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## **Abstract**

Imagine a democratic state in Africa where the Presidential-Executive and Parliament are constitutionally restrained from fundamentally reforming the institutions of land ownership and administration without the legal consent of traditional rulers (chiefs). This is the case in Ghana. Using the historical institutional theoretical approach, the study makes an original contribution to our understanding of how the political process of state formation between British colonial state makers and the rulers of traditional states in Ghana produced a type of state that I call the traditional-federal state in 1821-1831. The core legacies of this state are (i) the bifurcation of public authority between chiefs and government in the governance of land and people; and (ii) the complex interaction of informal-legal rules of customary law and formal-legal rules of common law. The study shows how these legacies have shaped institutional reforms within the dual 'customary' and 'public' sectors of land administration. The study argues that the traditional-federal state has constrained the development of transparent, accountable and efficient institutional framework of land administration.

The study helps us to understand the origins and nature of the bifurcation of state authority between chiefs and government over land administration in Ghana. Secondly, the study helps us to understand the nature of institutions of chieftaincy for customary land administration. The study shows that informal-legal customary institutions of land administration are complementary to, and substitute for, the formal-legal institutions of land administration. Thirdly, the study shows that the potential of communal land ownership to promote development could be realized if government, chiefs, and citizens are committed to the creation and enforcement of formal-legal rules of accountable administration that distributes the benefits among stakeholders. Finally, the study reinforces the historical institutionalist argument that the critical juncture of institutional development matters for understanding subsequent endogenous and exogenous sources of institutional change.

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## **Dedication**

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## **Declaration**

I declare that this study is my own work. It is presented to the University of York for the first time for the award of the degree of Doctor of Philosophy (PhD) in Politics.

**Signed:**.....

**Date:**.....

## **List of Abbreviations and Acronyms**

ACC	Ashanti Confederacy Council
AFD	Agence Française de Développement (French Development Agency)
ARPS	Aborigines Rights Protection Society
AU	African Union
CHRAJ	Commission for Human Rights and Administrative Justice
CIDA	Canadian International Development Agency
CJ	Critical Juncture
CJ-PD	Critical Juncture and Path Dependence
CLAU	Customary Land Administration Unit
CLEP	Commission on Legal Empowerment of the Poor
CLS	Customary Land Secretariat
CPP	Convention Peoples Party
CRC	Constitutional Review Commission
CRI	Cocoa Research Institute
DA	District Assembly
DFID	Department for International Development, UK
EU	European Union
FAO	Food and Agricultural Organization
FGI	Focus Group Interview
GhIS	Ghana Institute of Surveyors
GIS	Geographical Information System
GoG	Government of Ghana
GPRA	Ghana People's Representative Assembly
GTZ	German Technical Assistance Corporation
HIPC	Highly Indebted Poor Countries
HSSEC	Humanities and Social Sciences Ethics Committee
IDA	International Development Association
ILD	Institute for Liberty and Democracy
IMF	International Monetary Fund
JPC	Joint Provincial Council
KFW	Kreditanstalt Fur Wierderaufbau
KMA	Kumasi Metropolitan Assembly

KNUST	Kwame Nkrumah University of Science and Technology
LC	Lands Commission
LISAG	License Surveyors Association of Ghana
LMC	Land Management Committee
LAP	Land Administration Project
LAPU	Land Administration Project Unit
LAS	Land Administration Systems
LPSC	Land Policy Steering Committee
LSTC	Land Sector Technical Committee
LTD	Land Title Registry
LVB	Land Valuation Board
MEST	Ministry of Environment, Science and Technology
MLF	Ministry of Lands and Forestry
MLGRD	Ministry of Local Government and Rural Development
NDC	National Democratic Congress
NDF	Nordic Development Fund
NHC	National House of Chiefs
NLM	National Liberation Movement
NPP	Northern Peoples Party
NPP	New Patriotic Party
NTTC	Northern Territories Territorial Council
OASL	Office of the Administrator of Stool Lands
OECD	Organization for Economic Co-operation and Development
PD	Path Dependence/Path Dependent
PNDC	Provisional National Defence Council
PRAAD	Public Records and Archives Administration Department
PSLA	Public Sector Land Agencies
RHC	Regional House of Chiefs
SAL	Structural Adjustment Loan
SAP	Structural Adjustment Program
SD	Survey Department
SDI	Spatial Data Infrastructure
TC	Traditional Council
TCPD	Town and Country Planning Department

UGCC	United Gold Coast Convention
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UK	United Kingdom
USAID	United States Agency for International Aid

## Chapter 1

### **The Traditional-Federal State in Ghana: The Problem for Analysis**

An English officer...presides in courts held by the natives, and administers to them a kind of law made up of native customs and of English forms and maxims. I think it likely enough that he does much good. But I never could find out by which law he does it (*James Stephen, 1846, Minutes on cases in the Gold Coast*).<sup>1</sup>

#### **Introduction**

In this chapter I set out the problem for analysis, the research questions which the study addresses, the analytical framework of the study, the justifications for the research, and the overall structure of the study.

#### **1.1 The Bifurcated State: Public and Customary Sectors of State Authority**

Transparent and accountable formal-legal institutions of land administration have been shown to promote efficient access to and use of land as well as good economic governance of land resources in developed countries (De Soto 2000; FAO 2007; Wallace and Williamson 2006; Commission on Legal Empowerment of the Poor (CLEP) 2008a, 2008b; World Bank 2002a, 2003a; World Bank/IMF 2005). Yet, only two to ten per cent of Africa's land is governed by formal-legal institutions (World Bank 2003a). In the West African region as a whole, it is estimated that only two to three per cent of the land is covered by formal administration (Toulmin 2008). Access to land and security of land rights in Africa is largely governed by informal customary institutions of traditional authorities (Bruce 1998a). It is known that informal institutions constrain transparency, agential accountability, and rule enforceability in the governance of resources within any state (Helmke and Levitsky 2006; North 1990; Przeworski et al. 1999; Schedler et al. 1999; Tsai 2007). Particularly from the last decade of the 20<sup>th</sup> century, many international development agencies have provided financial and technical support to African governments to

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<sup>1</sup> James Stephen, Colonial Office, London, 28 January, 1846. Minutes on cases in the Gold Coast heard before the Judicial Assessor's Court presided over by Governor George MacClean (Metcalf 1964, Great Britain and Ghana: Document of Ghana History, no.151).

reform public sector agencies and customary institutions of land administration to facilitate economic development. While some progress has been made in the reform of public sector agencies, reformers have not only struggled to conceptually comprehend the nature of customary institutions but have had limited success in reforming customary institutions (World Bank 2003; Quan et al. 2004). Developmental states with transparent and accountable formal-legal institutions cannot be wished into existence (Leftwich 2000). Developmental states are the historical products of the politics of state organization among political ruling elites. Using the case of Ghana, this study examines how the organization of the African state enables and constrains the development of transparent and accountable institutions of land administration to facilitate economic development.

It is known that in many African states the mode of state authority and governance is bifurcated between two public spheres ruled by traditional authorities, on the one hand, and modern non-traditional political ruling elites, on the other hand (Ekeh 1975; Englebert 2000; Mamdani 1996; Ray 1996). The public sphere of traditional governance is generally referred to as the customary sector. The public sphere of modern government is generally referred to as the public sector. Within the public sphere ruled by traditional authorities, every citizen of the state is subject to customary law which governs social, economic, and political relations in local communities. Simultaneously, social, economic, and political relations of citizens are governed by the constitutional rules and statutory enactments of the public sector. Therefore, the public and customary institutions of governance are complementary, substitutive, and competitive of each other within and outside African states. Scholars acknowledge that the bifurcation of state authority and governance in Africa is the legacy of the politics of colonial state making (Dia 1996; Ekeh 1975; Englebert 2000; Mamdani 1996). However, there is little research on how the public and customary institutions of the bifurcated state enable or constrain development in each other. This study seeks to contribute to our understanding of this problem.

In this study, I use the concept of traditional-federal state to define the division of final state authority between chiefs (rulers) of the traditional states and central government concerning the administration of people, land, and the state, at the

formative moment of the colonial state in Ghana.<sup>2</sup> This study will show how the process of colonial state formation in Ghana between British colonial state makers and the existing traditional states shaped the development of the traditional-federal state. The creation of the traditional-federal state preceded, and actually shaped, subsequent political negotiations that occurred between powerful chiefs and non-chief political elites over the contentious demand for a federal system of government prior to Ghana's independence from colonial rule in 1957 (Allman 1993; Austin 1964; Gocking 2005; Ninsin 1991; Rathbone 2000a; Ray 1996). I shall argue that the traditional-federal state did not occur simply because "The British, indeed, envisioned the future constitutions of the Gold Coast in terms of a federation of the various indigenous states" (Arhin 1991:29). Rather, it was a political settlement that was bargained after a decade of war-making among the interested parties. The study will show how the configuration of the contested settlement of the traditional-federal state shaped the consolidation of the communal land ownership system managed by organizations of chieftaincy<sup>3</sup>, demands for the creation of accountable formal-legal institutions through which chiefs would manage communal lands on behalf of their subjects (as fiduciaries), and the creation of public sector agencies to manage the conflicting interests of government and chiefs in land.

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<sup>2</sup> The concept of 'federalism' embedded in my definition of the traditional-federal state follows the argument of Riker (2007:613) that "federalism is a constitutionally determined tier-structure. If its constitutional feature is ignored, then it is merely some particular arrangement for decentralization." The nature of the traditional-federal state and its organizational transformations is further elaborated in the next chapter. Useful discussions of the concept of federalism as used in the context of state formation have been provided by Follesdal (2007) and Riker (1975, 2007). The creation of the traditional-federal state was based on a negotiated peace treaty of state formation between chiefs of the existing traditional states and the new British colonial government officials.

<sup>3</sup>It is important to emphasize here that chieftaincy is an organization of institutions, actors, and agencies. It is not simply a single institution as the popular phrase 'institution of chieftaincy' used by constitution makers may suggest. Chieftaincy is used in this study to mean a political organization of chiefs and rules of customary law that govern local communities. The 1992 Constitution defines a chief as "a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage" (Article 277). The current 1992 Constitution of Ghana connects chieftaincy to national, regional and local state agencies. The national bodies on which chiefs serve include the Council of State, Judicial Council, Police Council, Prison Council, Forestry Commission, Lands Commission, National Commission on Culture, National Commission on Civic Education, and the Ghana Aids Commission (See Ninsin K. 2010, *Ghana's Traditional Authorities in Governance and Development*, (Chapter 4) Accra: Institute of Democratic Governance (IDEG)). The Executive, Parliament and the National House of Chiefs also share state authority in the reform of all matters concerning chieftaincy (e.g. customary laws in local communities and land administration). Within the judicial system of the country, the Judicial Committees of Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs have also been given original and appellate jurisdictions to hear and determine matters concerning chieftaincy (See Brobbey S.A. 2008. *The Law of Chieftaincy in Ghana*, Accra: Advanced Legal Publications).

Traditional authorities in Ghana manage about 80% of the country's land through informal institutions of customary law (Antwi 2006; Hammond 2005; Kasanga and Kotey 2001; Quan et al. 2008; Ubink 2008). Land administration in Ghana is therefore largely embedded in a dense network of informal institutions of customary law controlled by organizations of chieftaincy. The current 1992 Constitution of Ghana guarantees the co-existence of the public spheres of government and chieftaincy. Entrenched constitutional rules that would require a referendum to be held throughout Ghana in order to make amendments have been used to guarantee the survival of institutions of chieftaincy.<sup>4</sup> The constitution limits the authority of government and parliament to reform matters affecting institutions of chieftaincy – including customary institutions of stool/skin<sup>5</sup> land administration – without the cooperation of chiefs (currently organized into a National House of Chiefs, ten Regional Houses of Chiefs, and nearly two hundred Traditional Councils). Similarly, the Constitution limits the authority of chiefs and their local communities to reform their informal rules of customary law into formal-legal institutions without the consent of government and parliament. In effect, state authority for the reform of land administration is shared between chiefs, parliament and government. I examine in this study how the traditional-federal state has enabled and constrained the creation of effective, transparent and accountable developmental institutions of land administration across the public and customary domains of government and chiefs.

From 2001 to 2010, many international development agencies provided financial and technical support to the Government of Ghana to implement land administration reforms generally called the Land Administration Project (LAP) (World Bank 2003b, 2003c).<sup>6</sup> The LAP involved two key reform objectives that were at the core of the organization of traditional-federal state authority between government, parliament, and chiefs. The two reform objectives were (1) the restructuring of six

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<sup>4</sup> 1992 Constitution of Ghana, Articles 270(1), 289-292.

<sup>5</sup> The skin of an animal (leopard, tiger, etc) is used in Northern Ghana to symbolise the office of a Chief (similar to the 'throne' which symbolise the office of a king in Europe). Thus, communally owned lands are referred to as skin lands. In Southern Ghana, the concept of stool lands is derived from the stool (a wooden seat) on which the Chiefs sits. Following the standard practice, I shall use the concept of stool land to refer to both stool and skin lands. I shall also use the terms 'communal land' and 'customary land' in reference to stool/skin lands.

<sup>6</sup> The international development agencies that supported the LAP are the World Bank, the Canadian International Development Agency (CIDA), the UK Department for International Development (DFID), the German Technical Assistance Corporation (GTZ), Kreditanstalt Fur Wiederaufbau (KfW) and the Nordic Development Fund (NDF) (World Bank 2003c; Toulmin et al. 2004).

public sector agencies of land administration into a single agency; and (2) the creation of transparent and accountable agencies of customary land administration. By 2010, four of the six public sector agencies of land administration had been restructured into a single agency. The creation of transparent and accountable agencies of customary land administration within the domain of traditional authorities achieved very limited results. The LAP created 37 agencies of customary land administration out of the intended target of 50. According to the project implementers, none of the 37 customary land administration agencies is a public or state agency with formal-legal institutions (DFID 2010; LAPU 2009; MASDAR 2011a, 2011b). I shall examine how the organization of state authority between government and traditional authorities concerning land administration shaped the politics and outcomes of these reforms.

### **1.1.1 The Thesis: Critical Juncture and Path Dependence**

The thesis of the study is that the politics of colonial state formation in the Gold Coast (now known as Ghana) shaped the emergence of the traditional-federal state with bifurcated state authority between government and chiefs over land administration; and, the traditional-federal state has largely constrained the development of a transparent, accountable and efficient institutional framework of land administration. This study therefore reinforces the historical institutionalist argument that the critical juncture of state formation matters for the subsequent politics and outcomes of state development.

Within Ghana's current traditional-federal state, the successful reform of the institutions and agencies of land administration require the collective authority of government, parliament, and traditional authorities. Efforts to develop transparent, accountable and efficient institutions and agencies of land administration should not ignore the reality of the bifurcated organization of state authority between traditional authorities and government. The study examines, firstly, the historical origins of the traditional-federal state in Ghana; secondly, how land administration is organized in the state; and thirdly, how the organization of the state has shaped the politics and outcomes of land administration reforms. The research questions, summary of the analytical framework and structure of the study are outlined below.

## **1.2 Research Questions**

The central research questions of the study are:

- What is the provenance of the bifurcation of state authority between chiefs and government over land administration in Ghana?
- How has the bifurcation of state authority between chiefs and government shaped the politics and outcomes of land administration reforms?

In answering these questions I explore the following lines of enquiry:

1. What is the nature of land administration reform in Africa generally?
2. What is the provenance and nature of the traditional-federal state in Ghana?
3. How has the organization of the traditional-federal state shaped land administration reform within the public sector of the state?
4. How has the organization of the traditional-federal state shaped land administration reform within the customary sector of the state?

I hope that my exploration of the above questions will illuminate how the bifurcated organization of state authority and governance between traditional authorities, non-traditional political ruling elites, and citizens in Ghana has shaped the politics and outcomes of land administration reforms. A summary of the analytical framework used to investigate the above questions is outlined below.

## **1.3 Analytical Framework: Historical Institutionalism**

It is clear that the task at hand requires an analytical approach that is historically sensitive to the process of state development and also probes political interactions of power between actors in the organization of state institutions and agencies. Many political scientists have contributed to the development of an appropriate theoretical approach generally referred to as historical institutionalism (Collier and Collier 1991; Lipset and Rokkan 1967; Mahoney et al. 2003; Mahoney and Thelen 2010; Pierson 2004; Pierson and Skocpol 2002; Rokkan 1968; Steinmo et al. 1992). At the heart of the historical institutional analytical approach are four key propositions:

- First, institutions are created by human actors (individuals or their political agents) through political processes of cooperation, negotiation, and conflict;
- Second, actors involved in the politics of institutional formation, maintenance and change bring to the process diverse forms of ideas, power and resources;
- Third, actors are motivated by diverse reasons – social, cultural, economic, political and religious – to create, abide by, and enforce institutions; and,
- Fourth, the process of institutional formation and change occurs within prevailing institutional contexts that are commonly a powerful restraint on the ideas, interests and power of the actors involved in the new process.

The implications of the above core propositions of historical institutionalism are that explanations of processes and outcomes of institutional reform should begin by examining, firstly, the provenance of the institutions; secondly, how the institutions have been maintained; and thirdly, the role of political agency (internal, external or both) in initiating reform. In effect, for historical institutionalism, the role of political actors and the institutional context of reform are central to understanding processes and outcomes of institutional reform.

The historical institutional analytical approach will elucidate the provenance of the traditional-federal Ghanaian state, the organization of state authority over land administration by the political ruling elites, and the political forces (both external and internal) that have sought to *either* maintain *or* change existing institutions of land administration. The core historical institutionalist argument of this study is that the ideas, interests and distribution of authority between state actors at the ‘critical juncture’ or ‘formative moment’ of the Ghanaian state produced ‘powerful inertial stickiness’ that characterise the developmental paths of land administration. I shall throw more light on this important point in the next chapter where I develop the historical institutional theoretical framework of analysis.

My hope is that this study will contribute to a theoretical and empirical understanding of, firstly, the formation, maintenance, and change of institutions in the process of development; and secondly, how the organization of state authority in Ghana between traditional authorities and non-traditional political ruling elites concerning land administration has shaped institutional reform processes and

outcomes. The organization of state authority in a manner that requires the collective support of traditional authorities, government and parliament to reform institutions of land administration matters. The structure of the study is outlined next.

#### **1.4 Structure of the Study**

The study is divided into ten chapters. Chapter 2 sets out the conceptual, theoretical and methodological framework of the study. Chapter 3 discusses the nature of land administration reform in sub-Saharan Africa with particular emphasis on the customary sector. Chapter 4 examines the politics of colonial state formation in Ghana and the bifurcation of state authority between chiefs and government over land administration. Chapter 5 discusses how the colonial state incorporated chiefs and non-chief elites into the dominant ruling coalition; and, how the new ruling coalition reformed organizations of chieftaincy into a local government system through which chiefs administered communal lands, mobilized internal revenue for local development, and held accountable by their subjects. The colonial state transited from traditional-federalism into what I shall call the traditional-unitary state. Chapter 6 discusses the politics of decolonization and the modes of politics that separated organizations of chieftaincy from local government, the Executive and the Legislature to return the state to the path of traditional-federalism. Chapters 7 and 8 discuss the dual nature of land administration within the public and customary sectors of the state in the post-colonial period prior to the implementation of the Land Administration Project in 2001. Chapter 9 discusses the politics and outcomes of the Land Administration Project across the public and customary sectors of land administration. Finally, chapter 10 summarizes the findings of the study by emphasizing how the institutional configuration of bifurcated state authority between chiefs and government over land administration matters for the creation of an effective, transparent and accountable system of land administration.

## Chapter 2

### **Analytical Framework: Historical Institutionalism**

Exploring the sources and consequences of path dependence helps us to understand the powerful inertia or ‘stickiness’ that characterizes many aspects of political development – for instance, the enduring consequences that often stem from the emergence of particular institutional arrangements (Pierson 2004:11).

#### **Introduction**

Understanding the nature and causal effect of the bifurcation of state authority between governments and chiefs over land administration in Ghana requires an analytical approach that probes the provenance of the Ghanaian state. The theoretical framework in political science broadly referred to as historical institutionalism has been employed for these empirical tasks. Historical institutionalists emphasize that the formative moment or critical juncture of institutional development matter in shaping subsequent development processes within the institutions. This theoretical perspective underlies the analysis of the institutional emergence of a traditional-federal state with bifurcated state authority between government and traditional authorities concerning land administration; and, how the institutional legacies of the traditional-federal state has constrained land administration reforms. The research methodology suggested by the historical institutional theoretical perspective is generally referred to as comparative historical analysis. This chapter discusses the conceptual tools, theoretical framework, and research methodology that I used for the analysis of the thesis. The chapter is divided into five sections. The first section defines how I use the concepts of politics, political settlement, institutions, organizations, the state, and accountability in the analysis of the thesis. The second section outlines the historical institutional theory that underlies the thesis. The third and fourth sections discuss the research methodology and tools of data collection that I used. The fifth section concludes by emphasizing that it is more enlightening to diachronically analyze how the configuration of the traditional-federal state has evolved in Ghana to shape the political process of land administration reform.

## 2.1 Conceptual Framework

The concepts of politics, institutions, the state and accountability play key roles in understanding the thesis. I explain below what these concepts mean in the context of the theoretical and empirical analysis of the thesis.

### 2.1.1 Politics and Political Settlements

Following Leftwich (1983, 2004, 2007), I define politics broadly as all the activities of co-operation, conflict and negotiation involved in decisions about (a) the use, production and distribution of resources, and (b) the design of institutions and agencies to govern relations between human actors. Politics occurs wherever people have diverse interests, power, and preferences over these matters. Politics is not simply confined to the spheres of government as in its conventional usage. The parties to any political process might deploy different forms of power whether this is brute force, military, economic or ideological (Mann 1986). The extent of their power and how it is used will clearly influence outcomes. Though some theorists (Crick 2004) suggest that war or violence is not politics but represents the failure of politics, I prefer to see such violent conflict as a form of politics. In the often quoted dictum of Karl Von Clausewitz, ‘war is a continuation of politics by other means’.

For the purpose of understanding the developmental path of the state in Ghana, I distinguish between three distinct but related forms of politics, namely; (i) politics without agreed rules between the actors; (ii) politics without agreed rules between the actors intended to establish agreed rules; and (iii) politics within agreed rules intended to establish new rules.<sup>7</sup> In the modern world, it appears that politics without agreed rules between the actors is outdated. However, historically, it is analytically possible to separate (a) political activities of conflict between tribes or states that occurred without agreed rules and were not intended to establish any rules between the actors except to cause destruction; from (b) political activities of conflict that occurred without agreed rules but intended to establish rules to regulate future

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<sup>7</sup> Leftwich (2007) identified two distinct but related levels of politics, namely (a) The level which concern *rules of the game* (institutions); and (b) The level at which *games within the rules* occurs. My categorization of three distinct levels of politics was based on his distinctions. What I have added is the level of politics without rules of the game (the game being conflict or war).

interactions between the actors. Traditional states and British colonial officials in the Gold Coast sometimes engaged in both forms of violent politics without agreed rules (e.g. politics of war-making among the Asante Confederacy of states, the Fanti States, Akyem Abuakwa state, British colonial officials, and many traditional states). In the politics of state-making, *politics without agreed rules* usually shaped *politics of rule-making* which in turn shaped *politics within agreed rules*. Following the formation of the traditional-federal state from 1821-1901, political interactions between British colonial officials, traditional rulers, were largely characterized by non-violent forms of politics to create new state institutions and agencies.

Political agreements negotiated by contending political actors within historically specific periods of time is referred to in this study as political settlements (Di John and Putzel 2009; Laws 2010; Parks 2010). Political settlements include constitutions, peace treaties, and public policies. The concept of political settlement does not differ substantively from institutions. Perhaps, a useful distinction is that while a political settlement is a formal agreement negotiated among contending actors which reflects the distribution of power, not all formal institutions are the bargaining outcomes of political contentions (Di John and Putzel 2009). Examples of political settlements in this study are the 1831 MacClean Peace Treaty between British colonial officials, the Asante Confederacy, and some traditional states; the 1949 Coussey Committee Constitutional agreements between indigenous political elites; the 1953-57 independent state constitutional agreements; and the 1992 constitutional agreements among political elites and citizens. Political settlement in this study does not refer to ‘on-going political process’ (Laws 2010) or ‘rolling agreements’ (Parks 2010). Political settlement embodies empirically verifiable political intentionality and historical specificity to give it significant explanatory value in the historical analysis of development. The study will show that while some political settlements of state organization were consolidated by political ruling elites, others were reversed.

### **2.1.2 Institutions and Organizations**

The concept of institutions is central to the shared thesis among diverse strands of new institutionalists that ‘institutions matter’ in shaping human development (Hall and Taylor 1996; March and Olsen 2006). However there is no common definition of

the nature of institutions for the purpose of explaining exactly how institutions matter. It appears that the rational choice game theoretic definition of institutions as ‘rules of the game’ has become the most popular definition of institutions (North 1990; Rokkan 1968; Pierson and Skocpol 2002). The definition suggests that institutions are created by rational human actors to constrain social, economic and political interactions. Diverse interactions are metaphorically conceived as a game with the human actors as players of the game (North 1990). Institutions are defined in this study as humanly devised rules embedded with ideas, interests, power relationships and, usually, distribution of material resources that enable and constrain action (Hodgson 2006; Leftwich 2005; North 1990; March and Olsen 1989, 2004, 2006; Olsen 2007, 2010; Searle 1995, 2005; Shepsle 2010).

For the purpose of my research on how institutions matter, I shall draw an analytic distinction between formal and informal institutions. “There is less agreement...on how to distinguish between formal and informal institutions” (Helmke and Levitsky 2006:5). Many scholars have followed North’s (1990) distinction between formal institutions defined as ‘usually written rules’ and informal institutions defined as ‘usually unwritten rules’ (Leftwich 2007; North et al. 2009; Tsai 2007). This distinction however suggests that some formal institutions are unwritten and some informal institutions are written. Such unclear analytic definition is less useful. Helmke and Levitsky (2006:5) defined formal institutions as “rules and procedures that are created, communicated and enforced through channels that are widely accepted as official”; and “informal institutions as socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels.” This analytic distinction raises more problems than it resolves. O’Donnell (2006:289), in an afterword on the work of Helmke and Levitsky, pointed out that the attempt to categorize ‘indigenous legal systems’ as informal institutions on the basis of their ‘usually unwritten’ nature ignores the important fact that “indigenous legal systems and institutions are quite formally effected, including publicly appointed and legitimized authorities, detailed procedures, elaborate rituals, regularized sanctions and the like.” And there is much confusion about the nature and effect of informal customary institutions in Africa (Meagher 2007).

There is the need for a robust conceptual framework of formal and informal institutions not only for theoretical purposes (Collier et al. 2008), but also to inform knowledge about the type of institutions that are more likely to promote democratic and economic development (Chang 2007; Dahl 2005; Hare and Davies 2006; Grief 2006; North 1990; North et al. 2009). For the purpose of my analysis of how state institutions matter I develop a typology of institutions based on a state-society framework of analysis. Using a state-society framework, I develop a typology of institutions based on their *origin* and *form*. The origin of an institution is meant whether the institution originates from the state in which case I refer to it as state institution or it originates from societal actors in which case I refer to it as societal institution. The form of an institution is meant whether the institution is written or unwritten. Written institutions are called formal institutions and unwritten institutions are called informal institutions (Galligan 2007; Harrington 2008; Schauer 2008). Within the state, the two levels of analytic distinctions generate two types of institutions namely (i) formal state institutions and (ii) informal state institutions. Formal state institutions include written constitutions and statutory enactments. Informal state institutions are the unwritten rules of customary law that are recognized and enforced as part of the laws of the state. Informal state institutions have been noted to be the most difficult of legal orders to pin down (Galligan 2007; Harrington 2008). Within the society, the two levels of analytic distinctions generate two types of institutions namely (iii) formal societal institutions and (iv) informal societal institutions. Formal societal institutions include the written rules created by private businesses, non-governmental organizations, interest groups and diverse civil society associations. Informal societal institutions are the unwritten rules that regulate many aspects of social behaviour and relations in society (e.g. moral norms). Bratton (2007) and Hyden (2008) have discussed diverse informal rules of patron-client relations (clientelism and patrimonialism) that govern political behaviour in African countries. My thesis mainly deals with the creation, maintenance, reform and causal effect of formal and informal state institutions. The four types of institutions discussed above are shown below in Table 1.

**Table 1: A typology of institutions based on state-society framework**

<b>Origin</b>	<b>Form</b>	<b>Type of Institution</b>
<b>State</b>	Written	Formal state institutions
	Unwritten	Informal state institutions
<b>Society</b>	Written	Formal societal institutions
	Unwritten	Informal societal institutions

Lauth (2000) and Helmke and Levitsky (2006) have rightly argued that we need to know how diverse formal and informal institutions compete with, accommodate, substitute for, or complement each other. For instance, my study shows that informal rules of customary law (also referred to as informal-legal state institutions) governing chieftaincy-society relations of accountability play dual roles of complementing and substituting formal state institutions of accountability. The Courts and the Audit Service have found it almost impossible to hold chiefs accountable through formal-legal state institutions because unwritten rules of customary law are equally enforceable by the Courts. In September 2010, Parliament approved the codified rules of customary law governing aspect of chieftaincy-society relations in eleven traditional areas to enhance political order, transparency and accountability in traditional governance.<sup>8</sup> The process took ten years to complete.

For the purpose of my study I also attempt to address the analytic confusion in the literature over the concepts of ‘institutions’ and ‘organizations’ (Hodgson 2006; Leftwich 2007; North 1990; North et al. 2009). These two concepts are “so often used inter-changeably in the literature” (Leftwich 2007:11) in spite of attempt by many scholars to draw clear analytic distinctions between them. North (1990) draws an analytic distinction between ‘institutions’ defined as ‘rules of the game’ and ‘organizations’ defined as ‘collective-actors’. This analytic distinction helps to explain the role of organizations in the process of economic and political development. The problem is that collective-actor organizations are usually created not only to function as ‘players of the game’ but also as part of the ‘rules of the game’ – particularly within the constitutional rules of a state. For this reason, the concepts of institutions and organizations are used inter-changeably in the literature. North acknowledged that “for certain purposes we can consider organizations as

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<sup>8</sup> In Ghana, an informal rule of customary law assimilated by the common law is known as ‘common law rule of customary origin’ (Chieftaincy Act, 2008, Act 759).

institutions” (Hodgson 2006:19).<sup>9</sup> For instance, Levi (2006:10) remarked that “institutions are empty boxes without leaders and staff who have the capacity to produce the public goods the public demands and the facility to evoke popular confidence even among those who disagree with particular policies.” In this context, the institutions that Levi talks about are collective-actor ‘organizations’. A second problem with the concept of organization is grammatical. As a noun, the concept of organization also means “the way in which the elements of a whole are arranged”.<sup>10</sup> It is in this grammatical context that I use the concept of ‘organization’ when I talk about the organization of the Ghanaian state. Within this grammatical context of meaning, North et al. (2009:258) emphasize that “All states are organizations of organizations.” Here one sees how the grammatical and analytic problems have combined to create conceptual confusion. It is therefore sometimes confusing as to whether the concept of organization refers to a collective-actor organization or to an arrangement of the elements of a political system of rules and actors.

For analytical clarity, I shall use the concept of ‘agency’ to refer to collective actor organizations. Collective actor organizations that I shall deal with include six public sector land agencies namely the Lands Commission, Survey Department, Land Title Registry, Land Valuation Board, Office of the Administrator of Stool Lands, and Town and Country Planning Department. The study also examines reforms intended to create agencies of communal land administration called Customary Land Secretariat (CLS). Collective-actor organizations “manifestly have their own *internal* norms, conventions, and rules which define the hierarchies and the functions, and which regulate and facilitate the behaviour and interaction of members” (Leftwich 2007:11). However, the thesis is mainly concerned with the creation, maintenance and reform of the external institutions that regulate the existence and functions of collective actor organizations. For emphasis, institutions refer to the ‘rules of the game’, organization refers to the arrangement of rules and actors, and agencies refer to collective-actor organizations. I define in turn what I mean by the state.

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<sup>9</sup> The acknowledgement was made in a series of letters exchanged between Douglas North and Geoffrey Hodgson that sought to clarify the confusion (Hodgson 2006:19-21).

<sup>10</sup> Oxford English Dictionary, 6<sup>th</sup> Edition, 2006.

### 2.1.3 The State: The Politics of State Development in Ghana

This study is about the politics of state development. My thesis is that the current bifurcation of state authority between traditional authorities (or chiefs) and modern government over the administration of land and people in Ghana has been shaped by the critical juncture of colonial state formation from 1821 to 1831. To understand the origins and legacies of the Ghanaian state, it is crucial that I outline what is meant by the concept of the state in this study. The state is defined here as an organization of institutions (rules and agents) that claim final authority in the making and enforcement of legal rules, adjudication of disputes, and use of coercion against all other actors within a geographical territory (Dunleavy and O’Leary 1987; Dryzek and Dunleavy 2009; Evans et al. 1985; Hall and Ikenberry 1989; Leftwich 2008c; Loughlin 2010; North et al. 2009; Weber 1968; Tilly 1992).

There seems to be an emerging consensus among scholars concerned with the developmental capacities of states (North et al. 2009) that the dominant concept of the state in political science as a ‘single-actor representative agent’ (North 1989) should be jettisoned in favour of a conceptual framework that defines the state as an organization of rules and actors (Skocpol 1985). North et al. (2009:17) argued that “By overlooking the reality that all states are organizations, this [single-actor representative agent] approach misses how the internal dynamics of relationships among elites within the dominant coalition affect how states interact with the larger society.” Skocpol (1985:21) had also argued that an organizational perspective of the state is perhaps more important than the single-actor perspective for understanding developmental processes because,

States matter not simply because of the goal-oriented activities of state officials. They matter because their organizational configurations, along with their overall patterns of activity, affect political culture, encourage some kinds of group formation and collective political actions (but not others), and make possible the raising of certain political issues (but not others).<sup>11</sup>

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<sup>11</sup> Theda Skocpol (1985) traces this organizational perspective of the state to Alexis de Tocqueville. The influential work of Evans et al. (1985) in ‘Bringing the State Back In’ was perhaps the turning point in shaping the success of the organizational perspective of the state among historical institutionalists in Economics and Political Science.

Scholars have noted that states that have been able to perform their traditional and modern functions effectively have also acquired a large and sophisticated administrative apparatus (North et al. 2009). In Africa, due to diverse economic, political and administrative problems, many states have been unable to create an effective organizational apparatus to perform the traditional functions of states, let alone promote economic prosperity for their citizens (Chabal and Daloz 1999; Englebert 2002; 2009; Meredith 2006). Many African states are therefore struggling with legitimacy deficits. Many scholars and international development agencies with interest in Africa's economic and political developments have been fixated on promoting the democratization of African states (Diamond and Plattner 2010). Other scholars have been drawing attention to the need to focus on the creation of organizationally effective and efficient developmental states (Chang 2007; Leftwich 2000). The organizational perspective of the state has helped to shed light on the limits of participatory democracy in the creation of representative state agencies (Diamond et al. 2010; O'Donnell 2010; Przeworski et al. 1999; Schedler et al. 1999; Tilly 2007). All democratic states – whether developed or developing – are largely administered by unelected civil and public servants in diverse agencies. The scope of participatory democracy rarely goes beyond the ruling Executive, the Legislature, and local government. I argue that any attempt to create democratic and developmental states in African countries should be situated within the history of ideas, beliefs, actors, resources and global interactions that have shaped the process of state development in Africa since the pre-colonial era. It has been noted that the historical context of state development has usually been ignored by scholars, donors, and national stakeholders (Booth et al. 2005). This study examines the historical process of state development in Ghana and explains its causal effect on efforts to create an efficient, transparent and accountable land administration system.

For the purpose of generalizing some of the findings of the thesis across Africa, I shall give a brief overview of the politics of state development in Africa. At the beginning of the nineteenth century, the whole of Africa was ruled by “innumerable lineage and clan groups, city-states, kingdoms, and empires without any fixed boundaries” (Adu Boahen 2011:95). By the 1900, the innumerable African states and polities had been seized, occupied, and transformed into some forty colonial states by the European imperial power of Britain, France, Germany, Italy, Portugal,

Belgium, and Spain (Adu Boahen 2011; Gann and Duignan 1969).<sup>12</sup> Many scholars of African politics have recognized that the choice points of colonial state formation across African countries share the fundamental feature of the bifurcation of state authority between the existing rulers of African polities and newly created European central governments (Adu Boahen 2011; Dia 1996; Ekeh 1975; Mamdani 1996). Adu Boahen (2011:33-34) aptly explains that the process of colonial state formation across Africa occurred in the following three stages:

The first stage was the conclusion of a treaty between an African ruler and a European imperial power under which the former was usually accorded protection and undertook not to enter into any treaty relation with another European power, while the latter was granted certain exclusive trading and other rights. ... The second stage was the signing of bilateral treaties between the imperial powers usually based on the earlier treaties of protection which defined their spheres of interest and delimited their boundaries. ... The third and final stage was that of the European conquest and occupation of their spheres.

The numerous African independent states and polities were integrated into the colonial states that were created. Consequently, the process of colonial state formation led to the emergence of (and confusion over) two spheres of state (or public) authority where pre-colonial African states and the new European central government both claimed the people within the same geographical territory as their subjects (Ekeh 1975; Mamdani 1996; Ray 1996).<sup>13</sup> The subjects of the European governments later became known as citizens. Competition between ‘the two publics’ over the membership and allegiance of the subject-citizen has become one of the key legacies of colonialism in many post-colonial African countries.

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<sup>12</sup> According to Adu Boahen (2011:27), many of the colonial states in Africa were created by the European imperial countries “within the incredibly short period between 1800 and 1900”. The subject of the nature of colonial state-making across Africa by the imperial European countries is discussed by other scholars in Gann and Duignan (1969).

<sup>13</sup> For instance, Mamdani (1996:62-3) reports that after Great Britain had annexed the colony of Natal in South Africa in 1843, a British Commissioner noted the following state of affairs in 1846: “The natives own laws are superceded; the restraints which they furnish are removed. The government of their own chiefs is at an end; and, although it is a fact that British rule and law have been substituted in their stead, it is not less true that they are almost as inoperative as if they had not been proclaimed, from a want of the necessary representatives and agents to carry them out.” Later, we shall see the effects of similar proclamations of British colonial rule over Ghana from 1821. The point here is that following the creation of the colonial state the individual African became both a subject of the traditional African ruler and a subject (later citizen) of the European colonial government. After the “third and final stage” of colonial state formation in Africa (Adu Boahen 2011:34), the public sphere of the traditional states and African polities did not continue to lie outside the operation of the statutory rules of European colonial governments as Mamdani (1996) sometimes make it to appear.

The legacy of two spheres of public authority in post-colonial African countries has generated debates between those who support the reform, strengthening, and integration of traditional institutions into the ‘modern’ public institutions of the African state (Dia 1996; Logan 2011; Oomen 2003; Sklar 2003; Vaughan 2003) and those support the dismantling of traditional institutions for diverse reasons (Ntsebeza 2005; Mamdani 1996). This study does not enter into this general debate for the simple reason that the sheer diversity of traditional institutions of authority across Africa, even within one country let alone an entire continent, “makes historical iconoclasm a risky business” (Parker and Rathbone 2007:110). This position is consistent with the historical institutional theoretical and methodological approach underlying this study, which I shall discuss later. From the case of Ghana we shall see that the legacy of ‘two publics’ within the same state has presented complex opportunities and challenges to the building of a developmental state. Ghana is one of many African countries where political elites have tried to reform and integrate the remnant of traditional state institutions into the modern state to perform diverse functions.<sup>14</sup> For instance, Native Courts of traditional authorities were kicked out of the judicial system at the dawn of independence; but the independent state also reformed traditional institutions into Traditional Councils, Regional Houses of Chiefs and the National House of Chiefs with original and appellate judicial authority to hear and determine cases concerning chieftaincy. In Botswana, chiefs have been constituted into a National House of Chiefs to shape national legislation affecting institutions of chieftaincy. Moreover, Native Courts of chiefs have been integrated into the Botswana judicial system. In Zimbabwe and Zambia, traditional authorities constitute the Upper Senate of bicameral legislatures.

Ironically, popular support for traditional authorities has surged across many African countries in the era of democratization (Logan 2008, 2011). Between 1999 and 2008, four rounds of Afrobarometer surveys across many African countries have consistently shown that organizations of traditional authorities enjoy widespread support and trust among citizens.<sup>15</sup> The Afrobarometer surveys also show that in many African countries, citizens generally prefer to be ruled by their traditional

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<sup>14</sup> A useful overview of the nature and role of traditional institutions in Southern, Eastern and Western Africa can be found in the research works edited by Buur and Kyed (2007) and Vaughan (2003).

<sup>15</sup> See results of Afrobarometer surveys at <http://www.afrobarometer.org/> (last accessed 24/03/2012).

authorities than to be ruled by military leaders, one party states and presidential dictators. Furthermore, traditional authorities in many African countries command higher levels of public trust than state agencies such as parliament, the police/army, local government and the courts. Comparative historical research projects are needed to understand how and why support for traditional governance has surged across Africa. I therefore support the call by Vaughan (2003: xiii) that “The ongoing crisis of the African state and the resilience of traditional institutions necessitate a critical interdisciplinary inquiry into the significance of indigenous structures in the governance of African communities during the colonial and postcolonial periods.” Unfortunately, there has been a lack of an appropriate conceptual framework to define the nature of the colonial state in which state authority was bifurcated between the African traditional states and the new European central governments who operated from within their castles and forts (Ntsebeza 2005; Ray 1996; Ray and Rouveroy van Nieuwaal 1996; Sklar 2003; Vaughan 2003). An appropriate conceptual framework would enhance our analysis of the developmental character of the traditional ‘primordial public’ and the modern ‘civic public’ (Ekeh 1975; Shils 1957), the colonial interactions between the two public spheres of state authority (Gann and Duignan 1970), and the nature of organizational change that has occurred in postcolonial African states (Adu Boahen 2011; Buur and Kyed 2007; Vaughan 2003). The conceptual framework developed for this study is discussed in turn.

In the context of Ghana, the bifurcation of state authority between the traditional states and the new British colonial central government concerning the administration of people and land is conceptualized as the traditional-federal state. The traditional-federal state which was initially created from 1821-1831 has gone through major organizational transformations. At present the remnant of the traditional states have lost their authority to create and maintain their own military forces and sovereign states. However, the constitutional rules of the current fourth republic Ghanaian state (i) recognizes the customary laws of chieftaincy as part of the laws of Ghana, (ii) consolidates communal land ownership managed by traditional authorities in local communities, (iii) prohibits the transformation of communal lands (which constitute about 80% of the country’s land) into individual freehold lands, and (iv), crucially, limits the authority of government and parliament to reform institutions of chieftaincy without the authoritative consent of the chiefs (Brobbe 2008).

This study will show three major organizational transformations of the traditional-federal state in Ghana. It will show how after the colonial military conquest and occupation of the traditional states in 1901, the British colonial government, traditional rulers (chiefs), and native non-chief educated elites cooperated from 1902-1953 to gradually transform the traditional-federal colonial state into what I shall call the traditional-unitary state. Under the traditional-unitary colonial state, British officials, chiefs, and native non-chief educated elites became members of the ruling Executive and Legislature. Moreover, organizations of traditional states throughout the country were transformed into local government agencies – called Native Authorities – managed by the chiefs. Crucially, the traditional states retained ownership and administration of their communally owned (stool) lands. From 1954, the powerful class of native non-chief educated elites that had emerged replaced the chiefs in the Executive, the Legislature and the local government system. The acrimonious politics that developed between chiefs and the new ruling class of non-chief educated elites did not only lead to the separation of chieftaincy from the local government system, but also led to the design of constitutional mechanisms that insulated chieftaincy from central government control. The colonial state teetered back to the brink of traditional-federalism. The quasi post-colonial traditional-federal state has persisted in Ghana and it has posed developmental challenges for all stakeholders. The three major state transitions are summarized below in Table 2.

**Table 2: The legacies of traditional-federal state formation: 1821-2010**

Historical period	Type of State	Composition of Executive and Legislature	State authority over Traditional State administration	Nature of the legal rules (laws) of the state
1800-1820	Traditional state	Chiefs	Centralized in traditional states	Rules of customary law
1821-1901	Traditional-federal state	British colonial officials	Divided between the Executive and traditional states	Rules of customary law and common law
1902-1953	Traditional-unitary state	British colonial officials, Chiefs, and Native non-chief political elites	Largely centralized in the Executive	Rules of customary law and common law
1954-2010	Traditional-federal state	Native non-chief political elites	Divided between the Executive, Legislature and traditional states	Rules of customary law and common law

The organization and legacies of the traditional-federal state shaped diverse politics of land administration in Ghana. The traditional-federal state created between 1821 and 1901 shaped the emergence of a dual organizational framework of land administration divided between (a) the customary sector of land administration managed by traditional authorities, and (b) the public sector of land administration managed by civil servants controlled by the central government. I shall discuss how the distribution of state authority between chiefs and central government has shaped the politics creating diverse public sector agencies of land administration to manage the conflicting interests of the two ruling classes. I shall discuss how the distribution of state authority has shaped the politics and outcomes of reforms to create transparent and accountable agencies of customary land administration.

The study will show how chiefs and their educated subjects successfully fought to maintain control of their customary land ownership system from state expropriation initiated by British government officials in the late nineteenth century. Under the traditional-unitary state, the chiefs and their educated subjects cooperated with British government officials to create formal-legal institutions of accountability within traditional states for the management of the communally owned stool lands (including land revenues). The separation of chieftaincy from the local government system, the Executive and the Legislature to return the state to traditional-federalism (1954-2010) ushered in renewed reforms to create new accountable agencies of customary land administration in local communities. Throughout the study I show that the nature of the organization of state authority between chiefs and government matters in shaping the politics of land administration reform in the country.

We shall see that the current bifurcation of state authority between chiefs and government has significantly limited the power of government to ‘supply’ land administration reforms that are not supported by chiefs. The crucial theoretical point is that the colonial traditional-federal state continues to produce distinctive political processes and outcomes in matters concerning land administration. As earlier indicated, this study reinforces the historical institutionalist theoretical view that the critical juncture of state formation matters for the subsequent politics and outcomes of state development. I turn next to define what is meant by accountability.

#### **2.1.4 Accountability: The Politics of State Accountability**

Recent land administration reforms implemented in Ghana sought to create “accountable systems for managing and administering land at local level...in line with the Constitutional provisions, in a way that protects the rights of all land holders, recognises the public interest in land management, and provides an effective interface with democratic local and national government” (Toulmin et al. 2004:12). The objective of the reforms was surely in line with the 1992 constitutional provision which obliges traditional authorities who manage customary lands on behalf of their subjects to be “accountable as fiduciaries.”<sup>16</sup> It could be seen that both constitution makers and development actors have been concerned with the accountability of chiefs in communal land administration. The important question is what is accountability? There is some consensus among scholars that accountability refers to the process of holding agents (individuals or collective actors) responsible for their actions in the context of specified mandates (Fearon 1999; O’Donnell 1993; McGee and Gaventa 2010; Przeworski et al. 1999; Schedler et al. 1999). This definition meets the intentions of constitution makers and development actors to hold chiefs responsible for how they manage communal lands on behalf of their subjects.

There are about four key interrelated theoretical assumptions underlying demand for accountability of political agents (Manin et al. 1999a, 1999b; McGee and Gaventa 2010; Schedler 1999).<sup>17</sup> First, it is assumed that that an actor (or a group of actors) has agreed to play the role of an agent by performing some responsibilities on behalf of some principal actor (or group of actors). Second, it is usually assumed that the principal actor who appointed, nominated or elected the agent has performed whatever obligations that are due to the agent (including the provision of agreed financial, human, material, and political resources), to enable the agent perform the mandates. Third, it is assumed that principal actors will actually hold agents responsible for their actions. Fourth, it is assumed that if agents are transparent in the performance of their responsibilities or mandates it would enhance the knowledge and power of principals to hold agents responsible for their actions.

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<sup>16</sup> Article 36(8) of the 1992 Constitution of the Fourth Republic of Ghana.

<sup>17</sup> Useful discussions of the theoretical assumptions underlying issues of accountability can be found in the work of McGee and Gaventa (2010), Przeworski et al. (1999), Schedler et al. (1999).

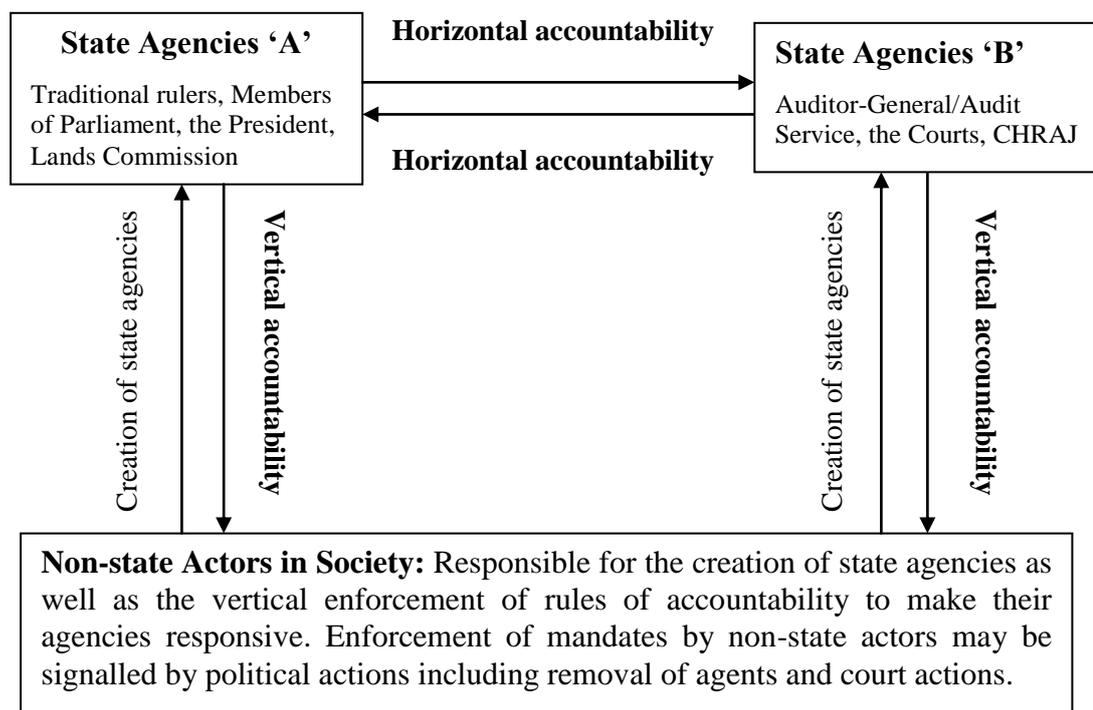
If all the above four conditions are met then there is effective accountability. In effect, accountability is the relation between agential mandates and the actual enforcement of sanctions or rewards by principals in response to agential actions. It should be noted that the *outcomes* of agential actions may not conform to what both principals and agents had envisaged. There could be *unintended outcomes* from agential actions because initial “conditions may change in such a way that the implementation of the mandate is no longer best” (Manin et al. 1999b:35). For that reason, the enforcement of rewards or sanctions by principals should be shaped by agential responsiveness (and non-responsiveness) to their institutional mandates. It should be based on what Stokes (1999) calls ‘mandate-responsiveness’; and not necessarily based on *outcomes* generated by the actions of an agent. It is also important for agents to be proactive to the interests of their principals.

This study shall be concerned with the analysis of accountability of state agencies in land administration. For this purpose, the study uses a useful analytical distinction made by Guillermo O’Donnell (1998, 1999, 2010) between two types of state accountability, namely, (i) vertical accountability and (ii) horizontal accountability. Vertical accountability is defined as relationships of accountability between state agencies and non-state actors in society. Horizontal accountability refers to relationships of accountability between two or more state agencies.

State agencies that manage land in Ghana include traditional authorities and public sector land agencies like the Lands Commission. Citizens expect their traditional authorities to be accountable to them in the use of public (stool) land revenues. Public sector land agencies are also expected to effectively deliver services concerned with the registration of land transactions. While chiefs are not directly elected or sanctioned by citizens (Brobby 2008); civil servants in public sector land agencies are also not directly rewarded or sanctioned by citizens. Therefore it becomes difficult for citizens to practically sanction traditional rulers and civil servants for unsatisfactory performance of mandates. It is generally acknowledged that Ghanaians do not think that it is culturally appropriate to publicly hold their traditional rulers responsible for their actions (Busia 1968; Kludze 1987, 2000; Odotei and Awedoba 2006; Oseadeeyo Addo-Dankwa III 2004). The vertical accountability of chiefs and civil servants to citizens may therefore become highly

dependent on agential willingness. The potential ineffectiveness of vertical state accountability is what influenced Ghanaians to also create state agencies such as the Courts, the Auditor-General Department, and the Commission for Human Rights and Administrative Justice (CHRAJ) to horizontally hold chiefs and civil servants accountable for their actions. Later we shall see how the ineffectiveness of chieftaincy-society relations of vertical accountability influenced colonial British government officials to negotiate with chiefs the creation of horizontal mechanisms of accountability. Currently, one of the legacies of the colonial politics of state making is the annual accountability of Traditional Councils of Chiefs to the office of the Auditor-General. Since the 1930s the Audit Service Department have tried to hold chiefs responsible for how they use stool land revenues. The practical examples from the Ghanaian context are used in Diagram 1 below to illustrate the nature of vertical and horizontal state accountability.

**Diagram 1: A model of vertical and horizontal state accountability**



In Diagram 1 above, state agencies are not automatically given but are created by actors in society – whether through peaceful, violent or coercive means. For analytical purposes, it is assumed here that the set of state agencies 'A' and 'B' were created by Ghanaians through constitutional design. Citizens expect all the state

agencies to be vertically accountable to them in the performance of mandates. However, as already indicated, traditional rulers, Members of Parliament and civil servants have also been made horizontally accountable to the Auditor-General department. Moreover, the Courts and CHRAJ are also used as agencies of horizontal accountability. There is some recursive horizontal accountability between the Auditor-General, Parliament and the Courts. The effectiveness of state accountability is dependent on the design and enforcement of a set of vertical and horizontal institutions of accountability. Many scholars have however noted that development practitioners have the tendency to demand the creation of questionable institutions of vertical state accountability (McGee and Gaventa 2010; O'Donnell 2010; Przeworski et al. 1999; Schedler et al. 1999).

Recent customary land administration reforms in Ghana have sought to “improve accessibility of *information* at the level of customary land administration on land use and holdings, land transactions and availability, and associated financial and cadastral records” (Toulmin et al. 2004:13). Reforms have also been implemented to strengthen horizontal accountability among the public sector agencies of land administration to enhance inter-organizational cooperation and effective public service delivery. The outcomes of the projects are discussed in chapter 9. We shall see that the ‘senior civil servants’ in Ghana who were tasked by international development agencies to create transparent and accountable agencies of customary land administration were aware that Ghanaian cultural norms prohibit the subjects of chiefs from publicly demanding accountability from their chiefs.<sup>18</sup> In the context of chieftaincy-society relations where rules of customary law largely define the “logics of appropriateness” (March and Olsen 2004), I argue that the choice of horizontal institutions of accountability is more likely to be effective in holding chiefs accountable than the dependence on vertical institutions of accountability. The existence of “cultural power distance” (Hofstede et al. 2010) between chiefs and their subjects should be taken seriously. The choice of institutions of accountability should be sensitive to the historical context of the power relations between chiefs and their subjects. I move on to discuss the theoretical framework of analysis.

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<sup>18</sup> Interviews with Dr Odame Larbi (Director of Land Administration Project), 1/12/2010, and, Mr Jimmy Aidoo (Deputy Director/Monitoring and Evaluation Officer of LAP), 1/12/2010.

## 2.2 The Historical Institutional Analytical Approach: Understanding the Origins and Causal Effects of State Institutions

The theoretical approach called historical institutionalism is what this study uses to explain the origins and causal effect of the bifurcation of state authority between chiefs and government over land administration in Ghana. The central argument of historical institutionalists in political science is that the creation and consolidation of institutions – particularly state institutions – matters in explaining current development process and outcomes in countries (Abbott 2001; Collier and Collier 2002; Evans et al. 1985; Hall 1986; Lipset and Rokkan 1967; Pierson 2004; Pierson and Skocpol 2002; Sanders 2006; Smith 2008; Steinmo et al. 1992; Thelen 1999). Historical institutionalists argue that institutions reflect the economic and political opportunities and constraints that structure interactions among diverse actors in society. It is therefore important that scholars and development actors examine the historical trajectories of institutions to understand why and how institutions matter in shaping development processes. When translated into the context of my study, it is important to examine the political-history of state formation in Ghana in order to understand the origins and causal effect of the bifurcation of state authority between chiefs and government over land administration. In the tradition of historical institutionalism, the political-history of the bifurcation of state authority between chiefs and government over land administration is explored in this study. The theoretical propositions that underlie historical institutionalism and the research methodology suggested by the approach are discussed in turn.

Historical institutionalism is not simply concerned with recounting historical events within a limited historical period as the popular phrase *history matters* may suggest; but, the analytical approach is concerned with the political analysis of the legacies of institutional formation in the course of historical development. As Mahoney and Thelen (2010:7) point out, historical institutionalists “view institutions first and foremost as the political legacies of concrete historical struggles.” Many scholars have argued that historical institutionalists should emphasize the primacy of human agency in the formation, maintenance and change of institutions (Leftwich 2007, 2008a, 2009; Lieberman 2002; Mahoney and Thelen 2010; Moe 2005; Smith 1992). It is theoretically misplaced to privilege the role of structure over human agency

(Hay and Wincott 1998; McAnulla 2002; Smith 2006). Thus, at the heart of historical institutionalism are (at least) the following four key propositions:

- First, institutions are created by human actors (individuals or their political agents) through political processes of cooperation, negotiation, and conflict.
- Second, actors involved in the politics of institutional formation, maintenance and change bring to the process diverse forms of ideas, power and resources.
- Third, actors are motivated by diverse reasons – social, economic, political and religious – to create and enforce institutions.
- Finally, the process of institutional formation and change occurs within prevailing institutional contexts that commonly enable or constrain the ideas, interests and power of the actors involved in the new process.

Historical institutionalists emphasize that state institutions are created by political actors (or human agency) through political processes of negotiation, cooperation, and conflict between actors. Political institutions are not neutral structures (Leftwich, 2004, 2007). The political process of institutional formation generates interests from diverse actors because, first, institutions are purposely devised to both enable and constrain action and distribution of resources, and, second, human beings differ in ideas, interests, power and values and therefore the process of institutional formation is bound to be contested among actors. Once institutions are created, they shape human interactions in defining social, economic and political development.

Historical institutionalists emphasize that institutional formation and change occur within institutional contexts that often privilege certain ideas and interests over others. This important claim does not suggest that human actors are helpless captives of institutional structures. The claim is based on the theoretical assumption that actors who benefit from existing institutions would (and usually do) protect the survival of their interests. Political actors are therefore more likely to support new ideas and actors that enhance existing benefits than those that do not. Particularly, state institutions provide actors with justifications for the ‘mobilization of bias’ (Schattschneider 1960) against actors who have conflicting or threatening interests. This notwithstanding, the creation of new institutions must necessarily be carried out through existing institutional procedures, channels of legitimation, and political

processes of negotiations. Existing procedures of legitimation privilege certain interests, ideas, values, and choices over others.

My study provides significant evidence to support the claim that the origin of state institutions do matter in shaping current process and outcomes. As we shall later see, the constitutional rules of Ghana do not only consolidate communal land ownership managed by pre-colonial traditional rulers, but the traditional rulers also negotiated constitutional rules that prohibits the creation from communal lands “a freehold interest howsoever described.”<sup>19</sup> The World Bank which provided financial support for land administration reforms in 2001-2010 realised that the 1992 Constitution affects its interest to create individual freehold land titles (World Bank 2003c:33). Crucially, the World Bank also found out that democratically elected Ghanaian governments cannot change the constitutional rules of land administration without the consent of traditional rulers (the National House of Chiefs, Regional Houses of Chiefs and 196 Traditional Councils) and at least two-thirds of the Members of Parliament. These constitutional rules did matter in shaping reform outcomes.

Historical institutionalists have largely focused their research on the provenance and causal effect of formal-legal state institutions and agencies – such as constitutional rules, electoral systems, the legislature, the executive, the judiciary, and public policies – rather than on informal institutions. This lopsided focus is quite understandable because it is usually impossible to delineate the origins of informal institutions. Harsanyi (1960:140) makes the important point that “if we want to restrict our analysis to a point shorter than the whole history of the human race, we have to admit as explanatory variables initial conditions which are already social variables.” Across all human societies, informal institutions are part of the initial conditions that enable the formation of new formal and informal institutions. In recent times, a number of scholars have looked at the nature and causal effect of informal institutions on development processes (Ensminger and Knight 1997; Farrell and Knight 2003; Grief 1994; Helmke and Levitsky 2006; Hodgson 2001; Lauth 2000; O'Donnell 2006; Steer and Sen 2008; Tsai 2007). It has been recognized that informal institutions do have significant effect in shaping behaviour in society and

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<sup>19</sup> 1992 Constitution of Ghana, Article 167(5).

the effectiveness of formal institutions. Understanding how formal and informal institutions interact to shape development processes in developing countries has become an important focus of analysis (Bratton 2007; Helmke and Levitsky 2006). Part of my study examined how informal rules of customary law interact with formal-legal state institutions to enhance or constrain the accountability of traditional rulers who manage communal lands on behalf of their members. We shall see that informal rules of customary law have the capacity to complement, conflict with, and substitute for formal-legal institutions (Helmke and Levitsky 2006; Tsai 2007).

Many historical institutionalists have contributed to the development of a parsimonious theoretical model that is used to explain how the origins of political institutions tends to have enduring causal effects on distinct development processes and outcomes. The theoretical model of explanation is referred to in this study as the critical juncture-path dependence (CJ-PD) model. The theoretical thrust of the CJ-PD model is to explain the development and legacies of “a limited range of institutions within a limited range of politics” (Rokkan 1968:175). The CJ-PD model is what I have used to explain, first, the provenance of the bifurcation of state authority in Ghana between chiefs and government over land administration; and, second, how the bifurcation of state authority between chiefs and government shaped the politics and outcomes of land administration reforms implemented from 2001-2010. The CJ-PD framework of explanation is discussed below.

### **2.2.1 The Critical Juncture and Path Dependence Explanatory Model**

The theoretical claim of the CJ-PD explanatory model is that some political institutional choices made at a particular point in time proved significant in structuring subsequent distinctive development processes and outcomes (Abbott 2001; Collier and Collier 2002; Lipset and Rokkan 1967; Pierson 2004). The initial political institutional choice is what is referred to as ‘critical juncture’ (CJ). The distinctive development outcome produced by the initial choice is referred to as ‘path dependent’ (PD) outcome. Following Rokkan and Lipset (1967), Rokkan (1968) and Collier and Collier (2002), I define a critical juncture as a period of time during which the core attributes of an institution, or a political process, or a political outcome was initially developed. A critical juncture is hypothesized to have

produced a distinct outcome. The definition of the period of a critical juncture cannot be done in abstract but through empirical historical analysis of the process of institutional formation. Collier and Collier (2002:33) emphasize that “The importance or lack of importance of a critical juncture cannot be established in general, but only with reference to a specific historical legacy.” Pierson (2004:11) also point out that “Claims about path dependence typically suggest that beginnings are very important.” The CJ-PD explanatory framework therefore contains two components: (1) the claim that a political decision, political settlement, or moment of institutional innovation occurred in the history of a given polity; and (2), that this event causally produced distinct legacies. The CJ-PD explanatory model does not seek to explain the origin of antecedent conditions that produced the CJ. It seeks to explain how the CJ was produced from the antecedent conditions.

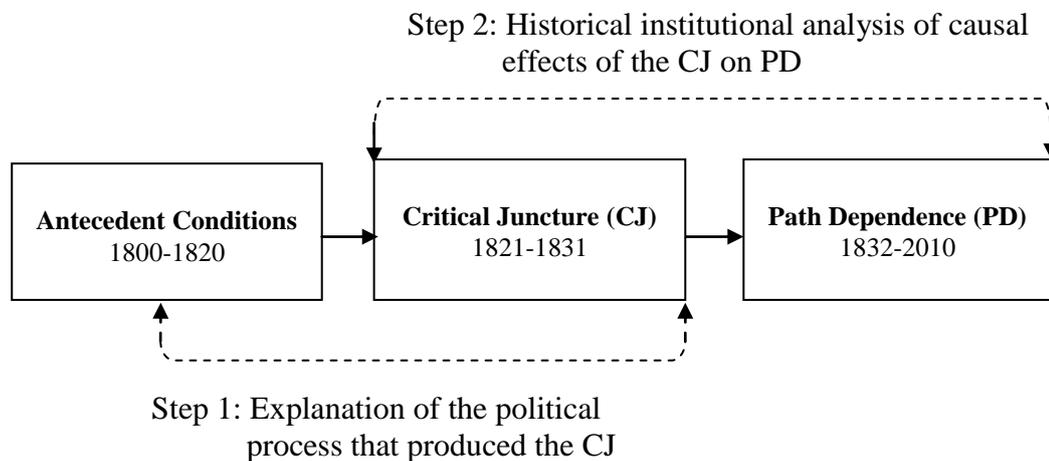
Methodologically, the CJ-PD explanatory framework suggests a causal analysis with a *terminus ad quo* (a starting point, origin, beginning, formative moment or choice point) and a *terminus ad quem* (a final or latest finishing point) (Collier and Collier 2002; Lipset and Rokkan 1967; Rokkan 1968). Rueschemeyer and Stephens (1997:57) rightly point out that “One needs diachronic evidence about historical sequences to explore and to test ideas about causation directly.” The diachronic evidence seeks to emphasize the historical institutionalist claim that historical choices matter. I shall return to the methodological implications of the CJ-PD analytical model. I discuss below how the CJ-PD model is applied to the study.

My study sought to examine the origin and causal effect of the constitutional bifurcation of state authority between chiefs and government over land administration in Ghana. From the analysis of the historical records, my argument is that the initial creation of the Ghanaian state during the colonial period is the critical juncture that structured the bifurcation of state authority between chiefs and government over land administration. The initial colonial state that was negotiated between 1821 and 1831 is conceptualized as the traditional-federal state. British colonial state makers declared colonial rule over Ghana (then called the Gold Coast) in 1821. The pre-colonial period was characterized by the existence of powerful traditional states with their political organizations of governance called chieftaincy. The political institutions that governed chieftaincy-society relations are generally

referred to as informal rules of customary law. Traditional states also administered land under a system of communal ownership. The study will show that the failure of British colonial officials and their military forces to supersede the traditional states and claim ultimate ownership of their stool lands led to the creation of a colonial state with bifurcated authority between chiefs and government over the administration of land. The creation of the traditional-federal state is hypothesized as the CJ which shaped the development of the current 1992 constitutional bifurcation of state authority between chiefs and government over land administration.

The study explains how the initial development of the traditional-federal state in 1821-1831 shaped diverse path dependent political processes and outcomes from 1832 to the present. For the purpose of my historical analysis of the causal effect of the configuration of traditional-federal state authority on the politics and outcomes of land administration reforms, I limit the periodization to 2010. The first phase of a long term land administration reform project came to an end in 2010. The diagram below depicts the CJ-PD framework that underpins my empirical explanations.

**Diagram 2: The CJ-PD Model of Historical Institutional Analysis<sup>20</sup>**



The colonial state that was created between 1821 and 1831 integrated the pre-existing traditional states and their communal land ownership systems. The nature of the critical juncture produced diverse outcomes including (i) conflicts between chiefs and government over land ownership leading to political settlements that

<sup>20</sup> See Collier and Collier (2002:30) and Mahoney (2001:113) for similar theoretical depictions of the CJ-PD explanatory framework.

consolidated communal land ownership, (ii) political reforms that sought to unify the dual authorities of chiefs and government within a single governmental structure from the national level to the local level, (iii) attempts to reform the informal rules of customary law to ensure transparency and accountability in chieftaincy administration, (iv) the sharing of stool land revenues between chiefs and government, (v) the creation of 'public sector' agencies to grant concurrence to communal land transaction, and (vi) constitutional rules that prohibits government and parliament to autonomously reform matters affecting chieftaincy without the consent of chiefs. Currently, the critical juncture has shaped demands from the World Bank, and resistance from chiefs, for the transformation of the communal land ownership system into individual freehold lands.

Thus, the critical juncture of state formation in 1821-1831 has produced many relevant legacies that I have discussed in the study. The key point is that the critical juncture matters for understanding the outcome of bifurcated state authority between chiefs and government. The pre-colonial antecedent condition, the critical juncture of state formation in 1821-1831, and diverse path dependent outcomes and processes that I have discussed in the study are summarized below in Table 3.

**Table 3: Antecedent Conditions, Critical Juncture and Path Dependence of the Traditional-Federal State in Ghana**

Antecedent conditions before 1821	Critical Juncture (CJ) of state organization: 1821-1831	Colonial Path Dependent (PD) Political Processes & Outcomes: 1832-1956		Post-colonial Path Dependent (PD) Political Processes and Outcomes: 1957-2010	
Existence of pre-colonial traditional states with ruling organizations of chieftaincy. Chiefs administered communal lands through informal rules of customary law.	Declaration of colonial rule over the Gold Coast by Britain and the failure of British colonial state makers to supersede the pre-existing traditional states through war-making. This led to the creation of the traditional-federal state with division of final state authority between the traditional states and the new British colonial Government.	1831	Creation of the traditional-federal state through Peace Treaty negotiated between 'Governor' George MacClean and the traditional states.	1957-2010	Consolidation of the traditional-federal state with integration of the rules of customary law in local communities into the laws of Ghana.
		1844	Consolidation of 1831 MacClean Peace Treaty through the signing of the 'bonds' of 1844 between Central Government and traditional states.		
		1877-1901	Consolidation of stool (communal) land ownership and tenure administration by chiefs following the failure of governments to claim, particularly through the 1894 and 1897 Crown Land Bills, ultimate state ('public') ownership of all lands.	1957-2010	(i) Consolidation of stool land ownership and tenure administration by chiefs with constitutional prohibition on the creation of individual freeholds from stool land. (ii) Land administration reforms in 2001-2010 to create accountable agencies of stool land administration.
		1878-1951	1878/1927 Native Jurisdiction Ordinance and 1944 Native Authority Ordinance formally transform organizations of chieftaincy into agencies of local government (Native Administration system).		
		1916-1953	The creation of a dominant ruling coalition comprising chiefs, non-chief indigenous political elites, and British officials within the Executive and Legislative Councils.	1969-2010	Co-optation of chiefs into Presidential-Executive decision-making through the Council of State.
		1926-1932	Chiefs created Provincial Councils of Chiefs and the Joint Provincial Council of Chiefs to strengthen chieftaincy governance and promote 'national-state' building.	1957-2010	Transformation of the Provincial Councils of Chiefs and Joint Provincial Council of Chiefs into ten Regional Houses of Chiefs and the National House of Chiefs respectively.

**Table 3 continuation: Antecedent Conditions, Critical Juncture and Path Dependence of the Traditional-Federal State in Ghana**

Antecedent conditions before 1821	Critical Juncture (CJ) of state organization: 1821-1831	Colonial Path Dependent (PD) Political Processes & Outcomes: 1832-1956		Post-colonial PD Political Processes and Outcomes: 1957-2010	
		1907-1945	Dominant ruling coalition of British officials, chiefs, and non-chief indigenous elites created the Survey Department (1907), Lands Department (1925?), and Town and Country Planning Department (1945) to govern access to and use of land.	1957-2010	Town and Country Planning Department consolidated. Lands Department Secretariat transformed into Lands Commission Secretariat in 1980s. Survey Department integrated into Lands Commission in 2008.
		1932-1951	i) Creation of formal-legal rules of Native Revenue Administration to govern chieftaincy administration. ii) Revenue and expenditure of State Councils of chiefs audited by Audit Service Department.	1957-2010	Revenue and expenditure of Traditional Councils of chiefs still audited by Audit Service Department.
		1949	i) Coussey Committee separated organizations of chieftaincy from local government. Political settlement implemented from 1951 with no alternative formal-legal rules created to govern stool land revenue administration. ii) Coussey Committee agreed over the sharing of stool land revenues between chiefs and local government agencies.	1957-2010	i) Organizations of Chieftaincy remain separated from local government. ii) Office of the Administrator of Stool Lands (OASL) is the current agency constitutionally created to collect and share stool land revenues. iii) Land administration reform in 2004-2010 to create new accountable formal-legal institutions and agencies to manage stool lands in local communities.
		1952-1956	Chiefs and the non-chief political elites negotiated constitutional limitations on the authority of government and parliament to reform institutions of chieftaincy without the consent of chiefs.	1957-2010	Constitutional limitations on the authority of government and parliament to reform institutions of chieftaincy consolidated in the 1957, 1969, 1979 and 1992 constitutions.
		1821-1956	Definitions of the geographical boundaries of the state. Final boundary defined in 1956.	1957-2010	Consolidation of the geographical boundaries of the Ghanaian state.

The path dependent processes shown in Table 3 are “grounded in a dynamic of increasing returns” (Pierson 2000:251) to the critical juncture of the traditional-federal state. While some PD processes that were subsequently produced were not sustained or consolidated, many others have been consolidated to the present. It could be seen from Table 3 that the politics of land administration in Ghana is embedded within complex set of rules of state organization that structures political relations of authority between chiefs and government. This makes the analysis of the politics of land administration reform a complex, and usually frustrating, adventure. The CJ-PD analytical framework will help us to understand why the customary land administration regime managed by chiefs remains the dominant form of land administration in Ghana. We shall see that the organization of the traditional-federal state continues to shape the politics and outcomes of land administration reform. Under the current traditional-federal Ghanaian state, organizations of chieftaincy (remnants of the traditional states) still retain some degree of final authority in the creation and reform of institutions of chieftaincy and stool land administration.

In sum, historical institutionalists emphasize that the initial development of institutions usually produce powerful inertial stickiness in shaping subsequent political outcomes. This study argues that the political settlement negotiated between British officials and rulers of traditional states to produce the traditional-federal state in the Gold Coast, between 1821 and 1831, continued to have a causal effect on the sharing of state authority between chiefs and government over the institutional development of chieftaincy and land administration. It does not appear that Ghanaian political elites and ordinary citizens are willing to abrogate the path of the current legacies of the traditional-federal state (Brobby 2008). To understand why the modern Ghanaian state limits the authority of government and parliament to reform institutions of chieftaincy and land administration, one would have to examine the provenance of the configuration of state authority between chiefs and government. It would become clear that there is a causal linkage between the political dynamics that shaped the initial development of the state and the current outcomes. This study has pursued such analysis by using the CJ-PD model of explaining the historical development of the Ghanaian state. The CJ-PD analytical model has an implicit research methodology that I discuss below in the context of my study.

### 2.3 Research Methodology: Comparative Historical Analysis

Lieberman (2001:1011) pointed out that “Although the emerging streams of historical institutional analysis have generated substantial insights in the field of comparative politics, this scholarship has lacked a self-conscious approach to methodology.” A number of scholars have elaborated upon the methodological approach suggested by the CJ-PD explanatory framework (Abbott 2001; Collier and Collier 2002; Mahoney and Rueschemeyer 2003; Pierson 2004). As earlier indicated, the CJ-PD methodological approach entails, first, a specification of the CJ from the antecedent conditions and, second, a causal analysis of the effect of the CJ on subsequent PD outcomes. Mahoney and Rueschemeyer (2003:10) emphasize that the methodology focuses on “a concern with causal analysis, an emphasis on processes over time, and the use of systematic and contextualized comparison.” Harsanyi (1960) conceived it as ‘a problem of *comparative dynamics*’ between ‘*initial conditions*’ of development and the ‘subsequent *external influences*’. In the context of my study, the two-step comparative historical analysis<sup>21</sup> involved:

1. Historical analysis of the origins of the present traditional-federal state.
2. Comparative historical analysis of the causal effect of the critical juncture of traditional-federal state formation on the subsequent organization of Chieftaincy-Government state relations over land administration.

The concern of the study was to understand, first, the provenance of the 1992 constitutional bifurcation of state authority between chiefs and government over land administration, and second, how the critical juncture of the bifurcated traditional-federal state have shaped the politics and outcomes of land administration reforms. I emphasize that the CJ-PD analytical model is not simply to present a parsimonious explanation of political outcomes but to explain the historical development of the traditional-federal state and its causal effect on land administration.

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<sup>21</sup> Comparative historical analysis is defined in this study to mean “[explanation of] similarities and differences in the development over time of different societies or different parts of the same society, in terms of the *initial conditions* (i.e. the conditions prevailing at some arbitrary point of time chosen as the starting point of our investigation) and in terms of the subsequent *external influences* (boundary conditions) affecting their development” (Harsanyi 1960:136). Diverse strategies of comparative historical analysis in the social sciences are discussed in Abbott (2001), Mahoney (2001), Mahoney and Rueschemeyer, eds. (2003), and Mahoney and Terrie (2008).

The methodological approach of the study focuses on sequential analysis of the causal linkages between the initial formation of the traditional-federal state and subsequent path dependent processes of state development. I take the traditional states and their systems of chieftaincy, communal land ownership and informal rules of customary law as historically given. I do not seek to explain the origins of these antecedent conditions. Before I discuss the research methods that I employed for data collection and historical analysis, I discuss below the problem of case selection from many path dependent outcomes of communal land administration reforms.

### **2.3.1 The Problem of Case Selection from Numerous PD Outcomes**

From 2001 to 2010, Ghana implemented land administration reforms in 37 communities intended to create accountable agencies of communal land administration. The reforms included other objectives that I discuss later. The problem of case selection had little to do with matters of theoretical interest (Gerring 2006, 2008). It was clear enough that there is a causal linkage between the integration of traditional states into the traditional-federal state and the subsequent communal land administration reforms in the 37 local communities. The problem was inadequate research funding to pursue an in-depth study of all the 37 cases of communal land administration reforms. Faced with acute research funding constraint, I selected for in-depth case study analysis three cases of communal land administration reform located within the powerful Asante Kingdom. The reasons for the choice of reform cases from the Asante Kingdom are explained below.

#### **a. Falling within the pathway: Maintaining the dynamics of power relations at the critical juncture of traditional-federal state formation**

The most important consideration in the selection of cases for CJ-PD analysis is the selection of cases that fall within the pathway of the hypothesized critical juncture to enable the researcher probe causal mechanisms (Gerring 2008; Lieberman 2001). On theoretical grounds, therefore, the balance of power relations between traditional states and government within the traditional-federal state needs to be maintained as much as possible to help examine the effects of external variables on the stability of the critical juncture. Colonial British officials and numerous traditional states in the

then Gold Coast (now Ghana) recognized that the most decisive factor for the creation of a stable colonial state was the willingness of the Asante Empire to negotiate a political settlement that granted independence to the other traditional states. The choice of cases of stool land administration reform in the Asante kingdom, the most powerful remnant of the traditional states, sought to enable hypothesis testing of causal mechanisms produced by the internal dynamics of power relations at the critical juncture of traditional-federal state formation.

The key objective of the Land Administration Project (LAP) was to create transparent and accountable administrative agencies to manage stool lands to enhance market transactions in stool lands (Quan et al. 2008; Toulmin et al. 2004; World Bank 2003c). The most important criterion used by the LAP for institutional reform in stool land owning areas was “economic viability” indicated by the following; demand for land relative to supply of available land; size of available land, potential for income generation from land transactions to support agencies once established, and the nature of land based economic and social activities. The centre of the Asante Kingdom called Kumasi traditional area typically met the reform conditions. The Kumasi traditional area witnessed three cases of reform processes to create Customary Land Secretariats (CLSs) as transparent and accountable agencies of stool land administration. The three cases were used for in-depth analysis.

Interestingly, areas with high economic transactions in stool lands in Ghana are also areas controlled by very powerful traditional authorities with acrimonious historical relations of power struggle with Government (Aryeetey et al. 2007; Austin 1964; Rathbone 2000a). From a political science perspective, it made much sense to analyse how the constitutional configuration of the traditional-federal state interacts with the variable of economic development to shape the politics of land administration reform. It is interesting to note that the history of state formation in Europe shows that the areas with high concentration of capital tend to have high concentration of political coercion, control, power, and conflict (Tilly 1992). Political and economic variables therefore tend to be the most crucial variables that shape processes of formation and the developmental paths of states. I move on to discuss the research methods that were used to collect data for historical analysis.

## **2.4 Research Methods: Documentary Analysis and Interviews**

Historical institutionalists have devoted some attention to elaborate on specific research methods that could be used to investigate ‘causal mechanisms’ or ‘historical causation’ of institutional paths of development (Abbott 2001; Gerring 2008; Lieberman 2001; McAdam et al. 2008). The CJ-PD comparative method of historical analysis suggests that the choice of appropriate research methods should be informed by the periodization of the outcome of research interest, accessibility of historical records, and accessibility of the actors who created the institutions of research interest. These matters do have implications for practical research considerations such as time constraint and availability of funding to pursue relevant data.

The periodization of the political outcome of research interest did matter for the choice of research methods. For instance, it is inconceivable that the political actors who negotiated the initial organization of the state from 1821 are alive to be interviewed for their perspectives about the outcome. However, to understand the outcomes of the Land Administration Project (LAP) implemented from 2001-2010, I could have access to existing historical records, official documents, relevant secondary literature, and the living actors who implemented the LAP. I discuss below how I collected research data from secondary literature, historical records, official documents and interviews to answer the research questions.

### **2.4.1 Secondary Sources of Research Data**

There is an extensive secondary literature describing the legal and organizational framework of the dual state authority over land administration between chiefs and government.<sup>22</sup> There also exist some detailed historical accounts of the political struggles between chiefs and non-chief indigenous political elites over the control of state authority over political governance during the dying moments of colonialism and the early post-colonial period.<sup>23</sup> Such historical studies served as useful maps in helping me get an idea of how far I needed to go into history to identify the critical

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<sup>22</sup> Comprehensive accounts of the dual system of land administration usually come from the work of legal scholars such as Ollenu (1962), Bentsi-Enchill (1964), and Woodman (1997).

<sup>23</sup> Outstanding detailed historical accounts of this exciting politics include the work of Austin (1964), Gocking (2005), and Rathbone (1993; 2000a).

juncture of chieftaincy-state relations, and also where to get the primary historical data for such analysis. What is less apparent in the extensive secondary literature is systematic theoretical explanation of the provenance of the bifurcation of state authority over land administration between chiefs and government, and the causal effects of this power configuration on the politics and outcomes of land administration reform.<sup>24</sup> In a conversation with Richard Rathbone who has done extensive field research on the politics of chieftaincy-state relations in Ghana over the past forty years, he offered me this advice, “In order to answer the questions you pose, there is no escaping the absolute necessity of working in the archives.”<sup>25</sup> He was right. What I did not anticipate was the high financial cost associated with archival research. I discuss below the kind of data that I collected from the archives.

#### **2.4.2 Examining Historical Records for Sequential Evidence**

The study relied solely on historical documents to account for the provenance of the traditional-federal Ghanaian state as well as the causal effect of the CJ on the subsequent structuring of power relations between chiefs and government over land administration, prior to the 2001-2010 land administration reforms. The study then relied partly on official documents produced by diverse actors who implemented the 2001-2010 land administration reforms to explain how the organization of state authority between chiefs and government shaped the politics and outcomes of the land administration reforms. The types and sources of historical documents that were collected for comparative historical analysis are described below.

In a 779-page book titled *Great Britain and Ghana – Documents of Ghana History, 1807-1957*, G. E. Metcalfe (1964) has published [on behalf of the University of Ghana] diverse historical documents from the British and Ghana National Archives concerning the historical development of the Ghanaian state prior to, and during, British colonial rule. The 515 documents are made up official letters, annual reports on political and economic developments in the Gold Coast, minutes of British officials in London about events in the Gold Coast, political agreements between British colonial governors and traditional states, reports of indigenous political

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<sup>24</sup> Notable exception can be made of the research works of Apter (1959) and Ray (1996).

<sup>25</sup> Richard Rathbone, email conversation, 28 July, 2011.

groups (e.g. Fanti Confederacy), minutes of Legislative Council debates, minutes of Executive Council debates, diverse constitutional settlements, etc. The rich historical documents compiled by Metcalfe proved to be an invaluable source of information for understanding the provenance of the traditional-federal state and the bifurcation of state authority between chiefs and government over land administration. Metcalfe's chronological presentation of historical events in the Gold Coast offered me the opportunity to do diachronic analysis of the historical sequences of state development. It helped me to explore and test ideas about causation directly.

The University of York online library also enabled me to access important official documents on political developments in Ghana kept in the British National Archives. I obtained relevant information from the Hansard of the UK Parliament (House of Commons and House of Lords) on important political developments concerning colonization and decolonization in the Gold Coast. The documents obtained from the Hansard of the UK Parliament have not been used directly in the study but they form part of the rich background knowledge that indirectly shaped my analysis.

During my eight months of fieldwork in Ghana, I collected relevant historical documents from the Public Records and Archives Administration Department (PRAAD) in Accra. In particular, I collected historical records on debates between traditional authorities, colonial British officials and merchants, and the 'new' indigenous political elites that took place in the Executive Council, the Legislative Council, the Legislative Assembly, and Parliament. Gold Coast annual reports on the administration of chieftaincy organizations (Native Authorities) played a key role in my understanding of institutional reforms negotiated between chiefs and British governors, particularly from the 1920s to the 1940s, to transform organizations of chieftaincy into transparent and accountable state agencies. Very little research work has been done by scholars about the important colonial state reforms that occurred although the reforms have left important institutional legacies of state accountability between organizations of chieftaincy and the Audit Service Department.

The Ghana Publishing Corporation in Accra which prints state official documents was also an important source for acquiring all the post-colonial constitutions of Ghana and statutory enactments such as the 1971 and 2008 Chieftaincy Acts.

Analyzing the historical sequence of state constitutional settlements since colonial rule is very important to understand the origins of the current 1992 constitutional bifurcation of state authority between chiefs and government. It would be seen that such diachronic analysis of the sequence of constitutional settlements played an important role in my causal claims of path dependent outcomes.

Concerning the analysis of the politics and outcomes of the Land Administration Project (LAP) implemented from 2001-2010, I collected official and unofficial documents from the Land Administration Project Unit (LAPU), Customary Land Secretariats (CLSs), the Lands Commission, the National House of Chiefs, and individual actors who played diverse roles in the reform process. The annual LAP implementation progress reports, from 2001-2010, were analyzed. I also obtained and analyzed some of the minutes from the meetings of the Land Sector Steering Committee (LSTC), the Land Policy Steering Committee (LPSC), and the LAPU to help me understand the variables that shaped the reform outcomes. The historical analysis of diverse documents produced from the LAP will clearly show that the constitutional organization of state authority between chiefs and government was the key factor that shaped the so-called ‘supply-led’ and ‘demand-led’ customary land administration reform strategies pursued by reform officials. The evidence from the LAP documents therefore plays a crucial role in supporting the CJ-PD thesis.

### **2.4.3 Interviews: Adding Little Colour to Stiff Accounts?**

The information obtained from official documents concerning the 2001-2010 land administration reform did not always satisfy my quest to understand the nature of the reform processes and outcomes. I considered it important to interview relevant actors who were involved in the reform in order to clarify some unclear reform processes and outcomes. The use of interviews to complement official documents in my comparative historical analysis should not be seen as an attempt “to add a little colour to otherwise stiff accounts” (Rathbun 2008:685).

Political institutions are created by human actors whose intentions matter for understanding the success or failure of institutional formation, maintenance and change. The land administration reforms implemented from 2001-2010 involved

diverse actors of international development agencies, civil servants, political elites,<sup>26</sup> traditional authorities and private consultants. To clearly understand the land administration reform outcomes I conducted unstructured interviews with 18 purposely selected individuals who participated in the reforms. I also conducted some kind of focused group discussions with four groups of actors.

The term *individual unstructured interview* is used here to refer to a research interview in which some or all of the questions that individual respondents are asked varies as a result of differences in respondent roles, knowledge, or other factors that is of interest to the researcher (Bryman 2008). Traditional authorities, civil servants, political elites, international development agencies and other reform participants usually did not have the same interest in the reforms. Individual unstructured interview with relevant reform participants was used to clarify reform processes and outcomes reported in official documents. The heads of the public sector land agencies (Lands Commission, Land Title Registry, Land Valuation Board, Survey Department, OASL, and TCPD) were interviewed to understand why they supported or resisted the reforms as well as their perspectives on the reasons for the reform outcomes. My interviews focused on the heads of the agencies because they had been constituted into a Land Sector Technical Committee (LSTC) to play key advisory and supervision roles in the reform process.

Government decision-making about the reform was largely dependent on the technical advice of these ‘senior civil servants’ (Kotey et al. 1998). ‘Junior staffs’ of the public sector land agencies played little role in the politics and outcomes of the organizational reform process (MASDAR 2011b). Notwithstanding the influential roles played by the senior civil servants in the reform process, they shared the consensus that the organization of the land sector agencies in the constitutional rules of the state played an important role in shaping reform outcomes. For instance, there was consensus among the heads of the agencies that the old Lands Commission and the OASL could not be restructured into a single agency because they had been

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<sup>26</sup> I use the concept of ‘elites’ here to refer to people who occupy political leadership positions in government and other state agencies. Leftwich (2010) has attempted to pin down the vague concept of elite. I use the term ‘political ruling elites’ to refer to the political leaders who participate in Executive and Legislative decision making in Ghana. They include Paramount chiefs within the 50-member National House of Chiefs whose legislative authority is required by Government and Parliament before institutions of chieftaincy can be reformed.

constitutionally structured to operate as separate agencies. What was less apparent to them was that the conflicting interests of chiefs and government had shaped the constitutional structuring of these agencies. The individual unstructured interviews provided further evidence to support the thesis that the bifurcation of state authority between chiefs and government over land administration matters for reform.

*Focus group interview* (FGI) is used here to describe a research interview where the researcher interviews a group of people about a specific situation or event that is relevant to the group and of interest to the researcher.<sup>27</sup> I interviewed three groups of traditional authorities responsible for the administration of communal lands in their respective local communities. They had played key roles in the attempt by the LAP to create transparent and accountable CLSs in their communities. Communal land administration reforms implemented under the LAP had a vaguely defined reform objective to ensure “effective accountability” in communal land administration. FGIs with traditional authorities at Gbawe and Nkawie local communities where CLSs had been created were intended to clarify the nature of the reform outcomes. For instance, the interview with traditional authorities at Nkawie produced evidence that contradicted the report in official document that the Nkawie CLS was “effectively operational” (LAPU-CLAU 2008). The Nkawie CLS project had become moribund due to some complex chieftaincy conflicts (MASDAR 2011b). The FGI with the Nkawie traditional authorities and CLS staff threw light on the nature of the conflict and how the organization of the traditional-federal state matters in the resolution of such conflicts. I also held a FGI with a group of civil servants who worked in the Auditor-General’s Department in order to understand the challenges they faced in auditing the stool land revenues and expenditure of Traditional Councils of chiefs. The FGI with the staffs of the Audit Service also sought to understand how the interaction between formal-legal rules and informal-legal customary laws in the administration of chiefs over communal lands affect their capacity to effectively audit the administration of chiefs.<sup>28</sup> Table 4 below summarizes the nature of the informants and interview approaches used.

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<sup>27</sup> I use the definition of Bryman (2008:197) that “In the case of group interviews or focus groups, there is more than one, and usually quite a few more than one, respondent or interviewee.”

<sup>28</sup>Initially, I had intended to conduct individual interviews with them but they suggested that a focus group interview would generate more interesting discussions. And certainly it did.

**Table 4: Nature of Interviews Conducted**

Nature of Interview	Categories of interview Participants	Number interviewed <sup>29</sup>
Individual unstructured Interviews	Staff of the new Lands Commission	3
	Staff of the Office of the Administrator of Stool Lands (OASL)	2
	Staff of the Town and Country Planning Department (TCPD)	2
	Staff of the LAPU (former and present)	4
	Staff at the Asantehene Land Secretariat <sup>30</sup>	2
	Private LAP project consultants, political elites, and other informants	5
<b>Total</b>		18
Focus Group Interviews (FGIs)	<ul style="list-style-type: none"> <li>i. Traditional authorities (Council of Elders) of the Nii Tetteh Kwartei family in Gbawe with some members of the local community present.<sup>31</sup> The Nii Tetteh Kwartei family owns large family lands for which a CLS had been established.</li> <li>ii. Land Management Committee (LMC) appointed by the Council of Elders of the Nii Tetteh Kwartei family to administer both the family lands and the CLS.</li> <li>iii. Traditional authorities and CLS staff of the Nkawie divisional area who manage stool lands within the Kumasi Traditional area of the Asante Kingdom.</li> <li>iv. Officials of the Auditor-General's Department who among many functions audits the accounts of Traditional Councils of Chiefs.</li> </ul>	

<sup>29</sup> Refers to only the number of interviewees referenced in the study.

<sup>30</sup> The Asantehene Land Secretariat rejected the new name of Asantehene Customary Land Secretariat (CLS) and so I use their preferred old name. The reasons for their rejection of the CLS project are discussed later in the study (chapter 9).

<sup>31</sup> The Council of Elders was composed of the chief of Gbawe, sub chiefs and the *Djaasetse*. The *Djaasetse* is the head of the council and leader in the appointment of chiefs for the Gbawe local community. In the encounter, the *Djaasetse* was the main speaker with his linguist (*Okyeame*). The interviewer experienced a function of the Council on the day of the interview. This was the arbitration functions. People with diverse problems come to the Council for solutions. There was a case of a man who had complained to the Council that his supposed land (acquired from the Council) had been occupied by another person. Upon investigation the Council realized that the land did not belong to the complainant and that he had misjudged the location of his land. He was shown the appropriate location of his land and he was satisfied with the outcome. There was another case of land litigation and the person who reported the issue was found not to have been paying the rent. He was asked to go and settle all the rent before the case could be dealt with. He settled the dues with the Land Management Committee (LMC) and a new arbitration date was scheduled for his case to be heard. My participation in the arbitration proceedings and subsequent public interview with the Council gave me a deeper insight into the prospects, challenges and outcome of the Gbawe CLS project. The Gbawe CLS was regarded by the LAP as the best CLS project (Quan et al. 2008). Permission was sought to digitally record the interviews but they refused on grounds that they might make statements which might be misinterpreted out of context. They only permitted handwritten notes and photographs to be taken. My interviews with the Council of Elders and the LMC proceeded after I had paid the 'drink money' as a customary requirement to speak with the traditional authorities.

The reform actors who were interviewed did not always fall into neat categories as I wished. For instance, the Regional Director of the Land Title Registration Division of the Ashanti Regional Lands Commission was a chief who usually assisted in the administration of the Asantehene Lands Secretariat. I sometimes asked him questions in his capacity as the Director of the Land Title Registration Division of the Ashanti Regional Lands Commission; and at other times I asked him questions in his capacity as a chief of a local community entrusted with the authority to administer customary lands on behalf of his subjects. The same duality of status was encountered at the regional office of the Office of the Administrator of Stool Lands whose head was the Chief Linguist (*Akyeamehene*) of the Asantehene – the powerful King of the Asante Kingdom. It therefore becomes difficult to categorize these unique actors as either traditional authorities or public servants. The situation symbolises the problems and opportunities faced in the organization of rules and actors within the traditional-federal state. The privilege of interviewing these two senior civil servants and high-level traditional office holders within the Asante Kingdom helped me to know more about the internal dynamics of stool land administration in the Asante Kingdom. They also helped deepen my understanding of the extent to which the chiefs of the Kumasi Traditional Council supported the objective of the Land Administration Project (LAP) to create transparent and publicly accountable agencies of stool land administration. In Table 4 above, I have added these two actors to the category of ‘other informants’.

#### **2.4.4 Other Sources of Primary Data**

During the period of my fieldwork in Ghana, officials of the LAP were busy trying to wind up the remaining activities of the first phase of the project. The research benefited from my participation in three important group activities. First, I was invited to a workshop organized by the LAP for the National House of Chiefs (located in Kumasi) and the LAP legal team to discuss the content of the second draft of a Lands Bill. Aspects of the Lands Bill dealt with institutional mechanisms intended to enhance the accountability of chiefs in land administration. Some of the interesting issues that emerged are discussed in the empirical chapters of the study.

Second, I was lucky again to have been invited to a workshop organized by the Land Tenure Centre of the Kwame Nkrumah University of Science and Technology (KNUST) for the Ashanti Regional House of Chiefs to discuss the implications of the new Lands Commission Act for customary land administration. This time the invitation came from staffs of the Asantehene Lands Secretariat and researchers at the Land Tenure Centre who were aware of my research interest in the issues. The knowledge gained from this workshop shaped my understanding about the position of the members of the Ashanti Regional House of Chiefs towards the CLS project.

A third opportunity to learn more about the views of chiefs and the general public on matters concerning chieftaincy and land administration availed itself during the consultative meetings of the Constitutional Review Commission (CRC). The CRC was established by Government in 2010 to review and clarify among many other things ‘the public character of chieftaincy institutions’. I participated in the consultative meetings of the CRC in the Ashanti, Eastern, Western, Greater Accra, and Central regions of Ghana to learn what the ordinary Ghanaian citizen, traditional authorities, and political elites think about their informal institutions of chieftaincy – particularly concerning their role in customary land administration.

The relevant information that I got from my participation in the above workshops and the CRC consultative meetings combined with the information I obtained from historical records to shape my conviction that the bifurcation of state authority in Ghana between chiefs and government over land administration is important in shaping the success or failure of land administration reforms.

#### **2.4.5 Academic Integrity and Research Ethics**

Research in the Department of Politics is regulated by rules of academic integrity and ethical conduct supervised by the Politics Department Research Committee and the University’s Humanities and Social Sciences Ethics Committee (HSSEC). Both committees approved the research proposal and methodological procedures after I had passed the academic integrity examination.

The rules of ethical conduct of the University of York were followed during the collection of research data in Ghana. Particularly, I made my research participants aware that the data being collected would be used solely for this academic purpose. The consent of interview participants was obtained to either digitally record the interview or take notes. As earlier indicated there was only one occasion where my interview participants (Gbawe Kwartei family Council of Elders) did not permit me to digitally record the interview but permitted the taking of notes.

Relevant interview participants were sent copies of the final draft to verify that confidentiality agreements have been met before the study was submitted for examination. Concerning matters of academic integrity, except for quotations that I have duly attributed to the work of the relevant researchers to support my thesis, I affirm that this study is my own original work and does not contain plagiarised material. Thus, to the best of my knowledge, the University's Code of Practice and Principles for Good Ethical Governance have been met in conducting this study.

## **2.5 Conclusion: Critical Juncture of Institutional Development Matters**

The constitutional rules of Ghana divide final state authority over land administration reform between chiefs and government; and, therefore limit the authority of government to autonomously reform the land administration system without the consent of chiefs. A hypothesis of this study is that the initial formation of the colonial state in the Gold Coast between British colonial officials and powerful chiefs of traditional states is the provenance of the current bifurcation of state authority between chiefs and government. The failure of British colonial state makers to end the political and institutional legacies of the existing powerful traditional states shaped the subsequent development of a state that divided final authority over land administration between chiefs and government. I have conceptualized the nature of the initial and present Ghanaian state as the traditional-federal state. The key point is that the 1992 constitutional bifurcation of state authority over land administration between chiefs and government is largely a reproduction of many incremental political settlements between chiefs, governments, and non-chief political elites that emerged from the political and institutional logics underlying the initial formation of the traditional-federal state in 1821-1831.

The historical institutional approach that I have used to examine the provenance and causal effect of the traditional-federal state “focuses on a limited range of institutions within a limited range of politics” (Rokkan 1968:174). In historical institutionalist language, the current bifurcation of state authority between chiefs and government over land administration is the path dependent outcome of the critical juncture of traditional-federal state formation in 1821-1831. The critical juncture of state formation matters. Historical institutionalists recognize that the critical juncture and path dependence (CJ-PD) explanatory model appears forbiddingly schematical, deductive, law-like, and mechanical (Steinmo and Thelen 1992; Goldstone 1998; Tilly 2001; Pierson 2004). But, as Rokkan (1968:199) explains, “this is not the purpose: the object is to single out in the multifaceted flow of events [in each unit] those choice points which proved most significant.” In fact, behind the screen of parsimonious explanation lies an in-depth historical analysis and rigorous testing of the historical evidence. It is only through the analysis of the available historical evidence that the analyst is able to reduce to the smallest possible number the range of explanatory variables required to account for a particular outcome.

Much of the diachronic evidence that supports the causal claims that I have made in the study comes from diverse historical records on state development in the pre-colonial, colonial and post-colonial periods. The study also used some interviews with key actors involved in recent land administration reforms to clarify the nature of reform processes and outcomes. It is my hope that the evidence that I collected from diverse sources to empirically support the CJ-PD thesis is adequate.

The important historical institutionalist argument that I have emphasized in the study is that when, how and why Ghanaian governments succeed or fail to reform dysfunctional state institutions and agencies of land administration should be understood by analyzing, first, the provenance of those institutions, and, second, the nature and reach of the authority of government to reform the institutions. The critical juncture of state organization between chiefs and non-chief political actors during the colonial era did matter in shaping the path of post-colonial state development. In the next chapter I discuss the nature of land administration in Africa before I move into the historical analysis of the Ghanaian story of why and how state authority over land administration is divided between chiefs and government.

## **Chapter 3**

### **Land Administration in Africa – A Literature Review**

Many factors reinforce the uncertainty about the purposes of a (land) tenure policy – the multitude of different stakeholders, the contradictory agendas; the interaction of various government departments; resistance within the political and administrative class, some of whose members see their interests threatened; and the conditionality imposed by funders and experts (Delville 2000:121).

#### **Introduction**

Here, I undertake a thematic review of the literature on land administration in African countries. The chapter highlights the conceptual and policy debates, the problems of, and challenges to, the creation of transparent and accountable formal institutions of land administration in Africa where the institutional environment is dominated by traditional authorities and their informal customary rules, norms, and organizational structures of power. Pre-colonial political organizations of chieftaincy in the majority of African countries continue to wield significant power over land administration. The review underscores the point that land administration reform in the majority of African countries is a political process that usually involves negotiation, cooperation and conflict between traditional authorities and government. The historical legacies of colonial state formation in Africa therefore matter for the current nature of land administration. The objective of this chapter is to highlight the historical legacies and challenges of state development in Africa in the context of customary land administration reform.

The chapter is structured into four sections. Section 3.1 begins the discussion by looking at the underlying concept of land administration. Section 3.2 discusses the land administration systems in Africa. Section 3.3 examines some of the customary institutional reform paths that have been suggested by scholars. Section 3.4 concludes the chapter by emphasizing the need for a deeper historical understanding of the provenance, challenges and prospects of the bifurcated African state in which traditional authorities and governments compete for control over land administration.

### **3.1 What is Land Administration? Issues of Land Ownership and Tenure**

The politics and outcomes of state formation in western countries have led to the dominant theoretical view that the state is (or claims to be) the ultimate owner of the land (Bruce 1998a; Gran 2005, 2007; Mahoney et al. 2007). Moreover, from the European perspective, all individual or group ownership rights are subject to “ultimate” ownership by the state. From an international relations perspective of state-to-state relations, the general convention is that every state has sovereign ownership over its territory. Generally, according to the dominant European view of land ownership,

With a few exceptions (such as Antarctica) the ultimate owner of the land is the state, which retains the right to acquire private property for public purposes and to control the manner in which the land is used, for instance through planning legislation. The state may also retain the right to minerals and hydrocarbons. Subject to this, many societies permit private land ownership with rights held either in freehold, which represents the maximum degree of freedom for the landowner, or leasehold in which there are greater limitations on how and when the land may be used (Mahoney et al. 2007: 2-3).

But the most important empirical point here is that while the claim of “ultimate” land ownership by the state may be valid within the internal politics of many countries in Europe, the paths of state formation in Africa have often followed a different trajectory (Boone 2003, 2007; Bruce 1998b; Dia 1996; Englebert 2002; Mamdani 1996). Unfortunately, how different paths of state formation in countries uniquely shape different systems of land ownership is usually ignored by many western scholars and practitioners who seek to replicate the western model of land administration in Africa. In the majority of African countries, land is largely owned by traditional states and customary authorities (Bruce 1998b; World Bank 2003a; Toulmin 2008). We shall soon see how the western model of the state’s claim to ultimate ownership of land differs from the African context where land ownership is largely under the control of traditional authorities. In Ghana it is estimated that the state owns just about 20% of the land while traditional authorities own the remaining 80% (Ministry of Lands and Forestry 2003). While the state claims final authority over all other actors within its geographical boundaries, it does not always claim ultimate ownership over land – in physical terms.

Land ownership should also be distinguished from land tenure. The legal term ‘tenure’, as noted by Bruce (1998b), comes from English feudalism and is derived from the Latin term for “holding” or “possessing”. This implies that a person may not have any ‘ultimate’ ownership claims over the land he/she possesses. Land tenure therefore means the terms – especially rights and obligations – under which land is legally possessed. Thus, the secondary ownership of tenure rights over land is distinct and dependent on the primary or ‘ultimate’ ownership. In Ghana, there are diverse land tenure arrangements between land owners and land tenants. We shall come to see that a key issue of debate in Ghana’s land administration reform is the definition of the nature of land tenure held by indigenous members of communal land owning groups.

Having clarified what I mean by land ownership and land tenure, I shall now try to establish a common understanding of what is meant by land administration. There is much confusion among scholars and practitioners about the concept of land administration (UNECE 1996; Dale and McLaughlin 1999; Williamson 2000; van der Molen 2003; EU 2004; Williamson et al. 2008). Let us review some of the conceptual definitions in order to establish some common understanding, and, if possible, arrive at a formal definition of what land administration is all about.

In the *Land Administration Guidelines* of the United Nations Economic Commission for Europe (UNECE 1996:14), land administration is defined as “the process of recording and disseminating information about the ownership, value and use of land and its associated resources. Such processes include the determination (sometimes known as the ‘adjudication’) of rights and other attributes of the land, the survey and description of these, their detailed documentation and the provision of relevant information in support of land markets.” This definition limits land administration to societies where systems of record keeping and dissemination have been developed rather than to all societies. Critical questions about who is recording land information, how it is recorded, and the purpose for which the information is being recorded or disseminated cannot be answered from the definition. UNECE therefore noted that the term land reform may also “involve changes in the tenure of the land, that is, in the manner in which rights are held, thus abolishing complex traditional and customary rights and introducing more simple and streamlined mechanisms of

land transfer” (UNECE 1996:13). Peter Dale, who was chairman of the 8-member UNECE task force that came out with the *Land Administration Guidelines*, together with John McLaughlin, offered an alternative definition of land administration (Dale and McLaughlin 1999). Land administration was defined to “refer to those public sector activities required to support the alienation, development, use, valuation, and transfer of land” (Dale and McLaughlin 1999:1). This new definition once again confined the activities of land administration to the public sector and still left our question unanswered. The exclusion of the private sector runs counter to the UNECE view that “Sustainable development is dependent on the state having overall responsibility for managing information about the ownership, value and use of land, even though the private sector may be extensively involved” (UNECE 1996:3).

Paul van der Molen (2003) made suggestions for updating the definition of land administration. He noted that in spite of some criticisms to the UNECE definition of land administration, and the alternative definition offered by Dale and McLaughlin (1999), the UNECE definition has “proven to be the guiding principle in policy documents, research programmes and education and training” because it allows for a broad interpretation of the concepts ‘ownership’, ‘value’, and ‘use’ (van der Molen 2003:1). Van der Molen (2003:2-3) however emphasized this crucial point:

Unlike many other geographic information systems, which provide information about geographical objects and their attributes, land administration systems reflect in principle the social relationship between people concerning land, as they are recognized by a community or a state. Therefore such a system is in no way just a ‘GIS’ [*Geographical Information System*]. Data recorded in a land administration system may have a social and legal meaning, and are based on accepted social concepts. That concerns both owners, rights and land objects. It is not relevant whether these concepts are laid down in the law or in unwritten customs. In both cases the rights to land, the right-holders and the land itself are understood by the people who determine the content and meaning of the land administration system. These rules, constituting the basic principles for the system and justifying its existence, form the institutional context for land administration.<sup>32</sup>

In effect, van der Molen was emphasizing the “paramount importance” of the “institutional aspects” of land administration over the dominant technical concerns. He urged the UNECE *Working Party on Land Administration* to consider new

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<sup>32</sup> I have made grammatical corrections to the original to make the quotation meaningful.

developments at the institutional level when they update the UNECE *Land Administration Guidelines*. UNECE is yet to incorporate this important institutional perspective into its definition of land administration (UNECE 2005).

In fact, the new institutional perspective on land administration may be hard for all scholars to initially appreciate. Williamson (2000:22) emphasized that “One of the major weaknesses in establishing land administration projects is that they focus on establishing land administration *institutions*, not land administration *processes*. The focus should be on the key cadastral processes of land adjudication, land transfer and mutation (subdivision and consolidation). All institutional and legal arrangements should be focused on these processes.” In his opinion, “The key performance indicators for a successful land administration system [LAS] are whether the LAS is *trusted* by the general populace, protects the majority of land rights, provides security of tenure for the vast majority of land holders and is extensively *used*. If these criteria are not generally met then there is a fundamental problem with the system” (Williamson 2000:16).

The World Bank, thus, clearly noted that the “issues relating to the *institutional framework* presents the biggest challenge to land administration reform” (World Bank 2003a:13). Notwithstanding widespread misunderstandings about the new institutional perspective of land administration emphasized by van der Molen, it appears that it is gradually gaining grounds among scholars and in policy documents, even if it is less understood. The *EU Land Policy Guidelines* for support to land policy design and land policy reform processes in developing countries notes that “a **land tenure system** is made up of rules, authorities, institutions and rights. **Land administration** itself (maps, deeds, registers, and so on) is only one part of a land tenure system” (EU 2004:2-3). Again, in the policy guidelines of the Food and Agricultural Organization (FAO), land administration is now defined as “the way in which the rules of land tenure are applied and made operational...land tenure is the relationship, whether defined legally or customarily, among people with respect to land” (FAO 2007:3). It is this institutional perspective of land administration that I shall fully take up in the study to explain how the institutions of land administration are created, maintained and reformed.

Land administration systems are best understood in institutional terms, that is, as systems of rules that define social relationships concerning how diverse interests in society should gain access to and use of land. This new understanding is crucial for effective policy design and implementation of land administration systems in developing countries, whether in the public sector, the private sector or the customary domain of traditional rulers in Africa. The institutional perspective of land administration shall help us to understand debates over what has come to be known as ‘legal formalization’ of customary land administration systems in Africa.

Legal formalisation is associated with the creation of official written rules and statutes in documents that give precise, explicit and clear definition of who owns what parcel of land, where it is owned, when it was owned, how it is owned, and what the rights or obligations of the owner are in relation to other interests (de Soto 2000; CLEP 2008b; Sjaastad and Cousins 2009). It is usually contrasted with the unwritten customs that govern customary land tenure. Legal formalization of norms, customs, and informal structures that govern the customary systems of land administration in Africa sometimes ignites political conflict.

This study defines land administration as the process whereby diverse actors with interest in land are involved in the creation and application of legal rules and organizational structures to (a) govern social relationships between people and land concerning land ownership, land tenure, and land valuation; and (b) to shape social, economic, and political outcomes. The underlying rules that define ownership, access, tenure or use, and value of land in institutional structures of administration are never static, but; “the humankind to land relationship in all countries is *dynamic*” (Williamson 2000:7). The institutional rules and structures of land administration that establish relationships of trust or distrust among powerful and less powerful interest groups are in a constant flux through conflict, negotiation, and cooperation. Land administration is fundamentally shaped by an unending political process.

It is the wish of some scholars and practitioners that “land administration systems should if possible be *non political* and should be concerned with putting in place an efficient land administration infrastructure to manage the humankind to land relationship” (Williamson 2000:7). The Commission on Legal Empowerment of the

Poor (CLEP) noted that poor people are usually disempowered of their land rights by powerful actors like the state without compensation. It noted that, “Rules are resources that can easily be subverted to serve the interests of the few, for example through corruption and lack of transparency. Hence, the governance structure and performance of such systems should be reviewed, and as necessary reformed. The separation of the powers of land registration and public land management is one such reform that will reduce the risk of abusive practices” (CLEP 2008a:66). The politics of institutional reform is less explored.

The reality is that all aspects of land administration (as is the case with all other institutions governing common pool resources) are profoundly political. According to Silva (2007:28), even the institutionalization of technology like Spatial Data Infrastructures (SDIs) in a developing country such as Guatemala “implies the exercise of power, alignment, and enrolment of different actors as the creation of alliances.” Enemark (2008:10-11) also notes that in a global perspective, land administration is basically about people, in terms of human rights, engagement and dignity; politics, in terms of land policies and good government; places, in terms of shelter, land and natural resources; and power, in terms of providing equity and legal empowerment of the poor. A non political perspective of land administration would therefore be largely misplaced (Leftwich 2004; Silva 2007; van der Molen 2003). A political perspective of land administration starts from the premise that the evolution or creation of institutions to govern social relationships relating to the use of land in all countries is profoundly a political process. We shall see that the creation of institutions to define land ownership rights, transparent access to land, and relationships of accountability between traditional authorities of communal land owning groups and their members have been intensely political since colonial rule. I discuss next the general situation of land administration in Africa.

### **3.2 Land Administration in Africa: The dominance of customary institutions or the legacies of traditional-federal states?**

The literature review from this section shall specifically discuss the nature of land administration in Africa and the current reforms to create modern land administration systems. I look at four major thematic issues concerning land

administration reforms in Africa; first, the general land ownership and tenure situation in Africa; second, the conceptual debate on the definition of the nature of ‘customary’ land tenure; third, the argument for legal formalization of customary land tenure, and; lastly, the argument against legal formalization of customary land tenure. The important matter that I seek to raise is whether the dominance of customary institutions of land administration across African countries is a symptom of the widespread existence of de facto or de jure traditional-federal states bequeathed by critical junctures of colonial state formation.

### **3.2.1 Land Ownership and Administration in Africa**

More salient in sub-Saharan Africa is the fact that land tenure administration has been dominated by customary institutional structures of authority that predate the modern state (Bruce 1998b; Herbst 2000; World Bank 2003a). The area of land under formal legal tenure covers only between 2 and 10 percent of total land (World Bank 2003a). In the West African region as a whole, it is estimated that only 2 – 3% of land is covered by formal legal documentation (Toulmin 2008). The percentage of land covered by formal tenure registration in the form of legal title in Ghana is estimated to be 20%, in Burundi it is estimated to be only 1% (Toulmin 2008). There is some agreement among scholars that the dominance of customary tenure is due to the chequered path of state formation through the pre-colonial, colonial, and post-colonial periods (Bruce 1998b; Dia 1996; Donald 1996; Herbst 2000; Mamdani 1996; Ray 1999). However, the crucial challenge that has faced many scholars and policy makers concerns how to reform the dominant customary estate controlled by traditional authorities. The general land policy and tenure situation in African countries is presented below in Table 5.

**Table 5: Land Tenure Policies in sub-Saharan Africa** (Source: Bruce 1998b)

Country	Official Tenure Objective	De Facto Dominant Tenure Type	Private Ownership	State Leasehold	Recognizes Customary Tenure <sup>33</sup>
Angola	Private ownership/ state leasehold	Customary tenure	No	Significant <sup>34</sup>	No
Benin	Individual land ownership	Customary tenure	Exists	Exists	No
Botswana	Customary tenure/ state leasehold	Customary tenure	Exists	Significant	No
Burkina Faso	Individual and collective registration	Customary tenure	No	Exists	No
Burundi	Private ownership	Customary tenure	Exists	Significant	No
Cameroon	Individual land ownership	Customary tenure	Exists	Significant	No
Cape Verde	Individual land ownership	Individual land ownership	Exists	Exists	No
C.A.R.	Individual/private registration	Customary tenure	Exists	Exists	No
Chad	Private titling registration	Customary tenure	Exists	Exists	No
Comoros	Mixed	Customary tenure	Exists	Unknown	Yes
Congo - B	State owned "individual" registration	Customary tenure	No	Exists	No
Cote d'Ivoire	Private registration	Customary tenure	Exists	Exists	No
Congo D.R.	State land/individual leasehold	Customary tenure	No	Exists	No
Djibouti	Unknown	Unknown	Exists	Unknown	Yes
Eritrea	State leasehold	Customary tenure	No	Exists	No
Ethiopia	State ownership	Customary tenure	No	Significant	No
Gabon	Individual registration of land	Customary tenure	Exists	No	No
Gambia	Customary tenure and title freehold in urban areas	Customary tenure	Exists	Exists	Yes
Ghana	Individual registration/ customary tenure	Customary tenure	Exists	Exists	Yes

<sup>33</sup> The terms 'customary tenure', 'indigenous community-based' and 'Community-based' were used interchangeably by the researchers (Bruce 1998b).

<sup>34</sup> 'Significant' does not refer to percentage of land area under private ownership or state leasehold but the impact of the nature of tenure on national tenure policy and practice (Bruce 1998b). Following Herbst (2000), countries listed as having between "significant" and "exists" for the extent of state leasehold is coded as "exists".

**Table 5 continuation: Land Tenure Policies in sub-Saharan Africa**

Guinea	Individual registration	Customary tenure	Exists	No	No
Guinea-Bissau	Individual registration	Customary tenure	Exists	No	Yes
Kenya	Private ownership	Private ownership	Significant	No	No
Lesotho	Customary tenure/ state leasehold	Customary tenure	No	Significant	No
Liberia	Individual ownership and registration	Customary tenure and freehold	Significant	Unknown	Yes
Malawi	Private ownership/ state leasehold	Customary tenure	Significant	Significant	Yes
Mali	Private registration	Customary tenure	Exists	Exists	No
Mauritania	Individual landownership	Customary tenure/Islamic	Significant	Significant	No
Mozambique	State leasehold	Customary tenure	No	Significant	No
Namibia	Private ownership/ state leasehold	Private ownership	Significant	Exists	Yes
Niger	Individual registration of land/titling	Customary tenure	Exists	Exists	Yes
Nigeria	Individual registration through certificates	Customary tenure	No	Exists	No
Rwanda	Mixed	Customary tenure	Exists	Exists	Yes
Senegal	Individual "lease hold"	Customary tenure	No	Exists	No
Sierra Leone	Individual registration	Customary tenure	Exists	Exists	Yes
Somalia	Unknown	Unknown	No	Significant	No
South Africa	Private Ownership	Private Ownership	Exists	Exists	Yes
Sudan	Mixed	Unknown	Exists	Exists	No
Swaziland	Customary tenure/ private ownership	Customary tenure	Significant	Exists	Yes
Tanzania	Unclear but state ownership	Alternative community- based	No	Significant	No
Togo	Registered	Customary tenure	Exists	Exists	Yes
Uganda	Mixed	Customary tenure	Exists	Exists	Yes
Zambia	State leasehold	Customary tenure	No	Significant	Yes
Zimbabwe	State leasehold/ customary tenure	Customary tenure	Significant	Exists	Yes

From the above land policy and tenure situation across western, eastern and southern countries in Africa, it is clear that customary institutional structures of power dominate land administration in African countries. The indigenous institutions of land administration in the numerous pre-colonial traditional states in Africa, together with their political structures of authority, were largely left intact by the colonial state established by European countries. The indigenous institutional foundations of the pre-colonial state were legitimated through long-held cultural values and wars of conquest. The modern state in Africa therefore inherited the colonial state, with its dominant customary land tenure institutions, through shallow democratic processes.

The official land tenure policies in African countries paint an interesting picture about the contentious internal land politics and the powerful influence of customary authorities on the state. As of 1996, it was only a handful of countries such as Eritrea, Ethiopia, Mozambique and Zambia that had legally asserted state ownership of the land as official tenure policy. While western scholars and some African political elites may assert that the state is the ultimate landowner; many governments hesitate to wield the same discourse in their domestic land politics. The internal politics over tenure policy has undoubtedly affected this institutional reform process of legal formalization.

In reality, formal land tenure policy in the modern African state is usually a reflection of the inherited formal structures of power at the top-level of government, and the indigenous informal customary structures of authority that dominate land administration in local communities. The emerging land tenure policy in Africa simultaneously integrates both the formal and customary institutional structures of power into the state. Consequently, the power of the modern democratic state to formally assert a coercive monopoly over land administration is effectively blunted by its underlying heterogeneous institutional structures. The large area of land covered by informal or customary institutions of land tenure has been the primary focus of recent legal formalization programmes by national governments and international policy actors.

### 3.2.2 What is Customary Land Tenure?

The exact definition of the nature of ‘customary’ land tenure in Africa has generated controversies (Alden Wily 2008; Feeny et al. 1990). Interestingly, existing conceptions of legal formalization of customary land tenure in Africa are grounded in the western conception of the state as “ultimate landowner” (Quan et al. 2004:13). Scholars and practitioners concerned with *Land in Africa* joined African politicians at a conference convened in London to grasp the nettle of *real-politique* and redefine the African state as ultimate landowner (Quan et al. 2004). From this western European perspective, the conference participants argued: “The accumulation of land and power over it by the state itself represents an alienation of rights of landholding groups, which merits either restitution or compensation” (ibid). While the notion of the state as ultimate landowner is asserted against rival customary claims, the specific character of the internal politics of the modern state is fatally ignored.

This new discourse being wielded in European capitals is however not consistent with the general land policy situation in many African countries where governments explicitly recognize customary land tenure as deriving from indigenous institutional structures of power rather than the modern state. In other words, in spite of the powerful chorus about the African state as “ultimate landowner”, that is being sung by scholars and African politicians in European capitals, the internal reality of tenure conflicts and policy uncertainty has cast its shadow over the appropriate conceptualization of the ownership and nature of the ‘customary’. According to Atwood (1990:659),

Land titling or registration, in the African context, refers to legally sanctioning primary land claims which are already recognized informally by the local community (although they may have been previously ignored or denied in formal law). It involves taking these claims out of the realm of informal lineage or community land ownership and making them fully legal, formal and individual; measuring precisely the boundaries of each claim; recording claims in a formal, state-administered land records system; and, under the Torrens system of title, providing a state guarantee to the claim that appears in the land records system.

This conventional land tenure institutional reform implies that any previous informal claims held by traditional authorities, rulers, chiefs, or kingdoms over land

ownership is declared void by the state and then defined as derived from grants made by the state. In reality, however, many African states jointly share land ownership rights with the dominant customary institutional structures of power.

The term ‘customary’, according to Leonard and Longbottom (2000:18), “is perhaps best used to describe the derivation of authority under indigenous systems of authority rather than the rights themselves.” This perspective tries to separate the land tenure rights claimed by indigenous authorities from the “indigenous systems of authority.” In their *Land Tenure Lexicon* produced from Francophone and Anglophone West African usage, Leonard and Longbottom acknowledged that it is difficult to “invent new terms such as ‘derived rights’” because “terminology is continuously evolving, and at any given moment, different terms or translations may be favoured by different people. ...where these terms differ from those used in Europe, the lexicon is targeted at researchers, policy makers and development practitioners familiar with European terminology” (Leonard and Longbottom 2000:2). Nevertheless, the attempts to describe land tenure in Africa within European templates to enhance research and policy understanding in western countries may have created more conflicts than it has resolved.

Alden Wily (2008) argues that the concept of “common property” as a status derived from the intervention of the state as in European countries is fundamentally different from the origin and nature of the ownership of customary land tenure in Africa. In his opinion, the failure by scholars and external development actors to properly distinguish between these two concepts has been the bedrock of all the conceptual confusions and the major hindrance to the development of an appropriate customary land tenure policy. Common property, “is real property that may be mapped, described and its owner (s) identified”; however, customary tenure in Africa “is a regime of land administration comprising norms, regulations and enforcement mechanisms, and which, when clarified essentially involves identification of the customary authority (traditionally chiefs and today often elected community councillors)” (Alden Wily 2008:44-45).

Alden Wily (2008) argues that the distinctive feature of customary tenure is that it is indigenous and rooted in the community level within villages and families rather

than one that arises from government legal intervention. In his view, “The customary reality is that such lands are the shared property of specific communities, either at village, village cluster or tribal level” (Alden Wily 2008:44). Alden Wily (2008:46) further point out that “Logically, customary interests cannot be recognized in their own right without at the same time recognising the existence of the (customary) regimes which sustain them.” This is the crucial point which also finds support in this study – that customary land rights are inseparable from the political jurisdiction of customary organizational structures of authority.

### **3.2.3 Capitalist Development and Institutional Reform in Customary Land Tenure Administration in Africa**

It has been noted that “land administration structures in Africa suffer from the same weaknesses as other components of the state: they are often highly centralised in structure and attempt to implement decisions in a top-down down manner, yet are ineffective in practice because of resource constraints, corruption and ‘capture’ by private interest groups” (Cousins 2000:170). Moreover, the international business community points out that it is more costly to gain access to land in sub-Saharan Africa than anywhere else (see Table 6 below) (World Bank/IMF 2005).

**Table 6: Time and cost to register property across regions of the world**

<b>Region</b>	<b>Days of property registration</b>	<b>% Cost of property registration</b>
OECD High income	34	4.8
East Asia and the Pacific	51	4.2
Middle East and North Africa	54	6.8
South Asia	56	6.1
Latin America and the Caribbean	62	5.6
Europe and Central Asia	133	3.2
Sub-Saharan Africa	116	14.4

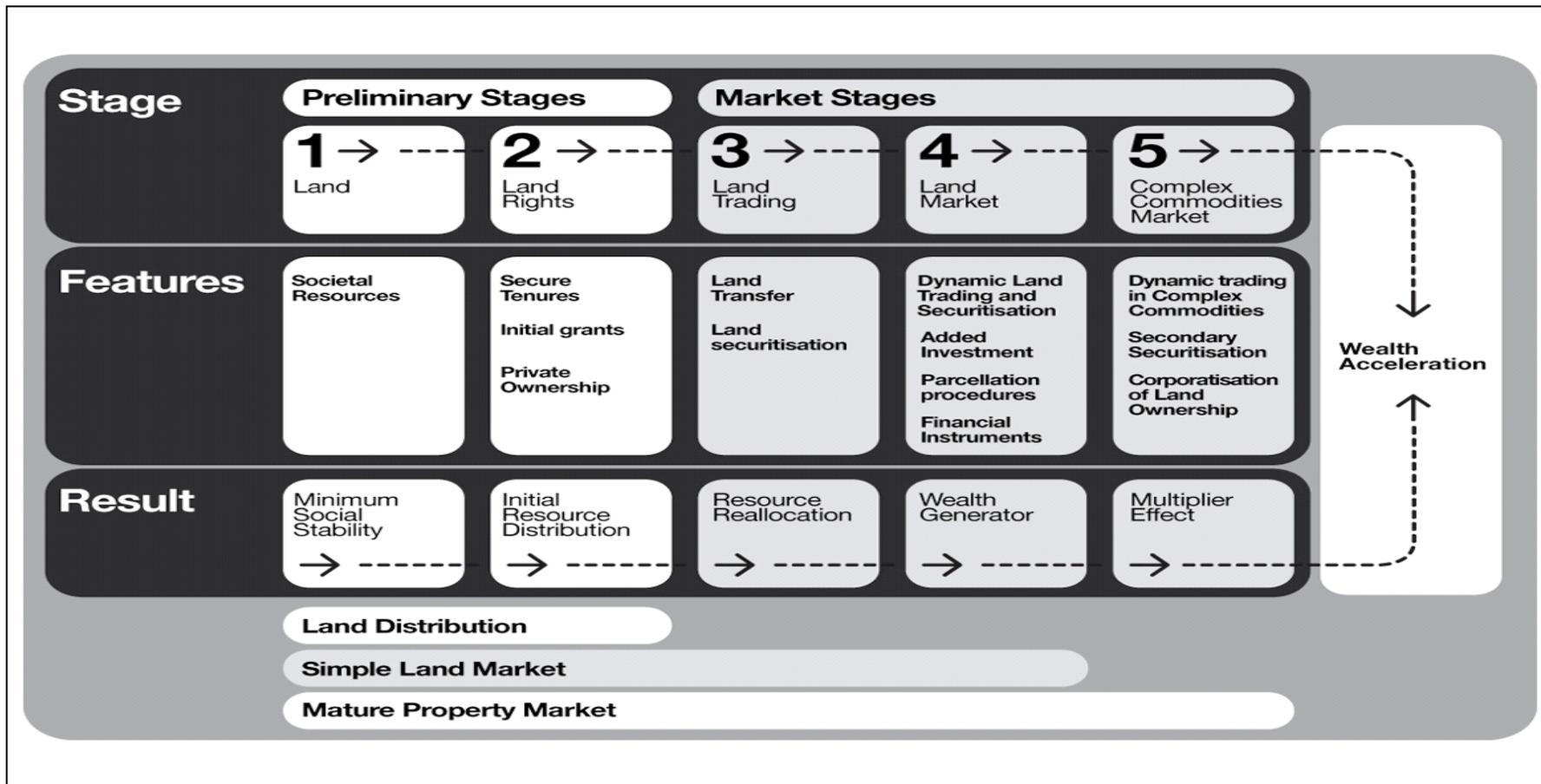
Source: World Bank/IMF (2005:36).

From the above data in Table 6, it is clear that improving the efficiency of public sector land agencies in sub-Saharan Africa becomes more crucial to enable capital formation and development. It is from such widespread negative evaluations among scholars, practitioners, and the international business community that the public and

customary institutional domains of land administration have been put on the reform agenda of international development partners in Africa. The reform of customary institutions of land administration and public sector agencies to improve access to land for business growth becomes more critical as “Banks prefer land and buildings as collateral since they are difficult to move or hide” (World Bank/IMF 2005:33). For instance, according to investors, in Zambia, 95% of commercial bank loans to businesses are secured by land and in Uganda 75% (ibid). It is argued that “The functioning of the property administration agency and land administration bodies is critical for the poor” (CLEP 2008a:66). According to international development actors, the lack of transparent, accountable, and enforceable rules governing legal formal land registration in Africa has constrained access to land for foreign direct investment, the establishment of new businesses, and capital formation from financial institutions (CLEP 2008a, 2008b; de Soto 2000; World Bank/IMF 2005).

Many scholars and practitioners have supported the argument that the legal formalization of rules and structures that govern social relationships to land among diverse social interests is what shapes the path to capitalist development (CLEP 2008a, 2008b; de Soto 2000; Wallace and Williamson 2006; Williamson et al. 2008). According to Williamson et al. (2008:4), modern land administration systems were “originally created on behalf of taxpayers merely for better internal administration of taxation, and, more recently, titling of land in support of more efficient and effective land markets.” The evolution of land markets as the foundation for capitalist development in the economies of western countries is schematised by Wallace and Williamson (2006) in Diagram 3 below.

**Diagram 3: The Evolution of Land Markets**



**Source:** Wallace and Williamson (2006:125)

In the above diagram, the emergence of market stages of land trading, land markets, and complex commodities markets is made possible by the process of legal formalization of fundamental rights claimed by diverse interests over land. It also makes it possible for land to be transferred from less productive owners to more productive forces of capital who seek access to land. The modern system of land administration functions as “the conversion process” to transform ‘dead land’ into the wealth of nations – in the form of formal legal title documentation over the land.

The argument for legal formalization of customary land tenure in developing countries is best captured in the following statement by Deininger and Binswanger (1999:248-9):

With share tenancy, tenants receive only a fraction of their marginal product. It is therefore difficult to motivate tenants to work hard enough, a phenomenon that is known as ‘Marshallian inefficiency.’ Share tenancy relations are still more efficient than wage labour however. They may be an ‘optimal choice’, given the constraints faced where markets for credit and insurance are incomplete.

Cutola and other scholars (Cutola et al. 2004:3) have summarized the arguments for legal formalization of customary land tenure in Africa as follows:

- i. Land registration stimulated more efficient use of the land, because it increases tenure security and removes disincentives to invest in the longer term management and productivity of the land;
- ii. enables the creation of a land market, allowing land to be transferred from less to more dynamic farmers and consolidated into larger holdings;
- iii. provides farmers with a title that can be offered as collateral to financial institutions; thereby improving farmers’ access to credit and allowing them to invest in land improvements; and,
- iv. provides governments with information regarding landholders and size of fields, which can provide the basis for a system of property taxes.

The UNDP Commission on the Legal Empowerment of the Poor (CLEP) also argues that the world’s poorest happen to hold their land properties in regions where customary institutions of authority dominate land administration. According to the CLEP, many rural poor in developing countries own about 9.3 trillion dollars worth

of landed assets that if legally formalized with title by governments can lift this bottom billion poor out of endemic poverty. In his influential book, *The Mystery of Capital*, Hernando de Soto argues that the lack of formal legal rights to land in developing countries deprives landowners from meaningfully stepping outside their communities to interact with other potential investors who have a convergence of economic interest (de Soto 2000). Through the Institute for Liberty and Democracy (ILD) and the CLEP, de Soto has led many legal formalization programmes in African countries to revive the 'dead capital'.

The view that poverty among the poor is not caused by a lack of assets among the poor but the lack of formal ownership of those assets is synonymous with the conventional negative perception held by some scholars and practitioners about land tenure systems in Africa. Atwood (1990:659) has noted that "The conventional view of 'traditional' or informal systems of African land rights is that they impede agricultural development, and that land titling or registration is needed to encourage land transfers to more productive farmers, improve farmer access to credit, and create incentives for investment in land improvement, soil conservation and new technology." Later I discuss some criticisms and resistance to legal formalization of informal rights over land tenure.

The World Bank's publication *Building Institutions for Markets* also emphasized that "Without land titling institutions that ensure property rights, poor people are unable to use valuable assets for investment and income growth" (World Bank 2002a: iii). Since the publication of its *Land Reform: Sector policy Paper* in 1975, the World Bank has been trying to create market oriented formal property rights institutions from informal customary land tenure regimes in Africa (World Bank 1975). For several decades, its main goal was to replace communal land tenure with market-oriented individual freehold lands (Cutola et al. 2004). In the view of the World Bank (1975:20) the prevailing conditions of "traditional-communal" land tenure in Africa "are the major impediments to development." Since the 1990s, the World Bank has aided many governments in African countries like Ghana to implement land administration reforms targeted at the transformation of customary land tenure systems into marketable individual freeholds (World Bank 2003c). Later we shall see the politics and outcomes of such efforts in Ghana.

In any case, almost all African governments have historically been involved in a power struggle with customary authorities in their attempt to extend the formal legal powers of the state beyond urban political enclaves (Herbst 2000). Thus, the huge support received from international development agents only acted as a strong catalyst. Customary institutional reform agents at the international level have included the United Kingdom Department For International Development (DFID), the World Bank, the German Agency for Technical Cooperation (GTZ), the United States Agency for International Aid (USAID), the Institute for Liberty and Democracy (ILD), the UNDP-CLEP, the French Development Agency (AFD) (Atwood 1990; Benjaminsen et al. 2009; Bruce et al. 2006; Larmour 2005; Toulmin et al. 2004). In terms of actual policy direction, we shall see that there has been less coordination of interests among these agents in Ghana.

Through the powerful instrument of loan conditionality to governments of poverty-stricken African countries, international reform agents like the World Bank have been very powerful in selling market-oriented individual property rights land administration reforms to governments (Bruce et al. 2006; Larmour 2005). In Sudan, political elites in Khartoum have committed themselves to the implementation of customary land tenure reform as part of a post-conflict peace accord (Alden Wily 2008). Across Africa, meaningful institutional reforms in customary land tenure have occurred in countries at rare moments or critical junctures such as during revolution (such as in Egypt) or during the initial organization of the post-colonial state (such as in Botswana).

### **3.2.4 Resistance to Institutional Reform in Customary Land Tenure**

Notwithstanding the advantages of individual land rights for capitalist development, many scholars, and even political elites in Africa, have cast doubts on an unequivocal relationship between customary land tenure reforms, increased demand for individual rights in land, increased investment, and access to credit (Alden Wily 2008; Bromley 2009; Cutola et al. 2006; Cutola et al. 2008; Kanji et al. 2005; Quan et al. 2004; Sjaastad and Cousins 2009). The neo-liberal ideological deconstruction of customary land tenure in Africa has been caught in unending intellectual debates among scholars and practitioners as well as political controversies in the internal

politics of some African countries like Ghana and South Africa. According to Sjaastad and Cousins (2008), customary land tenure reform has received considerable support from politicians while the academic community has been more reluctant to support the formalization-wealth creation thesis.

Opponents have argued that the creation of individual property rights from customary land could lead to landlessness among poor land users like women and lead to elite capture of customary land, and thus potentially increase conflicts over communal land (Sjaastad and Cousins 2008; Tsikata 2004). Moreover, the promotion of individual property land rights in Africa may impoverish the bottom billion rural poor whose subsistence livelihood depends on common access to customary land, rather than lift them from poverty into the global club of capitalism. It is argued that the transformation of customary land tenure into individual land rights would strip the complex web of secondary land use rights held by women, migrants, peasants, pastoralists and the youth on the customary largesse (Cutola et al. 2008; Kanji et al. 2005; Meinzen-Dick and Mwangi 2009).

A conference of scholars, practitioners and African political elites concerned with *Land in Africa*, agreed that “there is a clear consensus that imported solutions of tenure individualisation and titling are not workable in the African context” (Quan et al. 2004:11-12). This bloc of strong opposition to customary land tenure reform in favour of individualization should be worrying for advocates of legal formalization of customary land tenure along the western market oriented model. At the same time the above opposition bloc of elites may have given hope to the powerless peasants, farmers, women and youth whose common access to customary tenure is threatened by programmes of tenure individualization.

The strong resistance from a powerful elite bloc of scholars and pro-poor civil society actors appears to have led to some policy retreat from the original customary land tenure policies pursued by international reform agents. For instance, the World Bank has not only acknowledged the shortcomings of its market oriented customary land tenure reforms but has also put forward some interesting policy modifications (World Bank 2002a, 2003a). The World Bank now makes the following arguments:

This shift toward individual rights tends to undermine the ability of traditional systems to ensure that all members of the extended family have access to land. This feature of their land systems has helped some countries in Africa to avoid the extremes of poverty and landlessness that are common in Asia and Latin America: traditional systems have provided secure land tenure and encouraged farmers to invest in their land. In such cases, encouraging individual land registration and titling may be undesirable. Where traditional systems have failed to provide clear land rights, land titles and registration are useful (World Development Report 1990:65 in World Bank 2003a:89).

And

Secure and transferable land rights can be provided by both informal and formal institutions. Such systems must provide the information on who owns the land, who has secured interest in the land, where land transactions are registered, and how to access this information. The community-defined ownership or use rights in parts of Africa, for example, perform these functions. ... In the past such land tenure systems were thought to provide insufficient tenure security to induce farmers to make necessary investments in land. But research has shown that such systems can be effective (World Bank 2002a:34, 37).

And

Failure to give legal backing to land administration institutions that enjoy social legitimacy can undermine their ability to draw on anything more than informal mechanisms for enforcement. By contrast, institutions that are legal but do not enjoy social recognition may make little difference to the lives of ordinary people, and have therefore proven to be highly ineffective (World Bank 2003a: xxiii).

The Food and Agricultural Organization (FAO) synthesized findings from research works in Africa to argue in favour of indigenous land tenure systems as follows:

The idea that individual titling can provide adequate security of possession for African indigenous people runs counter to what we now know about the effects of individual tiling schemes on these vulnerable groups. We now know that the promotion of individual land titling may cause more harm than good, leading to discrimination against subordinate rights-holders (or at least those perceived to be subordinate) – the urban poor, women, elders, people who rely on herding (including pastoralists, hunters, gatherers and other minorities), and, as in Niger, the multiplication of arbitration authorities can increase local insecurity. The fact that security of rights to land under African communal systems is usually based upon social identity and that the rules of social classification may be manipulated to suit certain groups, means that administrators must be careful when they start talking about fundamental reforms of the social relations governing communities' access to land, the main source of indigenous peoples' livelihoods (FAO 2004:73-74).

Moreover, in 2006, the *Issues Paper* prepared for the High-Level Consultative Workshop on *Land Policy in Africa* convened by the African Union (AU) Commission emphasized that “Despite their extent and legitimacy, customary systems of tenure are under strain, because of demographic pressure, land scarcity and competition, growing urbanization, inter-group and wider civil conflicts, breakdowns in customary authority, and pluralistic systems of law” (AU 2006:5).

The new customary land tenure policy direction is clearly caught between the promotion of the land market agenda and the social protection of customary land tenure values against market-oriented interests (AU 2006; Cousins 2002; Quan et al. 2004; Toulmin and Quan 2000; van den Brink 2010; World Bank 2003a; 2003c). The modified ideological perspective of the World Bank is particularly interesting for this study as we shall soon be examining an empirical case of customary land tenure institutional reform in Ghana where the Bank is a leading reform agent.

Some scholars have raised questions about the unclear tenure policy directions put forward by international reform agents (Boone 2007; Delville 2000; Fitzpatrick 2005; Quan 2000a). Delville (2000:118) notes that “once the allocation of formal title is no longer seen as absolutely vital to the process of agricultural intensification, the tenure issue shifts from the economic to the social arena.” Quan (2000a:36) has raised two crucial questions about the vague policy direction, namely, (a) under what conditions do customary land tenure institutions fail? and (b) where there is failure, what specific policy interventions are appropriate?

The World Bank gave the following justifications for the transformation of communal land tenure systems into individual freehold lands (World Bank 2003a:90): (i) Where there has been a breakdown in customary tenure systems, or when traditional lines of authority have been severed and loyalties to lineage and communal groups eroded; (ii) where land encroachment by outside interests is common or increasing; (iii) where defensive registration is needed to safeguard individual or group rights; (iv) where there are high levels of fragmentation, disputation and inheritance problems; (v) where there are inter-or intra-ethnic conflicts over land; and (vi) where there is a demand for titles, as a result of a range of reasons, including changing social norms, the need for credit. The World Bank

argues that although there may be difficulties with programmes to implement mass land titling across the length and breadth of a country, however, clear cases of customary institutional failures particularly in economically productive urban and peri-urban areas (such as Greater Accra in Ghana) provide enough grounds for some special intervention programme (World Bank 2003a:91).

In Ghana, critics of the World Bank's advocacy for the conversion of customary land tenure into individual land titles argue that the major cause in the break of customary land tenure institutions of authority in Greater Accra is political interventions by governments in customary land administration (Kasanga 2000; Kasanga and Kotey 2001). These opponents have therefore argued that strengthening customary land tenure institutions against political onslaught from national governments would be a more effective way of securing customary land tenure rights of the poor. My study does not get into the arguments for or against customary land tenure reforms. I shall however discuss the politics and outcomes of support for and resistance to attempts by the World Bank to achieve its interest from the mid-1980s to 2010.

We can see that while there are powerful economic grounds for governments and pro-capitalist agents to transform customary land tenure systems into individual freehold lands, there are equally strong grounds to support customary land tenure institutions from failing in the first place. This powerful debate between scholars and development practitioners has seriously impacted on the development of any clear customary land tenure policy (Alden Wily 2008; Delville 2000a; Quan et al. 2004). We shall see how land administration reforms in Ghana from 2001-2010 became an ideological battle ground even among international development agencies.

The unending conceptual and policy disagreement among scholars and practitioners therefore raises a big question mark over how much is known about the origin, nature, and forms of the informal customary land tenure institutions of authority (Tsikata 2004; van den Brink 2010). The customary land tenure policy modifications made by the World Bank and other pro-capitalist reform agents does little to resolve fundamental confusions among scholars and practitioners over the appropriate definition of 'customary' land tenure institutions in Africa as well as the specific policy interventions required to reform customary land tenure. Defining the specific

nature of the appropriate policy interventions in customary land tenure systems has opened another phase of conceptual and policy controversy.

### **3.3 Paths to Legal Formalization of Customary Land Tenure**

Against the background of unresolved controversies over the nature or institutional character of the customary land tenure in Africa and its relationship to the state, the major problem facing institutional reformers is not so much about what is to be done but how the ‘customary’ should be reformed to promote pro-poor growth and effective land administration (Firmin-Sellers 1995; Quan et al. 2004). Many institutional reform strategies have been proposed by scholars, many of which have at some time been implemented in some African countries (Alden Wily 2008; de Soto 2000; Fitzpatrick 2005; McAuslan 2000).

The main reform strategy that has dominated the literature is the replication of Botswana’s transparent and publicly accountable Land Boards, as the model of best practice model in customary land administration in Africa. Many international development agencies have supported the replication of Botswana’s customary land administration system managed by Land Boards in other African countries. The crucial question is why Botswana has been successful in its customary land administration but other countries such as Ghana have not succeeded. The popularity of Botswana’s Land Boards among reformers calls for some historical analysis of how the Land Boards were established. Such analysis is needed to understand the prospect for, and challenges to, its replication in other African countries. A brief discussion of the nature and origin of the Botswana Land Boards is given in turn.

#### **3.3.1 Institutional Transfer of Botswana’s Land Boards?**

The Land Boards, established from 1970 through the 1968 Tribal Lands Act, have devolved responsibilities of land allocation, dispute adjudication, land use planning, and collection of rents (Adams et al. 2003; Nkwae 2008). Botswana’s Land Boards has become the model of best practice among international development agencies (Burns 2007; Deininger et al. 2010; World Bank 2003a). However, many scholars and international development agencies who advocate for the replication of

Botswana's Land Boards in other African countries usually fail to take into account the nature of politics within Botswana's dominant ruling coalition that enabled the evolution of the Land Boards. Therefore I shall first highlight the historical evolution of the Land Boards and then the some reform lessons suggested by scholars.

Prior to the creation of the Land Boards, customary land administration matters were controlled by powerful customary authorities or chiefs (*Kgosis*) as custodians of land in the political community (*morafe*). The erosion of chiefship authority over customary land administration began with the landmark Native Administration Proclamation of 1933/34 by British colonial authorities to promote democratic accountability and transparency in local administration by the *Kgosis*. Among other things, this colonial policy transferred "the money and other revenue raised from rents, tax, fines, levies, and similar sources into a tribal fund kept apart from the chief's personal income, and to pay him a salary based upon an estimate of his annual value. But in the past there was no such distinction between public and private revenue; it was all used and controlled by the chief" (Shapera 1938:66 in Vaughan 2003a:35). We shall later see how similar reforms in chieftaincy administration initiated by British colonial governments in Ghana were reversed by Ghanaian political elites before the end of colonial rule.

Seretse Khama, the Democratic Party leader and Prime minister of the newly independent Republic of Botswana was also a de facto traditional ruler of the most powerful kingdom in the country.<sup>35</sup> Therefore, as Vaughan (2003a:66) point out, "the constitutional reforms he embraced were thus more acceptable to his people since Tswana rulers had to adapt customs to historical changes." As a result of this rare historical moment whereby the embodiment of long-held customary laws and modern formal statutory laws found expression in the same political leader, the Botswana state was able to avoid the dilemma of the traditional-federal state that prevail all over Africa. The Tribal Land Law of 1968 passed by the National Assembly that established Botswana's modern land administration system managed by Land Boards followed the path of administrative reforms began by colonial

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<sup>35</sup> The senior grandson of Kgosi Khama III, and true heir to the *bogosi* (chieftainship) of the largest Tswana *morafe* – Ngwato. The unfortunate racial politics in the colonial period leading to Seretse Khama's abdication of his chiefly seat is recounted by many scholars (Vaughan 2003a).

administrators. The 1968 law changed customary institutions of land administration in the following ways: (a) removing communal land administration from the domain of the *Kgosi* (chief) to the domain of the Land Boards; and (b) formalising the informal rules of customary land administration into accountable legal rules (Adams et al. 2003; Nkwae 2008; Vaughan 2003a). The 1968 law did not change the communal ownership of land into individual freeholds or state lands. It only removed the administration of communal lands from the domain of the *Kgosi* and placed under the domain of Land Boards. The chiefly representatives on the Boards gradually lost their position to non-chief elected officials. Interestingly, as Table 7 below shows, Governments in Botswana have been committed to converting state lands into communal lands since independence. This shows Botswana’s strong support for customary norms of communal land ownership.

**Table 7: Categories of land tenure in Botswana, 1966-1998**

Year	Tribal land		State land		Freehold land	
	Area	%	Area	%	Area	%
1966	278,535	48.8	270,761	47.4	21,356	3.7
1979	403,730	69.4	145,040	24.9	32,960	5.7
1998	411,349	70.9	144,588	24.9	24,572	4.2

Source: White (1999, in Adams et al. 2003:2)

The politics of customary land administration in Botswana is not one that can be taken out from its historical context and technically fixed in other countries. Since independence, the traditional rulers and their subjects have cooperated in reforming the existing ‘tribal land’ administration system while maintaining the communal nature of land ownership (Adams et al. 2003; Nkwae 2008). The absence of competitive multi-party elections in Botswana’s *de facto* one-party system has also ensured the consolidation of the political settlements and reforms agreed by the dominant ruling coalition (Subudubudu and Molutsi 2009; Vaughan 2003a). Therefore, underlying the successful evolution of the transparent and accountable Lands Boards in Botswana has been the willingness of the political ruling elites to negotiate over the reform of the informal rules of customary law and traditional organizations of chieftaincy that governed ‘tribal lands’.

Many scholars like Hernando de Soto (2000) have proposed that other African governments should embark on a national integration of informal customary land laws into their legal formal institutional system. McAuslan (2000:94) also identifies two approaches to the successful integration of customary and formal land tenure systems, namely (i) the enactment of a unified national land law, and (ii) leaving the general law to the local communities to replicate the evolution of the English common law. Sjaastad and Cousins (2008:6) also suggest that governments should “mimic key elements of customary law through national legislation” rather than attempt a complete unification of customary and formal land law due to wide variations in customary land laws from one ethnic community to another. It could be seen that there is widespread recognition of the existence of dual legal structures of authority in African states. There is however little empirical analysis of whether or not customary authorities and governments have the political will and financial resources to integrate their bifurcated legal systems of authority.

Some attempts have been made by countries like Uganda, Malawi and Zambia to replicate Botswana’s Land Boards (Burns 2007; Kapitango and Meijs 2010; World Bank 2003d). So far, what is known from its replication in Uganda is that “The cost of Land Boards has been a real issue in Uganda. ...Subsequent investigations have indicated that the cost is neither viable nor sustainable and changes in the legislation have had to be developed” (World Bank 2003d:91). It appears that the political leaders in other African countries are not prepared to bear the financial and material cost of creating and sustaining a publicly accountable agency of customary land administration (World Bank 2003d). We shall see that while many international development actors advocated for the creation of accountable agencies of customary land administration in Ghana, government officials were not prepared to bear the financial cost of providing the administrative structures, personnel, and resources required for the functioning of such an agency. Botswana’s developmental Land Boards cannot be wished out of their political, economic, and cultural context.

Some leading scholars, practitioners, and interested political elites who convened at the *Land in Africa* conference in London concluded that “Although there is broad consensus, reflected at the conference, that the law should protect legitimate customary rights, and that customary and formal tenure systems should be integrated

there was less agreement about how to do so in practice, and how to devise appropriate land administration systems” (Quan et al. 2004:12). The World Bank has also reported that “Despite numerous initiatives during the last decade in sub-Saharan Africa to implement new land administration systems or to modernize existing ones, limited results have been achieved” (World Bank 2003d:22). The limited progress indicates that “more still needs to be known about customary land tenure institutions within the modern nation state” (Tsikata 2004:92). Boone (2007:558) has pointed out the most significant aspect of land politics that has been neglected in the debate: “Analysts tracking recent political liberalizations in Africa have not paid much attention to the constitutional aspects of land politics, and political science has largely ignored the links between questions of rural property on the one hand and deeper questions of African political development on the other.” Later we shall see how the politics of state formation and constitutional organization in Ghana underlies a prevailing dual system of ‘customary sector’ and ‘public sector’ land administration. Paths of state formation shape the paths of land politics. There is the need to understand the nature of customary institutions of land administration in the organization of power and authority within African states.

### **3.4 Conclusion: Understanding Customary Institutions of Authority**

The path of state formation development in African countries matters for current outcomes of land administration. Limited progress in the reform of customary land administration in Africa clearly shows the need for a deeper understanding of the nature of the African state. There is the need to understand the extent to which the formal-legal institutions of the state complement, conflict with, or substitute for the informal organizations of traditional authorities that dominate land administration. It is emphasized that we need to understand the ways in which different stakeholders interact over time in often diverse and dense institutional contexts to promote, negotiate or block change in the rules and structures governing land administration. These interactions are profoundly political. It emerges that the creation of transparent and publicly accountable formal-legal institutions of communal land administration in Africa cannot be wished into existence because of the inter-locking nexus of power between formal structures of government and customary institutional structures of traditional authority that pre-date the modern state.

The lack of conceptual and policy consensus over the nature of customary land tenure institutions shows that not much is known about these supposedly ‘informal’ institutions. Contextual historical analyses of customary land administration systems within African states are needed if any meaningful progress is to be made in the design and implementation of appropriate reform policies. In the chapters that follow, I discuss how the colonial process of modern state formation occurred in Ghana; and, the causal effect of bifurcated state authority between chiefs and government on subsequent land administration reforms.

## Chapter 4

### **The Politics of Traditional-Federal State Formation and Political Settlements Over Land Ownership in the Gold Coast: 1800-1901**

I have, in every public and private meeting, declared that every individual who resided under the British flag must consider himself as amenable to British law (*Governor Sir Charles MacCarthy, Governor of the Gold Coast, 1821-1824*).<sup>36</sup>

Traditional institutions...ha[ve] prevailed in that country from time immemorial and the local Government possesses neither the right nor the power to interfere with it (*Captain George MacClean, 'Governor' of the Gold Coast, 1830-1843*).<sup>37</sup>

#### **Introduction**

In this chapter, and the two that follow, I analyse the politics of state organization of authority over land administration in Ghanaian history. It is the central thrust of the three chapters that land tenure administration in Ghana today has been shaped by the historical organization of state authority and power between actors with interests in land tenure ownership and administration. In this chapter, I shall argue that the failure of British colonial Governments to conquer the existing traditional states and establish a unitary state shaped the evolution of a traditional-federal state that left the traditional states with substantial power over land ownership and land tenure administration. The nature of state organization between British colonial Governments and the traditional states constrained the former from reforming the land ownership system. The legacy of the traditional-federal state explains the dual institutional structures of authority that governs land tenure administration in Ghana today. My purpose in this chapter is to outline the complex unfolding politics that shaped the organization of land tenure administration in the traditional-federal state as well as the sources of demands for, and resistance to, land tenure reform.

The chapter is divided into five sections. Section 4.1 presents the story of the failure of the British colonial Government to create a unitary state after the Gold Coast was

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<sup>36</sup> Sir Charles MacCarthy to Earl Bathurst, 16 May, 1822, (Metcalf, 1964, document No. 75).

<sup>37</sup> Captain George MacClean was elected by the British merchants as President of the government following the withdrawal from the Gold Coast in 1828 of direct British Crown rule. MacClean assumed the title of 'Governor' and ruled until 1843 when direct Crown rule resumed.

officially declared a British colony in 1821. Section 4.2 presents how the British colonial governments negotiated with traditional states for the establishment of the colonial state that I call the traditional-federal state.<sup>38</sup> Section 4.3 discusses how the influx of European capital into the mining sector (the gold rush) forced governments to define the question of land ownership. Section 4.4 discusses how British Governments attempted to reform the land tenure administration system against strong opposition from Chiefs and African intelligentsia. Section 4.5 concludes the chapter by emphasizing the implications of the bifurcation of state authority between chiefs and government over land administration for subsequent developments.

#### **4.1 The Failure of the Colonial Unitary State Project: 1821-1830**

At the beginning of 1800, there was no national government in the Gold Coast but many sovereign traditional states and a number of merchant companies from powerful European countries (Britain, Portugal, Netherlands, Denmark and later France and Germany) who competed for trading influence and territorial rights. There were no national military, police, and judiciary organizations on the Gold Coast to enforce order, contracts, and obligations. European merchants relied on “prudence and caution”; material “dashes” to the Kings, chiefs, and Headmen; treaties with the rulers of traditional states; and the “customs and usages” of the traditional states to trade their guns, gunpowder, rum, and other wares to the natives. The merchants, in return, mainly bought slaves.

The most powerful traditional state on the Gold Coast was the “much dreaded” Asante Confederacy which could command an army of 20000 – 40000 men when invading another traditional state to either force it into its confederacy or enforce the existing allegiance and payment of tribute to the Asante King (*the Asantehene*). By 1800, the Asante Confederacy had reached the peak of its power after conquering almost all the other traditional states in present day Ghana.

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<sup>38</sup> The Aborigines Rights Protection Society (ARPS), a protest movement formed by chiefs and the intelligentsia to resist land reforms, saw the colonial state as “a federal union of the Native States” (Metcalf, No. 483). Governor MacClean referred to it as “a confederacy” (Metcalf, No. 98).

From the time the British Parliament formally decreed the ending of the slave trade in 1807, British Governments sought measures to effectively abolish the slave trade by British merchants in the Gold Coast. The promotion of 'legitimate' trade and African 'civilization' became additional tasks. Therefore, in 1821 the British Crown vested in itself all the forts, possessions, and property of the African Company of British merchants in the Gold Coast to establish colonial rule. Sir Charles MacCarthy was appointed by the Crown as the first Gold Coast Governor. Earl Henry Bathurst, the British Secretary of State for War and the Colonies, explained to MacCarthy the new colonial policy in the Gold Coast as follows:

The consequence will be that many local regulations and customs which have long prevailed in those forts will be altogether superceded and repealed: and you will find it necessary to make some general notifications to the inhabitants, in order to guard them against being implicated in any illegal proceeding by continuing to adhere to ancient usages, which may now be inconsistent with the law.<sup>39</sup>

Not long after MacCarthy arrived in the Gold Coast he reported to London, "I have, in every public and private meeting, declared that every individual who resided under the British flag must consider himself as amenable to British law."<sup>40</sup> MacCarthy's proclamations however infringed on existing powers and customs within territorial claims of the Asante Confederacy over the Fante territory on the coast. The claims of Asante had been recognized in 1820 by Joseph Dupuis, the British Consul for the Kingdom of Asante.<sup>41</sup> Soon, the Asante Confederacy and the new colonial government waged the first of many wars, 1824-1901, that would determine the fate of the two imperial powers on the Gold Coast.

Governor Charles MacCarthy succeeded in forming an alliance<sup>42</sup> with some of the native states "who had been reduced under the power of the King of Ashantees, and

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<sup>39</sup> Letter of Earl Bathurst to Sir Charles MacCarthy, 19 September, 1821 (Metcalf, No. 52).

<sup>40</sup> Letter of Sir Charles MacCarthy to Earl Bathurst, 16 May, 1822 (Metcalf, No. 53).

<sup>41</sup> The Dupuis Treaty with Asante (Metcalf, No. 42 & 43).

<sup>42</sup> The Oath-Taking at Nyankumasi, 20 December, 1823 (Metcalf, No. 63). The alliance between the traditional states and the new imperial British government led by Sir Charles MacCarthy is reported to have been made in the following manner: "The whole of the native chiefs who joined ... against the Ashantees were not satisfied until they had evinced their sincerity by swearing allegiance in their fashion, as follows. The person about to swear took a sword in his right hand and with great animation, whilst expressing his determination, called heaven to witness that he would be faithful to the cause, continually putting the sword upwards at the Governor's head, and flourishing it round his own, so near at times that His Excellency's eyes were frequently in imminent danger. They would also swear on the bible (white man's fetish as they termed it), but before any of them would consent

who readily embraced an opportunity to throw off his yoke”.<sup>43</sup> The traditional states were promised independence and protection from the Asante Kingdom. However, in the ensuing ‘Battle of Nsamanko’ in 1824, MacCarthy was killed and beheaded by the Asante army. The British Government sent Lieutenant-Colonel A. Grant to deal with the crisis in the Gold Coast. He arrived with military reinforcement, re-organized the native allies, and managed to temporarily repulse the Asante army.

Major-General Turner, the new Governor-in-Chief for the Gold Coast, was duly authorized to conclude a definitive treaty of peace with the Asante Kingdom; but, “without reference to any former treaty or convention which may have been concluded under the authority or sanction of the late African Company...with the Ashantees”.<sup>44</sup> In his review of MacCarthy’s failed policies, Turner commented,

Here we have no territory, sovereignty or subjects; consequently no right to administer laws, power to enforce them, or colonists to receive them. Therefore, when the Colony of Cape Coast is alluded to, it can only mean the fort. ... Sir Charles MacCarthy evidently looked at things through a flattering medium, and trusted much in the power of proclamations and fine words.

Major-General Turner embarked on the peace negotiations with the Asante Kingdom but failed in his bid to secure the independence of the rebel states before he contracted fever and died. Soon the Asante army was once again on the offensive against the rebel states. Lieutenant-Colonel Purdon led a new alliance with traditional states and won a decisive, but costly, victory in the Battle of Katamansu in 1826.<sup>45</sup> In 1828, the British Crown withdrew its imperial rule from the Gold Coast and once again handed over the forts, possessions, and property to British merchants. The Crown supported the merchants with a yearly grant of £3500-4000.

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to join the war against the Ashantees, Sir Charles was obliged to assure them that he would never make peace with that tribe without acquainting them with his intentions, and that their interest would ever be considered” (ibid). The reason for the oath-taking at Nyankumasi was that the native chiefs distrusted the intentions of the new colonial government because “in 1807... [the Assin fugitives] arrived at Cape Coast, expecting to find protection, but on the contrary the governor, colonel Torrane, seized Cheeboo [Tsiibu] their king, an old, infirm and blind man, and delivered him over to the Ashantees... at Annamoboe, where he was put to death with the most excruciating torture” (ibid).

<sup>43</sup> Dispatch from Lt.-Col. A Grant to Earl Bathurst, 31 July, 1824 (Metcalf, No. 65).

<sup>44</sup> Letter of Earl Bathurst to Major-General Charles Turner, 29 October, 1824 (Metcalf, No. 66).

<sup>45</sup> Governor Purdon reported that his force amounted to nearly twelve thousand men of which eight thousand were killed and two thousand wounded. The number of Asante army killed, wounded, or taken prisoners was estimated to be at least five thousand men (Metcalf, No. 75).

The political experience of the Crown in the Gold Coast contributed in shaping two key policies when crown rule returned to the Gold Coast in 1843. First, it shaped the policy of non-interference in the internal affairs of the native states – especially the “much dreaded” Asante Kingdom. Second, it shaped the policy of negotiation with the native states for the acceptance of British jurisdiction. The British Crown had learnt some political lessons from the unsuccessful unitary-state project.

#### **4.2 Merchants Rule and the Traditional-Federal State Project: 1831-1842**

This study argues that the creation of the colonial state and the organization of state authority between the traditional states and the British central government over land ownership shaped the nature of land administration reforms in Ghana. But a debatable question is what was the “Magna Carta” that established the colonial traditional-federal state (Adu-Boahen 2000)? Many scholars regard the series of treaties signed in 1844 between some independent native states and the British local government as the Magna Carta of the traditional-federal state in Gold Coast history (Cartland 1947; Metcalfe 1964). Collectively, the series of treaties, negotiated from 6 March 1844 to 2 December 1844, are generally known as the ‘Bond of 1844’. Through the ‘Bonds’ the traditional states recognized British political jurisdiction over them, the protection of individuals and property, and the moulding of customary law according to the general principles of British law.

Many scholars do not look at the fundamental question of how those ‘bonded native states’ were able to gain their independence from the Asante confederacy. If that question is answered satisfactorily the critical juncture of the formation of the traditional-federal state will move backwards to 1831 (Adu-Boahen 2000). The Committee of Merchants which ruled the Gold Coast for fourteen years, 1828-1842, before Crown rule returned in 1843, established the nucleus of the modern traditional-federal state through the 1831 Peace Treaty. This peace treaty was negotiated by ‘Governor’<sup>46</sup> George MacClean between the British merchant

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<sup>46</sup> When the Crown Government handed over to the British merchants the administration of the settlements, the President elected by the merchants, Captain George MacClean, was told not to assume the title of Governor. But, as MacClean usually pointed out, the situation in the Gold Coast (and not in London) dictated the appropriate course of politics. Not surprisingly, MacClean was sometimes accused by the merchants of setting aside the rules to govern independently (Metcalfe, No. 105).

government and their allies of victorious native states, on the one hand, and the defeated Asante Kingdom, on the other hand. Following the Battle of Katamansu in 1826 in which the Asantes were defeated, the terms on which a peace treaty was to be offered to the King of Asante was immediately prepared on 10 November 1827. The 1831 Peace Treaty recognized the following agreement between the parties:<sup>47</sup>

- a. The King of Asante has renounced for himself, his heirs and successors forever, all and every right to collect tribute (as a token of dependency) from any of the native states in alliance with Great Britain; and that he do acknowledge all of these states to be free and independent.
- b. The parties will engage in “free commerce” and “lawful commerce”; and shall ensure “perfectly open and free” access to markets for all persons engaged in lawful trade; “without forcing them to purchase at any particular market”;
- c. If any of the allied kings or chiefs “refuse to abide by the decision of the governor, or his representative, with the chiefs assembled with him in council, in that case he or they will no longer be considered as a confederacy, and must arrange his or their disputes as they best can.”
- d. The King of Asante has deposited in the Cape Coast Castle, in the presence of the parties, “the sum of 600 ounces of gold<sup>48</sup>, and having delivered into the hands of the Governor two young men of the royal family of Ashantee named ‘Ossor Ansah’ and Ossoo Inquantamissah’, as security that he will keep peace with the said parties in all time.” The securities shall remain in Cape Coast Castle for the space of six year from the date of the treaty.
- e. “Panyarring, denouncing and swearing on or by any person or thing whatever, are strictly forbidden, and all persons infringing on this rule shall be rigorously punished; and no master or chief shall be answerable for the crimes of his servants, unless done by his orders or consent, or when under his control.”
- f. “As the king of Ashantee has renounced all right or title to any tribute or homage from the Kings of Dinkera, Assin, and others formerly his subjects, so, on the other hand, these parties are strictly prohibited from insulting, by improper speaking or in any other way, their former master, such conduct being calculated to produce quarrels and wars.”
- g. That all the parties accept the jurisdiction of the Governor-in-Chief of His Britannic Majesty’s possessions on the Gold Coast (or his representative in the absence of the Governor) to decide “all ‘palavers’ relating to the agreements, with the assistance of two or more of the Kings and chiefs as a council.

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<sup>47</sup> The 1831 Peace Treaty is reproduced in Metcalfe, No. 98. It may be compared with Sir Charles MacCarthy’s dubious treaty of alliance made with some Fante and Assin states before he met a fatal end in the battle of Nsamanko (Metcalfe, No. 63).

<sup>48</sup> The 1831 Peace Treaty accepted the 600 ounces of gold bargained by the King of Asante instead of the 4,000 ounces of gold initially demanded in the existing terms prepared on 10 November 1827.

The above peace treaty became the basis of the traditional-federal state; and, for that matter, the modern Ghanaian state which incorporates the political organizations, institutions, and customary laws of the traditional states (Adu-Boahen 2000). How did Governor MacClean succeed where Major-General Turner and Lieutenant-Colonel Purdon had failed? During his visit to Accra, Governor MacClean succeeded in redeeming an Ashante princess called Atianvah “after much labour and difficulty, besides incurring considerable expense.”<sup>49</sup> It appears that the Asante princess had earlier been captured by some of the traditional states during a war with the Asantes. The princess who had “much influence with the king...declared that she will use every endeavour to bring about a peace betwixt the British settlements and Ashantee, provided she can be safely conveyed to Coomassie.”<sup>50</sup> MacClean and his government used princess Atianvah “to induce the king to come into their [our] arrangement for peace.” MacClean’s foresight produced the new “confederacy”.

The merchant government established a local militia and attached to the palaces of each of the parties to the peace treaty a militia who served as the link of effective communication with the Cape Coast traditional-federal government.<sup>51</sup> And for a period of thirty-two years (1831-1863) there was no war between the British local government and the Asantes. Dr R.R. Madden who was sent by Her Majesty’s Government in England to the Gold Coast to report on the state of affairs wrote:

The trade of Cape Coast has considerably increased. ...The cessation of warfare between the Ashantee and Fantee nations has caused the paths to be opened, from the interior to the coast; and the merchants of Ashantee now come down from Coomassie ...to Cape Coast or Anomaboe, without let or hindrance. This journey, which formerly was considered one of great peril and difficulty, is now easily performed in 60 hours’ travelling. ...During the last nine or ten years, the trade has gone on steadily increasing. In the year 1831, the imports into Cape Coast were £130,851. 3s 11 1/2d., and in 1840 they amounted to £423,170. The same steady increase is to be noted in the exports. These from Cape Coast Castle in 1831 amounted to £90,282,9s 6d, and in 1840 they had increased to £325,008.<sup>52</sup>

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<sup>49</sup> Minutes of the Council of the Committee of Merchants, 23 August, 1830 (Metcalf, No. 95).

<sup>50</sup> Minutes of the Council of the Committee of Merchants (Metcalf, No. 95). The political negotiations that resulted in the peace treaty is covered from Metcalf No. 94-99.

<sup>51</sup> In 1883 Captain Knapp Barrow was sent by Governor Sir S. Rowe to Kumasi to enquire about the causes of the disintegration of the Asante Kingdom. In his report Captain Barrow recorded, “All urged me to beg your Excellency to come to their assistance, to put their country straight for them, so that they may all be ‘of one mind’ as in the time of Governor MacClean whom they still revere and call to this day ‘Obrodie Badaie’ which means, ‘The time of the white man when everybody slept sound.’” (Captain Knapp Barrow, Report on his mission to Ashanti, 5 July, 1883 (Metcalf, No. 339).

<sup>52</sup> Dr R. R. Madden’s Report on the Gold Coast (Metcalf, No. 132).

The achievement of Governor MacClean led Her Majesty's Government to restore Crown rule to the Gold Coast in 1843. MacClean was given the new position of Judicial Assessor and magistrate to exercise British jurisdiction within and outside the forts. The Judicial Assessor is assigned the function of helping the native courts of the traditional states, based on their consent, to decide cases "whether according to British laws or the laws there prevalent." He continued to govern the Gold Coast until the arrival of Lieut.-Governor H.W. Hill, as new governor, in February 1844.<sup>53</sup>

#### **4.2.1 Return of Crown Rule and the Bonds of 1844**

The transfer of government and relegation of MacClean from the forefront of political decision-making began to shake the peaceful foundations of the colonial state, as both the independent states and the Asante Confederacy appeared to distrust the new political arrangements. On 6 March 1844, "several of the chiefs from different parts of the country" visited the new Governor "to pay their respects on the transfer of the Government."<sup>54</sup> Governor Hill seized the "opportunity" to "hurriedly" signed the first of a series of 'bonds' with chiefs who once again acknowledged "the power and jurisdiction" of the British government. These series of political agreements between the chiefs and the British government came to be known as the 'Bond of 1844'. The short content of the famous Bond of 1844 is reproduced below.

1. Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within diverse countries and places adjacent to Her Majesty's forts and settlements on the Gold Coast, we, the chiefs of countries and places so referred to, adjacent to the said forts and

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<sup>53</sup> In 1913, Casely Hayford in presenting a toast at a banquet held in honour of Governor Hugh Clifford had this to say about Governor MacClean: "He was able to inspire the sympathy and loyalty of the people, and he ruled with a success that has scarcely been matched since" (Hayford, 1913:155).

<sup>54</sup> According to Governor Hill, the real intent of the chiefs for their visit was for them to clarify the rumour that Her Majesty's Government intended "to pronounce freedom to all slaves within the limits over which jurisdiction has been exercised." The chiefs who maintained large numbers of domestic slaves in their traditional states had good grounds to be worried if the rumour were true. Governor Hill was however afraid to confirm to the chiefs the full truth in rumour because, he wrote, "an attempt to carry out any such measure would cause a revolution. The chiefs were delighted on my informing them that it was quite an idle report, and that the export slave trade was all that we prohibited. They expressed satisfaction on my telling them they were not at liberty to ill-use their domestic slaves, and if a person inherited a slave, that person was not at liberty to sell the slave again, but such slave was to be considered a member of the family. ... The chiefs expressed great satisfaction at the appointment of Captain MacClean to preside over the trial of offenders" (Metcalf, No. 144). Ghana derived its date of independence from British colonial rule, 6<sup>th</sup> March 1957, from the commencement date of the famous Bonds of 1844.

settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the protection of individuals and property.

2. Human sacrifices and other barbarous customs, such as panyarring, are abominations and contrary to law.
3. Murders, robberies and other crimes and offences will be tried and inquired before the Queen's judicial officers and the chiefs of the district, moulding the customs of the country to the general principles of British law.

Between 6<sup>th</sup> March – 2 December, 1844 eleven of such 'Bonds' were signed with chiefs. Unlike many scholars (Austin 1964; Gocking 2005; Pellow and Chazan 1986), I do not consider the series of Bonds signed in 1844 as the critical juncture that shaped the evolution of the modern traditional-federal state. The significance of the Bond of 1844 pales in comparison to the Peace Treaty of 1831 which, first, gained the independence of some traditional states from the Asante Confederacy and, second, created what MacClean called "a confederacy" made up of the newly independent traditional states, the remnant of the Asante Confederacy, and the local representatives of the British Crown. Commenting on the significance of the Bond of 1844, the Ghanaian historian Adu-Boahen (2000:41) wrote,

This bond is certainly not as important as estimated by some historians. It cannot be said to be the Magna Carta of Ghana or the legal basis for British rule in Ghana. In the first place, the bond was not even a treaty between the British and the Fante and their allies, but a mere declaration on the part of the latter, and the British who prepared it never considered themselves bound by it. Moreover, as indicated in the first clause, the signatory chiefs were merely recognising the power that had already been exercised. In other words, the bond did not create MacCleans's power but it merely acknowledged it formally.

The change from the merchant-elected Governor MacClean to crown-appointed Governor Hill did not affect the organizational framework of the 'confederacy' that had been created by the 1831 Peace Treaty. For many chiefs within the Gold Coast Protectorate and the Asante Kingdom, the 1831 Peace Treaty of MacClean marked the period of "Obrodie Badaie" – which means, 'The time of the white man when everybody slept sound.'<sup>55</sup> That was the time when the traditional-federal state with a national government was formed. The effects of colonial state formation on land ownership and administration are discussed in turn.

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<sup>55</sup> See the Report written by Captain Knapp Barrow, 5 July 1883, from his mission to the Asante Kingdom to ascertain the causes of its rapid disintegration (Metcalf, No. 339).

#### 4.2.2 The Creation of Public Lands: A Necessary Feature of States

Between 1821 and 1874, colonial government interferences in stool land ownership and administration were confined to the compulsory acquisition of stool lands as public lands and the ‘consensual’ adjudication of disputes over stool lands. Before 1821, British merchants in the Gold Coast acquired lands from the chiefs for their settlements. The merchant ‘governors’ kept a “Register of Town Lands dating from 1818.” When the possessions of the merchants under the African Company were vested in the British Crown in 1821 their land acquisitions became Crown property. The Minutes of the Executive Council of MacClean’s government states:

It would appear that erroneous ideas were entertained...by the authorities in England, who seemed to suppose that the local Government were bound to pay these allowances in the name or in lieu of *ground rent*. This, as the Council well knew was not the case – not only the ground on which the castle is built, but a very large extent of country having long been the actual property of the Crown – in proof of which, it may be sufficient to state that the greater part of even the native inhabitants, hold the ground on which their houses are built by grants from the Crown, which grants have always been given by the Governor for the time being, of which he (the President), has, during the last five years, given many, and [of] which a regular registry is kept in the Castle with ground plans annexed.<sup>56</sup>

The creation of the colonial state and its expansion required governments to acquire lands from chiefs to be used for public purposes (construction of state buildings, roads, railway, etc). State owned lands are public lands. The authoritative research of Bentsi-Enchill (1964:20-2), recognises that “lands held by the Crown or Government of Ghana” became public lands. Bentsi-Enchill also commented,

To be sure, the British had acquired during the nineteenth century what was acknowledged to be an irregular jurisdiction over many of these coastal states; but the annexation had nevertheless something of the character of a surreptitious encroachment, protected allies waking up suddenly to find themselves transformed into a British colony and their citizens British subjects.

Lack of resistance from chiefs to the “surreptitious encroachment” could also be explained by payment of “allowances” to the chiefs. The absence of powerful indigenous protest movements during the early periods of colonial administration enabled the peaceful creation of public lands.

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<sup>56</sup> Minute of the Council of Merchants, 10 August, 1835 (Metcalf, No. 107).

### 4.2.3 The Fante Confederation: In Search of an Accountable Chieftaincy?

The intelligentsia in Cape Coast, from the early days of their emergence on the political scene, found it more beneficial to work with their weakened chiefs to establish what they called a confederation of Fante states in 1868 towards self-government from British rule. The Fante confederacy was also established in order to create a strong force against their “common enemy” the Asante Kingdom.<sup>57</sup> The immediate catalyst for the formation of this political movement was an exchange of forts between the British and the Dutch governments in 1867 for effective control over the native states and introduction of customs duties.

The exchange of forts led to the placement of some Fante states under the Dutch, who had been strong allies of the Asantes.<sup>58</sup> In the words of British Governor, H. T. Ussher, the Fante states “now find themselves in a precarious position; at enmity with the Dutch, on unfriendly terms with Her Majesty’s Government, divided among themselves, and finally threatened by Ashantee.” The strong historical relationship between the Dutch and the Asantes was given by Major-General Turner as follows:

In everything with Elmina there is much difficulty, as I have reason to apprehend that Earl Bathurst considers it a respectable Dutch settlement with European authorities and troops. ...Although the flag of the Netherlands is flying there...there are no European soldiers or merchants,...the people are all Africans (chiefly Ashantees) by whom, and not by the nominal Governor, all questions of importance are decided.<sup>59</sup>

It was through Dutch merchants that the Confederacy of Asante States acquired much of their guns and modern military weaponry that they used against both the British and the Fantes.<sup>60</sup> The Fantes looked upon the Dutch as feudatories to the Asantes. As Governor Ussher also wrote, “this opinion is unfortunately strengthened by the fact of the payment to the King at Coomassie, of a yearly tribute by the Dutch

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<sup>57</sup> About twenty four Fante kings and chiefs signed the constitution of the ‘Fante Confederation’.

<sup>58</sup> The Asantes bought much of their guns from the Dutch aside from the yearly payment of stipend by the Dutch to the Asante King. See Metcalfe No. 274.

<sup>59</sup> Letter of Major-General Turner to Lt.-Col Purdon, 18 October, 1825 (Metcalfe, No. 71).

<sup>60</sup> The British constantly expressed their desire to the Netherlands Government to buy off the Dutch settlement in the Gold Coast for two reasons; first, as a way of weakening the military power of the Asante Confederacy, and, second, to ward off threats of French incursions into the Gold Coast.

for the ground upon which Elmina stands.”<sup>61</sup> Certainly, the transfer of forts involved many complications which became “daily more alarming, and threaten to involve the Protectorate in ruin.”<sup>62</sup> Logically, all the Fantes, including those still under British protection, interpreted the transfer to the Dutch as a betrayal by the British to their mortal enemy. It is for this reason that the Fante states sought “to support and protect themselves, regardless of British interests or protection.”<sup>63</sup> Governor Ussher wrote, “Their loyalty had been shaken to its foundations.”<sup>64</sup> The Fantes did not understand why the British, “a Power for so many years their ally and protector”,<sup>65</sup> had sold them to the Asantes. The Fantes were “inclined to throw off British allegiance”<sup>66</sup> to form their own confederacy.

Indigenous political elites who organized the governance structure of the Fante Confederation imitated British institutions of government, and layered them on existing weak institutions of chieftaincy. At the top of the governance structure was the ‘king-president’ to be elected from the body of kings. The day to day administration of the Confederacy was to be managed by ‘the Ministry’ made up of “men of education and position.”<sup>67</sup> The judicial functions of the confederacy were to be performed by provincial assessors appointed in each province or district. The Confederacy’s constitution however stated that parties dissatisfied with judicial decisions in the confederacy may appeal to the British Courts. The British government was kept in an advisory relationship.

More important to the study, one of the objectives of the Fante Confederation was “To develop and facilitate the working of the mineral and other resources of the

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<sup>61</sup> Letter of H. T. Ussher to Sir A. Kennedy, 6 April, 1868 (Metcalf, No. 262).

<sup>62</sup> Letter of Ussher to Kennedy, 19 March, 1868 (Metcalf, No. 261). The complications of the transfer was the result of frequent change of British leadership in the Gold Coast. Between 5 April 1864 and 8 August 1868 there had been eight changes with an average of a change of leadership of every six months. The suggestion of transfer of forts was made by Administrator Colonel Conran on 6 September 1866 (Metcalf, No. 257), the transfer agreement was made on 5 March 1867 (Metcalf, No. 259), a month after Ussher had been made acting Administrator before he became full Administrator on 20 July, 1867. In 1868, Ussher complained about Conran’s ignorance about the precarious nature of intra-state relations in the Gold Coast but it was too late (Metcalf, No. 263).

<sup>63</sup> Ussher to Kennedy, 19 March, 1868.

<sup>64</sup> Letter of H. T. Ussher to Sir A. Kennedy, 6 April, 1868 (Metcalf, No. 262).

<sup>65</sup> Ussher to Kennedy, 6 April, 1868.

<sup>66</sup> Letter of Ussher to Kennedy, 19 March, 1868.

<sup>67</sup> Constitution of the Fante Confederacy (Metcalf, No. 279).

country.”<sup>68</sup> It is reasonable to suggest that men who had gone through British formal education were dissatisfied with the management of land resources by their chiefs. Moreover, the imitation of British formal institutions of rule also suggests the preference of educated Ghanaians, if not the chiefs, for a more transparent and accountable system of local administration. The political objectives of the Fante Confederation marked the beginnings of the long search for an accountable chieftainship, and, for that matter, accountable customary land administration.

Generally, the Fante Confederation did not receive support from colonial government officials. Herbert. T. Ussher,<sup>69</sup> described the educated members of the Confederation as “A small class of discontented and unprincipled natives, (who appear to be an evil inseparable from all negro communities).”<sup>70</sup> W. H. Simpson<sup>71</sup> identified two things with the new political movement. First, he identified the “pernicious interference of the ‘scholars’ or semi-educated natives, hitherto in uncontrolled ascendancy.”<sup>72</sup> Second, he identified the need for devising a system of rule that is consistent with the prerogatives of the Crown, a union for self-defence between the different nations within the protectorate, and a platform for training the natives towards self-government.<sup>73</sup> C. S. Salmon<sup>74</sup> arrested almost all the officials of the Ministry because he saw the creation of the Fante Confederation as a “dangerous conspiracy [that] must be destroyed for good or the country will become altogether unmanageable.”<sup>75</sup> He saw the creation of the Confederacy as an attempt by the non-chief educated elites to usurp the authority of their chiefs:

The worst feature in the new constitution is the complete manner in which all power is taken from the native kings and placed in the hands of ‘Ministry’ and ‘Executive Council’, composed of young men, some of doubtful respectability, and none with any means, or holding any position in the country.<sup>76</sup>

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<sup>68</sup> Constitution of the Fante Confederacy.

<sup>69</sup> Administrator of the Gold Coast from 9 February 1867 to 7 August 1867.

<sup>70</sup> Ussher to Kennedy, 6 April, 1868 (Metcalf, No. 262)

<sup>71</sup> Acting Administration from 8 August 1868 to 3 November 1869.

<sup>72</sup> Letter of W. H. Simpson to Sir A. E. Kennedy, 5 December, 1868 (Metcalf, No. 266)

<sup>73</sup> Simpson to Kennedy, 5 December, 1868.

<sup>74</sup> Colonial Secretary and Acting Administrator from July 1871 to May 1872

<sup>75</sup> Letter of C. S. Salmon to J. J. Kendall, 20 January, 1872 (Metcalf, No. 282).

<sup>76</sup> Salmon to Kendall. 20 January, 1872.

Clearly, colonial government officials were unwilling to share power with the new class of educated native ‘young men’. However, from the 1880s, this view changed and the colonial government began to co-opt the African intelligentsia into the ruling coalition. Crucially, about eight decades later, the emerging class of educated “unprincipled” ‘young men’ succeeded in taking away almost all state power from the native kings. In the next chapter we shall know how this happened; and, more importantly, how they used their power to transform chieftaincy.

Until then, the activities of the Fante Confederation led to serious problems with the Asantes who began to invade the member states of the Confederacy. C. S. Salmon was proved right that neither the educated men nor the chiefs of the Fante Confederacy had the means to defend themselves against the Asante “should serious complications arise”.<sup>77</sup> However, the Asantes not only directed their anger against the Fante states but also drew the colonial government into another war. Whenever it comes to a war with the Asantes, “that great native power” as Governor Ussher had described them,<sup>78</sup> the Fante states and the British Government both realized that they needed the support of each other. The reason was best offered by John Pope-Hennessy, Acting Governor in Chief of West African Settlements (1872-73):

Up to this, the Gold Coast differed from all other colonies in one important respect...that is, in the absence of the first element of government – power. The West Indian Troops in Cape Coast Castle gave the Government no real power in the Protectorate. Experience shows that they were not physically fit for any operations in the interior. As Imperial troops, an Administrator ran great risk in using them. The chiefs in the interior have not been slow to learn this; and when, of late years, an administrator was weak enough to utter threats, the chiefs have laughed at them.<sup>79</sup>

In Weberian conceptions of the state, the Government not only lacked a monopoly on the legitimate use of coercion or violence, but, more seriously, its weak military force could not withstand the geographical conditions in the bush in the event of war with powerful Asante states in the interior. The temporal remedy for Government lay in strengthening the traditional-federal system of government with ‘loyal’ traditional states wherever they may be found. The British local Government was not unaware

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<sup>77</sup> Salmon to Kendall, 20 January, 1872.

<sup>78</sup> Ussher to Kennedy, 6 April, 1868.

<sup>79</sup> Letter of John Pope-Hennessy to Kimberly, Sierra Leone, 29 October, 1872 (Metcalf, No. 286).

of the precarious nature of its dependence on the military forces of loyal traditional states. Therefore, Government also began to create its own national coercive machinery made up of “a mixed force, partly Mohammedans and partly pagans, that is, made up of the Houssas and of the Fantee police.”<sup>80</sup> Such a national force would become more stable, effective, and permanent, and gradually more powerful over the forces of the traditional states. In fact, when C.S. Salmon, began to lay the foundations of a national military and police force, Pope-Hennessy noted:

It is clear that the local Government are obtaining, for the first time, some real power, independent of the precarious and costly imperial troops. With that power at his disposal, the Administrator can establish district magistrates in the interior, by whom trade can be protected and something like an administration of justice secured, in concert with the native chiefs.<sup>81</sup>

The majority of recruits for the national military and police forces that were developed by Government from the 1890s were Hausa tribal men from the Northern territories. And the first national Military school was called the Hausa Military School. It is important to point out that the Gold Coast British Government also lacked another important element of an effective state – territorial sovereignty.

The Berlin Conference of 1884-5 was yet to take place and the Asante Confederacy largely remained uncooperative. It is for these reasons that the British Crown proclamations of territorial sovereignty over the Gold Coast Colony in 1874 would not only be vaguely defined and ineffective; but also no formal act of annexation was made till 1901.<sup>82</sup> Until then, let us turn to another British war with the Asantes, arising from the provocations of the Fante Confederacy.

#### **4.2.4 The Defeat and Disintegration of the Asante Confederacy**

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<sup>80</sup> Pope-Hennessy to Kimberly, 29 October, 1872.

<sup>81</sup> Pope-Hennessy to Kimberly, 29 October, 1872.

<sup>82</sup> In 1874, The British Government issued Letters Patent and Orders in Council that sought to assume full rights of sovereignty over the Gold Coast. Lord Hailey (1951a:197) described the legal orders as follows: “The terms of the Orders in Council reflected the air of hesitation which characterized the policy of the Government. . . . It avoided the formula of annexation; it made no specific mention of the Protectorate; and it did not define the areas to which the Order applied. It was in form therefore a mere extension over an undefined area of the powers conferred on the Crown under the Foreign Jurisdiction Act of 1843.” The boundaries of the colonial state were never clear until 1901.

The new Asantehene, Kofi Karikari, “in direct contravention of the Treaty of 1831”,<sup>83</sup> made “preposterous demands”<sup>84</sup> to restore to the Asantes all the states under British protection that were formerly subjects of the Asantes. This led to the ‘Sagrenti War’<sup>85</sup> of 1873-4 between the British with their allies and the Asantes. Sir Garnet Wolseley who was sent by the British Government to lead the war organized a strong military force from the armies of protected states, 200 of the 2<sup>nd</sup> West India Regiment, the Naval Brigade, and the 42<sup>nd</sup> Highlanders. The Sagrenti war struck the fatal blows that led to the rapid disintegration of the Asante Confederacy and its subsequent integration into the Gold Coast Protectorate in 1901. Kumasi, the capital of the Asante Confederacy, was burnt down during the Sagrenti war.

The content of the new Peace Treaty that was made at Fomena on 13 February 1874 remained almost the same as that of the 1831 Peace Treaty. It reaffirmed the independence to the victorious allied states, the freedom of trade, and the protection of human rights to life. Bolstered by the great victory over the Asante Confederacy, governments, supported by the Colonial office in London, began to expand the formal administrative frontiers of the Gold Coast traditional-federal state. The defeat of the Asante Confederacy in 1873-4 brought a sense of political stability in the Gold Coast Colony. Colonial governments, European capitalists, chiefs, and ordinary people seized the best opportunities for political, economic, and social advancement.

### **4.3 European Capital Development and the Question of Land Ownership**

Hardly had the British and their allies conquered the Asante states when European capitalists began to troop into the Gold Coast mining sector to prospect for gold. In 1877, the Earl of Carnarvon who was Secretary for the Colonies asked Sanford Freeling, Governor of the Gold Coast, to give some encouragement to the mining industry. Governor Freeling responded that for the influx of European mining to have a chance of success it “would entail the assumption of the soil by the

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<sup>83</sup> Letter of Governor Hennessy to Earl of Kimberley, 18 September, 1873, in J. J. Crooks (1973:464) *Records Relating to the Gold Coast Settlements from 1750 to 1874*.

<sup>84</sup> Hennessy to Kimberley, 18 September, 1873.

<sup>85</sup> ‘The name ‘Sagrenti’ is a local corruption of the name *Sir Garnet Wolseley*.

Government, for the tribes would never alienate it willingly even if a large payment were made.”<sup>86</sup> His justification for this was that,

The rightful owners of the soil in the Protectorate are the kings and chiefs and their people, and not the Government. I consider that Her Majesty’s Government have no territorial rights whatever over the various districts of the Protectorate. The limits of British territory are...strictly speaking...only the forts... There is no land absolutely unoccupied, in the sense of being without an owner; it is either the property of the occupant of the Stool or of certain chiefs and headmen. These allow others to occupy and do so on payment of a certain portion of the yield, whether of gold or provisions; but the occupier obtains no fixed tenure, and the duration of his occupancy is purely arbitrary on the part of the owner. ... Land cannot be entirely alienated. It is held with tenacity and there is no subject which gives rise to disputes of so much acrimony and pertinacity as disagreements relating thereto. At present there is a disagreement of the kind which has for many years past been a source of trouble and anxiety to the Government.<sup>87</sup>

Governor Freeling concluded that any compulsory alienation of land from the rightful owners would not only be unjust but, critically, more likely to ruin the indispensable cooperation between Chiefs and the Government. Interestingly, today, the view that stool land cannot be entirely alienated has gained firm currency among many legal scholars, within the country’s judicial system, and in the 1992 constitutional framework (Brobbey 2008; Kludze 2000). It is a view which has been challenged by some scholars who emphasize that it was an invention by chiefs and colonial government officials (Amanor 2010; Firmin-Sellers 1995; Hill 1963).

For present purposes, the crucial point is that the inability of British Governments to compulsorily alienate stool lands from Chiefs was because of the logical outworking of the traditional-federal system of indirect rule, in which British governments largely depended on the coercive structures of traditional states to maintain political conditions required for the growth of European merchant capitalism. This was the era of the well-known colonial system of indirect rule. The path of state formation where governments possess monopoly over coercion, law making and adjudication, and all other actors within a territory, had been pursued by Sir Charles MacCarthy in 1821-4. But MacCarthy’s coercive-intensive path of state formation (Tilly 1992) had ended in fatalism leading to the withdrawal of Crown rule from the Gold Coast.

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<sup>86</sup> Letter of Governor Freeling to Carnarvon, 29 May, 1877 (Metcalf, No. 318).

<sup>87</sup> Freeling to Carnarvon, 29 May, 1877.

The lessons from MacCarthy's coercive-intensive path of state formation influenced subsequent mercantilist governments to choose the alternative path of negotiating with traditional states, for recognition of British sovereignty and acquisition of land with compensation. The view of Government that "the rightful owners of the soil in the Protectorate are the kings and chiefs and their people, and not the Government" would become firmly consolidated in legal, constitutional, and scholarly discourses (Brobbey 2008; Hayford 1913; Kludze 2000; Sarbah 1904). However, what still remains to be settled is the question of the relative position of the kings and chiefs and their subjects in the ownership and administration of Stool lands. How the Government attempted to settle this crucial question is the issue that I discuss next.

#### **4.4 Resistance to Reform in Stool Land Ownership**

I discuss in this section a series of legislative processes initiated by Government to reform the stool land administration system in the Colony, Ashanti, and the Northern Territories. In 1878, in the Gold Coast Colony, when Government made the first attempt to clearly define the limits of power to be exercised by Chiefs, Government gave Chiefs the authority to administer some vaguely defined 'unoccupied lands'. However, in the 1890s, when Governments attempted to reform the administration of the 'unoccupied lands' through the famous Land Bills, the legislative initiatives gave rise to the kind of acrimony that governor Freeling had predicted in 1877. I discuss below the attempts by successive Governments to reform stool land administration.

##### **4.4.1 Bifurcation of State Authority in Land Administration: Administration of 'Unoccupied Lands' by Chiefs and Government**

The 1878 Native Jurisdiction Ordinance, which was repealed and re-enacted in 1883, strengthened the powers of Native Authorities by giving them the authority to make bye-laws for purposes of administering, among other things, "Unoccupied lands and forests", "Land Marks and fences", and "Mines and mining."<sup>88</sup> The Ordinance also created Native Tribunals with civil jurisdiction to determine "All suits relating to the

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<sup>88</sup> Native Jurisdiction Ordinance, 15 January, 1883 (Metcalf, No. 319). 'Native Authorities' included Chiefs ("the Chiefs known as Ohen, Ohene, Manche and Amagah"), Captains, Headmen, and others who by Native customary law are the councillors of the Stool of the Head Chief.

ownership or possession of lands held under native tenure, and situated within the particular jurisdiction of the Tribunal.”<sup>89</sup> Head Chiefs, with the concurrence of their Councillors (Chiefs, Captains, Headmen, and others who by native customary law are the Councillors of the Stool) were also given the authority to make bye-laws “for promoting the peace, good order, and welfare of the people of his division.”<sup>90</sup> In effect, the state was strengthening the indirect system of rule through the chiefs. Interestingly, there was almost no acrimonious debate between Government, Chiefs, and African intelligentsia over the definition of “unoccupied lands.” So long as the administration of “unoccupied lands and forests” remained in the domain of Chiefs, Government got the full support of chiefs and their educated natives.

Thus, Governor Sir Samuel Rowe got the support of both the Chiefs and African intelligentsia to establish the system of deeds registration in the Gold Coast. Under the Land Registry Ordinance of 1883, a Land Registry office was established for those who wanted to register their documents covering stool land transactions. This proved to be an important step in the country’s history of land administration. Deeds registration continued to be the system of land registration in the post-colonial era, until 1986 when Government attempted to replace it with the more secure system of land title registration. The transition from deeds registration to title registration would however create conflicts between offices of the Land Registry and new agencies of land title registration. I shall return to discuss this matter in the context of the politics of land administration reform in Ghana.

The introduction and growth of the cocoa industry in the 1890s proved wrong Governor Freeling’s view that land could not be entirely alienated by chiefs through market forces (Hill 1963). Attempts by colonial Governments to reform the land administration system in 1894 and 1897 would be met with a well organized opposition from Chiefs and African intelligentsia. The successful opposition would become a lasting historical monument to be cherished by African political elites.

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<sup>89</sup> 1883 Native Jurisdiction Ordinance. The ‘Native Tribunal’ was composed of the Head Chief of any Division with his sub-chiefs and Councillors (Section III of the Ordinance). The Ordinance became the basis of Chieftaincy administration and was reformed in 1927. While Government tried to use the Ordinance to regulate the powers of the Chiefs and their traditional states, the Government had no control over the independent administration of the Chiefs. In fact in 1901 the Government embarked on a final war with the Asante State. It was not until 1944 that radical reforms were implemented.

<sup>90</sup> 1883 Native Jurisdiction Ordinance.

#### 4.4.2 The 1894 Crown Lands Bill: Vesting ‘Waste Lands’ in Government

The dramatic injection of European capital into the mining sector and indigenous capital into the cocoa industry (Hill 1963) made government change its opinion about the capacity of chiefs to manage stool lands. In 1874, the first European Company for gold mining was formed in the Gold Coast. By 1902 the mining sector had been “overrun by prospectors...and during the year no less than 2,825 concessions were taken up and filled in the Colony”.<sup>91</sup> The value of mining concessions and land for cocoa farming rose dramatically in the 1890s. Finding trustworthy native interpreters to transact business between chiefs and European prospectors was not a problem at all as Governor Freeling had thought in 1877.<sup>92</sup> According to Governor John Roger, “Unfortunately, many native chiefs appear to sell or lease...Stool lands, which they hold as tribal trustees, without imposing any conditions as to the manner in which such rights may be exercised.”<sup>93</sup> Native lawyers benefited from the increasing cases of land litigation and native merchants also profited from land speculation. Governments therefore felt the need to control the reckless alienation of stool lands by chiefs. But Governments would not find strong support from Chiefs and their educated subjects until the 1930s.

In 1894, Governor Sir W. B. Griffith introduced the Crown Lands Bill in an attempt “to prevent the continuance of this reckless improvidence”<sup>94</sup> by the chiefs. Almost throughout the Colony, chiefs and the ‘educated native community’<sup>95</sup> (largely made up of lawyers and merchants) joined forces to violently protest against the attempt by the government to vest in the Crown “the forests, waste lands, and minerals.”<sup>96</sup> The Fante Confederation and other organized movements in the Gold Coast also sent

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<sup>91</sup> Extract from the Annual Report for the Gold Coast for 1902 (Metcalf, No. 439).

<sup>92</sup> Letter of Governor Freeling to Carnarvon, 29 May, 1877 (Metcalf, No. 318).

<sup>93</sup> Statement by Governor John Roger, Legislative Council, 30 September, 1907 (Metcalf, No. 443).

<sup>94</sup> Statement by Governor John Roger, Legislative Council, 30 September, 1907.

<sup>95</sup> The phrase ‘educated native community’ was used to differentiate the interest of the class of educated natives from that of the illiterate population. Unfortunately, many Chiefs who were educated at that time were not included as part of that class. Rather the Chiefs were seen as representing the large illiterate ‘tribal’ populations. The lack of clear distinction between the ‘educated native community’ and the educated ruling class of chiefs had political consequences for Chiefs, which I discuss in the next chapter. I shall however use the phrase to represent the class of educated lawyers, merchants, and scholars who gradually became very influential in the politics towards independence, especially from the 1920s. I sometimes also use the broader term ‘Ghanaian educated elites’ and ‘Ghanaian intelligentsia’ to refer to the same ‘educated native communities’. The conception of ‘African’ is sometimes too broad for capturing the context of Gold Coast politics.

<sup>96</sup> Letter of Governor William Maxwell to the Marquis of Ripon, 9 May, 1895 (Metcalf, No. 395).

protest petitions to the British Government in England. Griffith's decade-long reign as Governor of the Gold Coast came to an end the same year he introduced the Bill. Governor William Edward Maxwell, who succeeded Griffith, generally supported the desirability of the Bill but opposed aspects of the Bill on three technical grounds. In the view of Governor Maxwell, first, the relative interests of the British Government, the Gold Coast Colony, and the native population had not been "clearly laid down by law"; second, the nature of land tenure within the Colony had not been surveyed to make it possible for government to clearly identify and possess waste lands; and, third, 'Native Law' recognised by the Bill had not been ascertained and codified and therefore was "something quite unknown".<sup>97</sup> Governor Maxwell therefore deferred the passage of the Bill "for sometime longer."<sup>98</sup>

Towards future legal enactment on lands, Governor Maxwell pointed out that the enactment will deprive "the right of the paramount authority to deal with natural products, and with land which has not been turned to account." He emphasized, "the right – if it exists – of making grants to strangers, particularly to Europeans, of waste lands and of minerals and of concessions of forest land, will be taken away." The reasons he gave were that "The practice of making such grants and concessions is quite modern, and is probably illegal according to Native Law and Custom."<sup>99</sup>

Governor Maxwell asked the Colonial Secretary to give him the necessary legal powers that "would greatly strengthen [his] hands in dealing finally with this troublesome question". Even if the requested legal powers were given, would he be able to take away the powers of the chiefs over the so-called waste stool lands? Are legal powers enough to fill any gaps that may be created from lack of cooperation by the powerful chiefs and their people? Or, as Governor Freeling saw it, was it the case that "the time...certainly has not yet arrived"? Just three years after Government withdrew the Crown Lands Ordinance, a reshaped version called the Lands Bill was presented to the chiefs and their people. This will help us know the empirical answers to the questions. What happened to this redressed Bill is discussed below.

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<sup>97</sup> Maxwell to the Marquis of Ripon, 9 May, 1895.

<sup>98</sup> Maxwell to the Marquis of Ripon, 9 May, 1895.

<sup>99</sup> Maxwell to the Marquis of Ripon, 9 May, 1895. Governor Maxwell based his ideas about the Crown Lands Bill as well as the direction of future policy on his long experience with native authorities in the Malay States, in the Malay Peninsula, where he had served from 1865-94.

#### 4.4.3 The 1897 Public Lands Bill: Defining Stool Lands as Public Lands

The Colonial Government reshaped the Crown Lands Bill and in 1897 introduced the Bill to the Legislative Council constituted by six official members appointed by the British Crown. The major innovations in the 1897 Lands Bill included:

- a. the redefinition of stool lands as “public lands” to be administered for the benefit of the people;
- b. the concurrent rights of Government and chiefs to administer such public lands as trustees;
- c. the removal of the authority of chiefs to create any private right in public land, without the consent of the Governor; and,
- d. the reversion of abandoned lands to public lands after a period of three consecutive years.

The reshaped Bill attempted to curtail the power of chiefs to administer stool lands like private property. C. J. Bannerman, the counsel for the chiefs, however argued in the Legislative Council that the intent and form of the redrafted Bill was the same as that of 1894 and that “this is another way of getting into the room through the window if the doors are locked.”<sup>100</sup> Responding to the rhetoric of the counsel for the chiefs, Governor Maxwell stated:

What it does is this: it distinguishes between public rights and private rights. It recognises the fact that the stool lands of a tribe are really public lands which ought to be administered for the benefit of the people...to see that native chiefs do not abuse their position, and exceed their powers, by encroaching upon the rights of those for whom they are really trustees, and by dealing illegally and improvidently with stool lands, which are...the public lands of the tribe.<sup>101</sup>

The formal distinction between “public rights” and “private rights” was to make it possible for members of the stool to hold their chiefs accountable in the administration of a public resource. In fact, the position taken by the Governor on the definition of ‘stool lands’ as ‘public lands’ had firm roots in the principles of customary law known to native legal scholars who were leading members of the ARPS (Hayford 1903; Sarbah 1904). John Mensah Sarbah – an influential educated

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<sup>100</sup> C. J. Bannerman, Legislative Council Debates, Accra, 29 June, 1897 (Metcalf, No. 418).

<sup>101</sup> C. J. Bannerman, 29 June, 1897.

Ghanaian legal scholar and unofficial member of the Legislative Council –, suggested that the period of three consecutive years given for undeveloped lands to revert to the domain ‘public lands’ should be extended to ten years. Governor Maxwell agreed to Sarbah’s suggestion to modify that section of the Bill. There appeared to have been consensus between the famous Ghanaian guardian of customary law and the Governor. It appeared that the Colonial Government was better prepared than before to overrun strong opposition from native legal scholars.

The chiefs mounted stronger opposition to the Bill. In 1898, a protest movement called the Aborigines Rights Protection Society (ARPS) was formed by the chiefs and educated elites to lead the fight against the Bill. The ARPS sent a delegation to England to fight their opposition to the Bill. Government’s control over the Legislative Council and articulation of a better argument were not enough to secure victory over the chiefs and the protest movements. Between 1897 and 1899, the British Colonial Government found itself in heated races with France and Germany for the control of territories in the northern part of the Gold Coast. Government required the support of the Chiefs in the Colony to protect its loosely defined territorial boundaries. The Lands Bill was once again withdrawn by the Government.

The victories achieved by the ARPS over the Land Bills shall become a lasting historical monument in Ghanaian politics. The dependence of colonial government on traditional states to rule indirectly is what made it impossible for government to act alone in land administration reforms. In 1916, government would begin to co-opt chiefs and non-chief intelligentsia into the Legislative Council to facilitate political cooperation. But the Ghanaian political elites made it clear to British government officials that they would cooperate in all matters except any attempt to reform the land tenure system (Hayford 1913).

In 1900, when it seemed that the complications of international boundary demarcations with competing European powers had been settled, the remnants of the Asante states mounted their last resistance to colonial rules in what came to be known as the Yaa Asantewaa war of 1900-1. Government required the support of loyal traditional states in the Colony and in Ashanti to prosecute its war agenda.

#### 4.4.4 Crown Lands and Intra-state Transfers of Stool Land in Ashanti

The rapidly disintegrating Asante Confederacy found a new King in Kwaku Duah III, better known as Nana Agyeman Prempeh. In 1894-5 the new King tried to rebuild the Confederacy. War broke out first among the Asante states and later between the Kumasi state and other states that were under the protection of the Colonial Government. The Colonial Government was not going to tolerate the rebuilding of an Asante military organization that would be used to cause internal political instability. Governor Maxwell led a military expedition to Kumasi, seized the King of Kumasi, and brought the King to the Colony. This resistance was fatally crushed and many of the Asante chiefs were either arrested or killed in the war. Nana Prempeh was shipped out of the Gold Coast to live in exile in Seychelles Island until 1924. On 26 September 1901, the Ashanti Order in Council finally incorporated the Asante states into the defining boundaries of the Gold Coast Protectorate.

In 1901, Joseph Chamberlain, the Secretary of State for the Colonies<sup>102</sup> suggested to Captain Donald Stewart, the British Resident of Kumasi, to make two changes in the ownership of land in Ashanti: “first, the taking by the Crown of lands of the tribes that rose against British rule; and, secondly, the transfer to loyal tribes of lands of disloyal tribes.”<sup>103</sup> Governor Matthew Nathan<sup>104</sup> and Captain Stewart were however of opinion that the proposed confiscation of the lands of the tribes to the Crown “would not be desirable.”<sup>105</sup> They argued that:

- a. The Colonial administration is “not in a position to dispense, over any considerable part of Ashanti, with the assistance of these chiefs”.
- b. Although it had become necessary for the colonial administration “to take from [Chiefs] some of their sources of wealth and therefore of power”, the administration should rather put the chiefs “in a position to get considerable rents for their lands”, to “compensate them, to some extent, for depriving them of less legitimate sources of revenue.”<sup>106</sup>

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<sup>102</sup> Secretary of State for the Colonies, 1895-1903 (see Metcalfe, p.480, Note 1).

<sup>103</sup> Letter of Governor Nathan to Chamberlain, 19 March, 1901 (Metcalfe, No. 435). Chamberlain had proposed that such changes should be made “unless such a course was clearly repugnant to native custom or tribal practice” (ibid).

<sup>104</sup> Governor of the Gold Coast from 1900-3.

<sup>105</sup> Letter of Governor Nathan to Chamberlain, 19 March, 1901 (Metcalfe, No. 435).

<sup>106</sup> Nathan to Chamberlain, 19 March, 1901. Governor Nathan and Captain Stewart explained that the Asante states had been deprived of “less legitimate sources of revenue” because “They can no longer

- c. The colonial administration had already “secured to the Government, by the provisions of the Concessions Ordinance, a good revenue from the mines, apart from any rents of lands”.
- d. Allowing the chiefs to keep their lands would facilitate co-operation between the chiefs and mining companies: “Leaving to the chiefs their lands and the rents they will derive from them, will give them a special interest in keeping their countries quiet, and will be a guarantee for their good conduct.” It would also assist the mining companies to get help from the chiefs in getting labour.
- e. The confiscation of land would take away the revenue that the chiefs and people would use to pay the direct tax that was going to be imposed on them because “The Ashantis are neither agricultural nor industrial”.
- f. The “absence of any reliable survey” and “complete information” on current ownership of land would make it difficult to define and demarcate the lands. Against such background, any confiscation would involve the Government in “the land palavers which are a constant dispute between the native tribes”, and which the Government is “often able to settle as a disinterested arbiter.”

With regard to the policy of “the transfer to loyal tribes of lands of disloyal tribes” Governor Nathan and the Resident Commissioner of Ashanti, Captain Stewart, agreed to proceed with the policy with some restraint and discrimination in order not to arise “claims based on an ownership lost in war 70 to 80 years ago”.<sup>107</sup> Thus, on the one hand, they were “strongly opposed to allowing the claims of the king of Denkyira to land on the north and east of the Offin river”<sup>108</sup> due to strong opposition from “the loyal king of Bekwai...with the Adansis against the Denkyira being allowed to come to the north or east of the Offin.”<sup>109</sup> On the other hand, they decided to give to the king of Bekwai “the villages of Chinabusu and Odumasi...as part of his reward. ... The villages were taken from Adansi as part of the punishment of that people for their disloyal and treacherous conduct.”<sup>110</sup> Such intra-states land transfers led to future land conflicts between some chiefs in Asante (Berry 2001).

In the absence of the exiled Asantehene, the British colonial government subsequently vested the administration of the Kumasi town lands in the British

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increase their riches by raiding their neighbours for slaves and loot, and even in their courts of justice they cannot get the large fees and fines they formerly obtained”.

<sup>107</sup> Nathan to Chamberlain, 19 March, 1901.

<sup>108</sup> Nathan to Chamberlain, 19 March, 1901.

<sup>109</sup> Nathan to Chamberlain, 19 March, 1901.

<sup>110</sup> Nathan to Chamberlain, 19 March, 1901.

Crown, by the Ashanti Administration Ordinance of 1902. The lands vested in the British Crown included all land within a one mile radius of the Kumasi Fort, later defined by the 1928 Kumasi Town Boundary Ordinance as 'Part One Lands'. To date, the Kumasi 'Part One' lands are administered by Government.

The above land policies in Ashanti largely re-affirmed the view outlined by Governor Freeling in 1877 that the "The rightful owners of the soil in the Protectorate are the kings and chiefs and their people, and not the Government."<sup>111</sup> Moreover, without the cooperation of the chiefs, Government lacked an effective coercive power and land administration agencies to embark on a policy of confiscation of stool lands to the state. The dangerous policy of "the transfer to loyal tribes of lands of disloyal tribes" was however going to have some effect on conflicts of land ownership between the Asante states in the post-colonial era (Berry 2001). The politics of inter-stool land disputes in Ghana is better understood when placed within the context of the colonial politics of state-making.

The defeat of the Asante states in 1901 ended the period of intra-state wars in the Gold Coast. On 26 September 1901, the British Government enacted the "Order in Council defining boundaries of the Gold Coast Colony and annexing all Territories within such Boundaries hitherto unannexed."<sup>112</sup> In 1956, British Togoland (placed under UK Trusteeship by the United Nations following the defeat of the Germans in the Second World War) voted to join Gold Coast to complete the boundaries of present day Ghana. From 1902 to 1947, British officials incorporated chiefs and non-chief Ghanaian political elites into the dominant ruling coalition. The new ruling coalition largely cooperated to consolidate the communal land administration system, reform the political institutions governance from the national to the local levels, and expand infrastructure. The colonial traditional-federal state made a gradual transition to what I call the traditional-unitary state in which the bifurcated authorities of chiefs and government were unified in national and local structures of governance. The politics of traditional-unitary state building, chieftaincy organizational reforms, and land administration are discussed in the next chapter.

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<sup>111</sup> Letter of Governor Freeling to Carnarvon, 29 May, 1877 (Metcalf, No. 318).

<sup>112</sup> Gold Coast Order in Council, 26 September, 1901 (Metcalf, No. 438).

#### **4.5 Conclusion: The Legacies of the Traditional-Federal State Matter**

I have sought to show that the failure of British colonial Governments to establish a unitary state that claims monopoly over land ownership, and the legitimate use of coercion over all other actors living on the land, left the traditional states with their substantial power over land ownership and land administration. In a system of traditional-federalism where Government largely relied on the organizations of chieftaincy to rule indirectly, the strong opposition mounted by the Chiefs and intelligentsia to Government land tenure reform initiatives in the 1890s succeeded. The dynamics of power in the politics of land tenure administration reform is clearly reflected in the dynamics of intra-Asante states stool land transfers and the vesting of the Kumasi town 'Part One Lands' in the British Crown in 1901, and to be re-vested in the Asantehene in 1943. Land politics in Ghana continues to capture the power struggle between chiefs and government within the traditional-federal state.

I have also shown that it was not for want of trying that the British Governments were not able to overrun the power of the traditional states. Sir Charles MacCarthy followed the coercive-intensive approach of state making (Tilly 1992) in an attempt to supersede the traditional states and repeal the local regulations and customs, but he failed with fatal consequences. The failure of that approach is what shaped the critical juncture of traditional-federal state formation by Governor MacClean in 1831. And successive governments committed themselves to that path until 1916 when the British colonial government began to co-opt Chiefs and African intelligentsia into the government machinery towards the establishment of a unitary state. The themes of colonial state reform, the co-optation of Chiefs and African intelligentsia into government, and the effect of these reforms are what I will take up in the next chapter. For now, I will try to explain the above political processes from 1800-1916 through the conceptual lenses of historical institutionalism.

Until British colonial rule was officially declared in 1821, there existed within the traditional state only one sphere of public organizational arena, the sphere of chieftaincy. However, in the conceptual framework of historical institutionalism, I have argued that the creation of the traditional-federal state in 1831 was the critical juncture at which the modern public institutional arena – with its own set of formal

judicial rules, government, coercive machinery, and limited sovereignty – distinct from the public arena of the traditional state, was created. Paradoxically, at the inception of the new public arena, the subjects of chiefs who lived under the British forts were now considered by the British colonial officials as subjects of the British Crown – and therefore subject to the common laws of England. Consequently, there emerged two public arenas (Ekeh 1975) that competed for the allegiance of the subject-citizen in African local communities (Mamdani 1996).

For the subject-citizen, the two competing public arenas presented the opportunity for institutional shopping from whichever arena offered the greatest satisfaction of effectiveness and efficiency. Interestingly, Chiefs followed suit. The competition for institutional legitimacy between the two public organizations shaped a process of institutional ‘imitation’ and ‘indigenization’ (Leftwich and Hogg 2008). The interaction of customary laws and English common laws made it extremely difficult for the British Colonial Office in London to understand by which law an English Judicial Assessor who presided in the Native Courts of Chiefs administered justice.<sup>113</sup> An irreversible path of political, legal, and institutional dualism of power and authority defined the character of the traditional-federal state.

Many historical institutionalists accept the definition that a critical juncture refers to the period of the initial development of an institution or organization that proved significant in shaping subsequent processes or outcomes (Collier and Collier 2002; Rokkan 1968). An important theoretical question is how does a critical juncture become established? In the context of my analysis, the question will be this: ‘How was the traditional-federal state established?’ The answer should be clear. Without the intervention of British colonial adventurers (the exogenous variable) in the politics of the traditional states (the antecedent conditions), the traditional-federal state would not have been created between 1821 and 1831 (the critical juncture). Therefore, it is not possible to define a critical juncture without the intervention of an exogenous variable – the British colonial state-makers.

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<sup>113</sup> See Minute by James Stephen, Colonial Office, London, 28 January, 1846 (Metcalf, 151). Also the ‘Petition of the Cape Coast Chiefs to the Governor, 18 May, 1887’ (Metcalf, 357) shows the imitation of municipal institutions. The organizational structure of the Fante Confederation is another clear case of the attempt by the Natives at institutional imitation and indigenization.

The above historical analysis of state formation could help us resolve some theoretical controversy among historical institutionalists surrounding the periodization of a critical juncture. The controversial issue is “How long do critical junctures last” (Collier and Collier 2002)? Collier and Collier (2002:32) argue that “critical junctures may range from relatively quick transitions...to an extended period.” Capoccia and Kelemen (2007:348) however argue that “the duration of the critical juncture must be brief relative to the duration of the path-dependent process that it instigates.” I argue that the periodization of a critical juncture should not be resolved in the abstract but with reference to an actual process of institutional formation. In the above historical analysis, prior to 1821 there was only one public sphere of legality controlled by traditional states. In 1821 a new public sphere of legality was declared by British colonial state-makers. As we have seen, the British colonial state-makers did not intend to create what Ekeh (1975) calls ‘the two publics’ shared between traditional states and central government. The declaration of a new public therefore marked the beginning of the politics of war-making that led to the creation of the traditional-federal state in 1831 with ‘the two publics’. 1831 is therefore marked off as the *terminus ad quem* of the critical juncture because that was the point when the “institutional form” (Thelen and Mahoney 2010:15) of the state with bifurcated authority divided between chiefs and government was initially created. The institutional form of the outcome of research interest is important in defining the periodization of a critical juncture.

Following Collier and Collier, I suggest that a critical juncture should be defined as the period when the “the core attributes of the legacy – that is, the basic attributes produced as an outcome of the critical juncture” were initially created (Collier and Collier 1991:31). In the absence of the core attributes of the legacy, the outcome of research interest could not have been produced. In the case of my historical analysis, without the creation of a colonial state in 1831 with bifurcated authority between chiefs and government, the current post-1992 constitutional configuration of the Ghanaian state with bifurcated authority between chiefs and government could not have been produced. It should be emphasized that the formation of an institution is a political process that could either take a long period or a short period (Leftwich 2004; Rokkan and Lipset 1967). It would therefore be theoretically misplaced to emphasize that the period of a critical juncture should be short or long.

From the above discussions, what I have tried to show is that the emergence of ‘the two publics’ sharing state authority over the citizen-subject and a dual system of land administration is explained by the failure of British colonial rulers to extinguish the antecedent public sphere of the traditional states. The form of the current 1992 constitutional rules of state organization remains fundamentally the same as it was in 1831. The stability of the stool land tenure system is explained by the failure of the British colonial state-makers to supersede the traditional states and their rules of customary law governing stool land administration; and, leading to the creation of a state with bifurcated authority between chiefs and government over the administration of land, the people and the state. The conflict that subsequently occurred between chiefs and British government officials over the 1894 and 1897 Land Bills was one of the legacies of the critical juncture of state organization.

It is important to emphasize that both the Chiefs and their subjects (whether with or without formal education) mounted strong resistance to the 1894 and 1897 Land Bills. It is important to point out the role played by the Ghanaian intelligentsia in resisting the land reforms because of the tendency among some scholars (Amanor 2010; Aryeetey et al. 2007; Ninsin 1989) to over-emphasize the role of Chiefs, but largely ignore the strong support offered to the chiefs by the Ghanaian intelligentsia, who were primarily lawyers (Hayford 1913; Sarbah 1904). In fact, land ownership reform never became a class issue among Ghanaians during the colonial era (Crook 1986). Radical reform of the communal land tenure system is likely to succeed if there is strong support from Chiefs, the intelligentsia, Government, business interests, and citizens. Moreover, the direction of reform must be clearly defined – whether stool lands should be redefined as state lands or the creation of individual property rights from stool lands should be allowed. In the next chapter, I discuss how British government officials incorporated the chiefs and the non-chief Ghanaian educated elites into the dominant ruling coalition; and, how the new dominant ruling coalition created transparent and accountable formal-legal institutions through which chiefs managed communal lands on behalf of their subjects.

## Chapter 5

### **Transition to the Traditional-Unitary State, 1902-1953: Nation-State Building and Accountability in Chieftaincy Administration**

Leaving to the chiefs their lands and the rents they will derive from them will give them a special interest in keeping their countries quiet, and will be a guarantee for their good conduct (*Governor Matthew Nathan to Joseph Chamberlain, 1901*).

Our land tenure system and our institutions are founded upon a rock, and we trust that they will find...a sure defence (*J. E. Casely Hayford to Governor Hugh Clifford, 19 May, 1913*).

Our Land Policy is to recognise that the land belongs to the natives of the country; to devise such legislation as would lead to a satisfactory and economical settlement of land disputes; to provide facilities for owners to obtain a clear title to their lands; and finally, to acquire equitably such lands as may be required for public works necessary to the development of the country in the interests of its inhabitants (*Governor Gordon Guggisberg to Legislative Council, 1926*).

#### **Introduction**

This chapter focuses on the analysis of how British government officials, chiefs and non-chief educated elites negotiated the reform of chieftaincy organizations into accountable agencies of local government through which chiefs administered stool lands and mobilized internal revenue for local community development. The reforms occurred between 1902 and 1953. I suggest that the reforms in chieftaincy administration provide valuable lessons for current attempts to reform organizations of chieftaincy into transparent and accountable agencies of stool land administration. The development of an accountable chieftaincy through which chiefs administered communal lands, mobilized internal revenue for community development, and were held accountable by government and their subjects, occurred through a complex process of change shaped by four main factors; namely, (a) the consolidation of the stool land administration system, (b) the incorporation of chiefs into the dominant ruling coalition, (c) the willingness of government and chiefs to share authority, responsibilities, and revenue through the local government system, and (d) the emergence of a class of educated citizens who demanded and enforced accountability in chieftaincy administration. The complex interaction of these factors to shape chieftaincy accountability in local government is what I discuss here.

The chapter is divided into four sections. Section 5.1 discusses the commitment of the British-led government to consolidate the communal land administration system in order to secure political cooperation from chiefs and the non-chief educated elites. Section 5.2 discusses the political incorporation of chiefs and non-chief Ghanaian elites into the dominant ruling coalition through a series of constitutional reforms. Section 5.3 discusses the reform of organizations of chieftaincy into a transparent and accountable system of local government through which chiefs administered stool lands, mobilized internal revenue for local community development, and were held accountable by government and their subjects. Section 5.4 concludes the chapter by emphasizing that the creation of a transparent and accountable chieftaincy for stool land administration depends upon three things: first, the willingness of chiefs and government to reform organizations chieftaincy into impersonal systems of accountable governance, second, the sharing of stool land revenues between chiefs and government, and, third, the interest of subjects of chiefs to enforce the impersonal rules of accountability governing chieftaincy administration.

### **5.1 Consolidation of Communal Land Ownership: Cocoa Boom, Economic Revolution and Conflict over Stool Lands**

Here I discuss the commitment of British governments and the Ghanaian educated elites to consolidate the communal land ownership system in spite of increasing commercialization of stool lands by chiefs. The commercialization of stool lands was the result of increasing investment by Ghanaians in commercial agriculture, particularly in cocoa farming, from the 1890s. Hill (1963) and Firmin-Sellers (1995) have argued that the cocoa boom made chiefs realize that they could derive long term rents from land if they preserve the communal land ownership system than if they sell the lands outright to farmers. This argument is plausible. However, it should also be acknowledged that the mass production of semi-educated elementary school graduates by the mid-1920s significantly checked the behaviour of chiefs in stool land sales in local communities (Austin 1964; Hailey 1951). Furthermore, the emergence of educated Ghanaian elites who joined forces with chiefs in 1897, to form the Aborigines Rights Protection Society (ARPS) for the protection of communal land ownership from state appropriation, is a crucial variable that helped the consolidation of the communal land ownership system, beyond the era of

colonial rule. The consolidation of communal land ownership was therefore shaped by the complex interactions of bottom-up top-down and politics. Understanding the factors that shaped the consolidation of the communal land ownership system is important for understanding why British government officials and chiefs later negotiated accountable institutions to govern the mobilization and utilization of stool land revenues in local communities. I shall first discuss the cocoa boom and its concomitant effect on stool land sales and, second, the reasons for the change in colonial government land policy to consolidate the stool land ownership system.

### **5.1.1 The Cocoa Boom and Increasing Stool Land Sales: The Invention of Customary Rules of Stool Land Ownership?**

Up to 1890s, trade in the Gold Coast was largely restricted to natural jungle produce such as palm oil, palm kernel oil, and rubber (Adu-Boahen 2000; Metcalfe 1964). The 1889 report on ‘Economic Agriculture in the Gold Coast’ commented that Cocoa is “a product worthy of every attention”<sup>114</sup> because “The culture is cheap, and the preparation is simple, so that it should receive the attention of small cultivators.”<sup>115</sup> In 1890, the curator of Government gardens, on his visit to Mampong saw a cocoa plantation of about 300 trees that belonged to a native called Tetteh Quashie who had brought his experimental cocoa beans from Fernando Po.<sup>116</sup> It is generally acknowledged that Tetteh Quashie’s successful cocoa plantation became the foundation of the cocoa boom during the first decade of 1900.

In 1906, Governor John Roger noted that “the principal feature of the year was the rapid development of cocoa plantations, which now extend from the Western side of the Aburi hills, through Akim and Kwahu, until they reach and even cross the borders of Ashanti.”<sup>117</sup> Cocoa farming spread rapidly in Southern Ghana where the fertile lands supported its growth. By the first decade of the C20th cocoa had become Ghana’s chief export and Ghana became the leading producer of cocoa in the world. Table 8 below shows the consistent growth and export of cocoa from 1905-1931.

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<sup>114</sup> Report on Economic Agriculture on the Gold Coast, 1889, (Metcalfe, No. 361).

<sup>115</sup> Report on Economic Agriculture, 1889.

<sup>116</sup> Circular of Government Gardens to Governor, Aburi, 22 August, 1890 (Metcalfe, No. 362a).

<sup>117</sup> Governor John Roger, Statement in Legislative Council, 30 September, 1907 (Metcalfe, No. 443)

**Table 8: Volume of Cocoa Exports in the Gold Coast, 1905-1931**

Year	Tons	Value £ (F.O.B) <sup>118</sup>	Year	Tons	Value £ (F.O.B)
1905	7,000	187,000	1919	176,000	8,278,000
1906	8,000	336,000	1920	125,000	10,056,000
1907	10,000	515,000	1921	133,000	4,764,000
190	13,000	541,000	1922	159,000	5,841,000
1909	21,000	755,000	1923	197,000	6,567,000
1910	22,000	866,000	1924	223,000	7,250,000
1911	41,000	1,613,000	1925	218,000	8,222,000
1912	39,000	1,641,000	1926	231,000	9,181,000
1912	52,000	2,489,000	1927	210,000	11,728,000
1914	53,000	2,194,000	1928	225,000	11,230,000
1915	78,000	3,651,000	1929	238,000	9,704,000
1916	73,000	3,848,000	1930	191,000	6,970,000
1917	92,000	3,147,000	1931	244,000	5,493,000
1918	67,000	1,797,000	1932	---	---

Source: The statistics in have been compiled from the Address of Governor Guggisberg to the Legislative Council on 6 March 1924 (Metcalf, No. 467) and the Address of Governor Slater to the Legislative Council on 1 March, 1932 (Metcalf, No. 478).

From Table 8, we can see that in 1931 Ghana exported the highest quantity of cocoa to the global market but earned the least amount of revenue.<sup>119</sup> Later I shall discuss how the decrease in government revenues from cocoa exports due to 1930s global economic depression influenced government to negotiate with chiefs over the creation of new laws that enabled chiefs to mobilize internal revenue from taxation for local development. In 1931, new horizontal and vertical rules of accountability in chieftaincy administration were created. Local taxation by chiefs led to an increase in bottom-up demand from the subjects of chiefs for accountability in chieftaincy administration. The reforms in chieftaincy administration from the early 1930s were influenced by the complex interaction of many factors.

The rapid spread of cocoa farming and the massive wealth that it produced for Ghanaians led to the rapid appreciation in land prices, increasing land sales by chiefs and increasing land conflicts between chiefs (Alence 1990; Green and Hymer 1966;

<sup>118</sup> Free on Board (F.O.B)

<sup>119</sup> The increase in export of cocoa in 1931 was “entirely due to the cocoa ‘hold-up’” by cocoa farmers “from the end of October, 1930 to the beginning of January, 1931” (Governor Sir R. Slater’s speech to the Legislative Council, 1 March, 1932, Metcalf, No. 478). The reason for the cocoa hold-up was largely due to the effect of the economic depression on cocoa prices.

Hill 1963; Firmin-Sellers 1995). There was a scramble for stool lands between all social classes – both the chiefs and their subjects – leading to “innumerable inter-tribal boundary disputes which “caused so much protracted and regrettable litigation.”<sup>120</sup> Many Chiefs did not only make huge investments in cocoa farming but they also took steps to strengthen their claims over stool land ownership. In 1912, the Belfield Report on the Alienation of Native Lands in the Colony and Ashanti had this to say on the prevailing system of communal land ownership:

Notwithstanding the communal principles on which the native system of land tenure was based, and the unquestionable right of every member of the tribe to participate in the use of the land and in the profit accruing from it, the result of the administration of the reserve land by the chiefs and headmen has been that they have by degrees arrogated to themselves the profits arising from such administration, until, at the present time, the mass of the people derives from it no advantage other than the privilege of cultivating allotted portions, and any revenue which is obtained from it is absorbed by their superiors.<sup>121</sup>

The indiscriminate sale of stool lands to cocoa farmers led to the creation of individual and family land rights from stool lands in many parts of Southern Ghana (Hill 1963). In 1917, Governor Hugh Clifford noted that “though all land still theoretically belongs to the Stool, the vested interest of the cocoa farmers has brought into being a measure of individual property in real estate, such as was never contemplated by ancient tribal customs.”<sup>122</sup> Governor Clifford noted that “The acquisition of considerable wealth by individuals who would otherwise enjoy no high status in the tribe” entailed “a great social revolution in their social structure.”<sup>123</sup> He cautioned that “the political results which this shows signs of producing should be jealously guarded by all who desire to see the tribal constitutions, which their ancestors have evolved, preserved from the disintegrating forces of too rapid innovation.”<sup>124</sup> In spite of remarkable institutional innovations that the chiefs initiated to guard their power, they were unable to prevent the social, economic and political revolutions from pushing chieftaincy to the margins of the modern state. Organizations of chieftaincy remained the dominant political structures

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<sup>120</sup> Governor Sir Hugh Clifford, Speech in Legislative Council, 25 October, 1917 (Metcalf, No.454).

<sup>121</sup> The 1912 Belfield Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti (Metcalf, 444).

<sup>122</sup> Governor Sir Hugh Clifford, 25 October, 1917.

<sup>123</sup> Governor Sir Hugh Clifford, 25 October, 1917.

<sup>124</sup> Governor Sir Hugh Clifford, 25 October, 1917.

of rule in the modern colonial state until the mid-1950s when they were pushed out by the non-chief educated elites. How this occurred is discussed in the next chapter.

Before the chiefs lost their central role in the governance structures of the modern state in the 1950s they were able to re-assert their authority over communal land ownership in the country. Hill (1963) and Firmin-Sellers (1995) emphasize that the emergence of wealthy non-chief cocoa farmers in Southern Ghana made chiefs realize that they could derive considerable rent from cocoa farmers if they enforce the ‘theoretical’ rules of customary law that prohibits the outright sale of stool lands to individuals. Nana Sir Ofori Atta, the paramount chiefs of the Akyem Abuakwa State and a member of the (national) Legislative Council, led the process of “reinventing tradition, defining a version of customary land tenure favourable to themselves” (Firmin-Sellers 1995:867). So long as the rules of customary law remained informally defined, many powerful chiefs like Nana Ofori Atta were able to successfully re-assert the claims of the traditional states over ‘allodial’ ownership of stool lands that they had previously sold. This raises questions over whether ‘tradition’ was reinvented or re-asserted. The informal rules of customary law that organized chieftaincy-society relations at the critical juncture of colonial state formation remained uncodified into formal-legal statutes. To date the situation remains largely the same. I move on to discuss why the British-led government supported the chiefs to consolidate the communal land ownership system.

### **5.1.2 Consolidation of Communal Land Ownership: Explaining the Change in Colonial Government Land Policy**

Notwithstanding the increasing land conflicts, ruinous litigations, and “the existence of some diversity of opinion with respects to ownership”<sup>125</sup> throughout the Gold Coast; Colonial Governments resigned themselves to the view that any “general appropriation by the Crown as was contemplated by the Land Bill of 1897 is...out of the question.”<sup>126</sup> In 1926, Governor Guggisberg emphasized:

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<sup>125</sup> Belfield Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, 1912 (Metcalf, No. 444).

<sup>126</sup> Belfield Report, 1912.

Our Land Policy is to recognise that the land belongs to the natives of the country; to devise such legislation as would lead to a satisfactory and economical settlement of land disputes; to provide facilities for owners to obtain a clear title to their lands; and finally, to acquire equitably such lands as may be required for public works necessary to the development of the country in the interests of its inhabitants.<sup>127</sup>

Moreover, concerning any future land administration reform, Governor Guggisberg re-assured those who had doubts that “if Government adopted any other policy, it would not receive the support of the Secretary of State.”<sup>128</sup> The Parliamentary Under-Secretary of State for the Colonies, W. G. Ormsby-Gore, also made it clear after his visit to the Gold Coast in 1926 that “any radical alteration in the general policy of the Government in regard to the land is neither practical nor desirable”.<sup>129</sup> Clearly, at least after the second decade of the C20th, the colonial Governments were committed to consolidate the stool land ownership system.

In 1931, the colonial Government enacted the Land and Native Rights Ordinance (No. 8) to vest in the Governor the administration of Native Lands in the Northern Territories. Governor Alexander Slater stated the objects of the law as follows:

- a. To preclude the natives from the temptation to dispose of their lands outright, with regard for the requirements of their descendants, and for totally inadequate payment;
- b. To ensure that such profits as are derived from the land are used for the benefit of the community as a whole and not of any particular section or individual member of it; and
- c. To minimize the possibility of ruinous litigation.<sup>130</sup>

Commenting on the 1931 Land and Native Rights Ordinance governing the Northern Territory, Governor Slater stated that “had a similar Ordinance been applied to the Gold Coast Colony some forty or fifty years ago, certain of the states would now be

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<sup>127</sup> Proceedings of a Meeting of the Legislative Council, 22 February, 1926 (National Archives of Ghana, Accra, ADM 14/2/12, p.17)

<sup>128</sup> This assurance was given by Governor Guggisberg because a proposal by the Secretary of State to inquire into the question of lands in West Africa “appears to have aroused fresh alarm in some quarters that Government is after the people’s land” (National Archives of Ghana, ADM 14/2/11, pp.133-4).

<sup>129</sup> Report by the Hon. W.G.A. Ormsby-Gore (Parliamentary Under-Secretary of State for the Colonies) on his visit to West Africa during the year 1926 (Metcalf, No. 470).

<sup>130</sup> Governor Sir Alexander R. Slater, Legislative Council, 1 March, 1932 (Metcalf, No. 478).

in a far more prosperous and happier condition than they are today.”<sup>131</sup> As we now know, the nature of colonial state-making before the C20th, when Government depended heavily on the military forces of the southern states to ensure law and order or prosecute war against the powerful Asante states, made it almost impossible for similar policies to be pursued in Southern Ghana. The important point is that government now supported the Chiefs to administer their stool lands.

The position of colonial Governments did not change through the remaining period of colonial rule. Colonial Governments limited themselves to the establishment of agencies for the registration of land titles. The Survey Department was established in 1909 to help land owners obtain a clear title to their lands. The Lands Department was later created out of the Survey Department in the 1920s to facilitate the payment of compensation by Government to those whose stool lands were compulsorily acquired by the state for purposes of public infrastructural development.

The question that needs to be answered is why the colonial Government changed its position from state appropriation of land in the 1890s to support the chiefs to manage the system of communal land ownership. Three political and economic reasons are offered here to explain the colonial Government’s support for the consolidation of the communal land ownership system. They are (i) the need for the colonial government to obtain widespread political support from chiefs and the non-chief educated elites in the process of state building, (ii) the capacity of the communal land ownership system to support European capitalism, and (iii) the capacity of chiefs to mobilize revenue from stool lands to support local development. The first two reasons are further explained below. The third reason shall be explained later in a separate sub-section because it was bundled with the complex political process of reforming organizations of chieftaincy into an effective system of local government in the country. Communal land administration was, and still remains, intertwined with chieftaincy administration in local communities.

Firstly, I argue that the change of colonial government policy from state appropriation of communal lands to state consolidation of the communal land

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<sup>131</sup> Governor Sir Slater, Legislative Council, 1 March, 1932.

administration system was a political trade-off with the chiefs and the educated Ghanaian elites to enhance the political legitimacy of the fragile colonial state. When the Asante Confederacy was finally defeated by the British-led armies in 1901, the Secretary of State for the Colonies, Joseph Chamberlain, suggested to Captain Donald Stewart, the British Resident of Kumasi, “the taking by the Crown of lands of the tribes that rose against British rule.”<sup>132</sup> As indicated in the previous chapter, Governor Matthew Nathan and Captain Stewart pointed out that “Leaving to the chiefs their lands and the rents they will derive from them, will give them a special interest in keeping their countries quiet, and will be a guarantee for their good conduct.”<sup>133</sup> Politically, by 1901, the British colonial government had not succeeded in “[reducing] the traditional rulers and their people from the status of protégés to that of subjects of the British” as suggested by Adu-Boahen (2000:60).<sup>134</sup> By 1902, the British colonial government was far from consolidating its administrative authority and jurisdiction beyond the Colony. One of the key strategies employed by the British Governors to enhance the legitimacy of the state and secure political order was to gain the political support of the chiefs and their subjects. To succeed, Governor Nathan and Captain Stewart rightly advised their superiors in London to abandon the attempts to claim ultimate ownership of the ‘native’ lands.

Following the failure of the 1894 and 1897 Land Bills, many chiefs and non-chief educated elites became more interested in protecting their lands from state appropriation. On 26 December 1912, Sir Hugh Clifford became Governor of the Gold Coast. Interestingly, five months after his arrival, the Aborigines Rights Protection Society (ARPS) held a successful banquet for him. It is important to be reminded that the ARPS was the political movement (composed of powerful chiefs, educated native traders and lawyers) described in the 1912 Belfield Report as a society that “exists for the avowed purpose of opposing and blocking any action by

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<sup>132</sup> Letter of Governor Nathan to Chamberlain, 19 March, 1901 (Metcalf, No. 435). Chamberlain had proposed that such changes should be made “unless such a course was clearly repugnant to native custom or tribal practice” (ibid).

<sup>133</sup> Letter of Governor Nathan to Chamberlain, 19 March, 1901 (Metcalf, No. 435).

<sup>134</sup> Adu-Boahen (2000:59-60) has argued that “The re-establishment of the Executive Council and extension of the powers of the Legislative Council (in 1886), the re-creation of the Supreme Court (in 1876) and above all the appointment of District and Travelling Commissioners and the operation of the Native Jurisdiction Ordinance (NJO) of 1883 certainly entrenched the British in Southern Ghana and reduced the traditional rulers and their people from the status of protégés to that of subjects of the British.” Captain Stewart, the British resident of Kumasi, knew that the chiefs and their people had not been reduced to powerless subjects.

the Government or by any persons, which may, in the opinion of the members, be subversive to their interests, or likely to be prejudicial to their native customs or their canons of land tenure.”<sup>135</sup> The banquet organized by the ARPS in honour of Governor Clifford was therefore a carefully prepared political stage where the members of the ARPS reminded the new Governor Clifford of “the assurance as regards our lands that the pledges given to us by Mr Chamberlain will not be set at naught nor our right to them in any way interfered with.”<sup>136</sup> Governor Clifford chose the path of “co-operation” (Hayford 1913) that had been laid out before him by the ARPS. The bifurcation of state authority between chiefs and government over land administration was strongly defended by the educated elites.

Secondly, the colonial British Government supported the communal land administration system because the customary land administration supported the economic interest of European capitalists as well as the growth of indigenous capital. Government’s commitment to land tenure reform was not shaped by a concern that the stool land tenure system constrained access of the poor to available land. It is important to emphasize this point because of recent pro-poor concerns that tend to emphasize that the stool land tenure system constrains access of the poor to available communal land. It was shaped by the concern that the prevailing land tenure system was likely to constrain the expansion of European capital and, perhaps to some extent, indigenous capital. However, by the end of the first decade of 1900 these concerns had become unfounded. European mining companies had no problem at all in securing access to stool land as Governor Freeling had thought in 1877 (Addo-Fening 2006). In contrast to the thinking of Governor Freeling, alienations of stool lands to European mining interests did not “entail the assumption of the soil by Government.”<sup>137</sup> The capability of the stool land tenure system to facilitate access to land for European capital is an important reason for the change in colonial Government land policy at the turn of the twentieth century.

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<sup>135</sup> The 1912 Belfield Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti (Metcalf, No. 444).

<sup>136</sup> Speech of J. E. Casely Hayford, ‘The Aborigines’ Banquet’ in Honour of Governor Hugh Clifford, 19 May, 1913 (Hayford, 1913:156).

<sup>137</sup> Letter of Governor Freeling to Carnarvon, 29 May, 1877 (Metcalf, No. 318).

Concerning the growth of indigenous capital, the rapid growth of the cocoa industry was facilitated by the ease with which non-members of particular stools (commonly referred to by scholars as ‘strangers’) were able to purchase stool lands for cocoa farming and other commercial forms of agriculture (Hill 1963). This broke the myth among British government officials that access to stool lands was determined by one’s tribal lineage to a stool land owning group. Access to stool land became largely dependent on the availability of capital and not one’s communal membership, gender, or access to the traditional power structure. There is no doubt that the role of capital in determining access to land worked against the poor in areas where there was high demand for scarce land. But in an expanding market economy, how long could one advocate on behalf of the poor for free access to land based on membership of a land owning community? The stool land tenure system also supported government’s economic interests at the local level by helping government to mobilize internal capital from land through the payment of royalties by mining companies and the payment of property rates. We shall later see that stool land revenues became the second largest source of internal revenue mobilized by chiefs to help promote local development. Government became convinced that the stool land tenure system neither constrained access to land nor local revenue mobilization. Therefore, it became hard for government to find any powerful economic motivation to reform the communal land system.

From the above, a combination of political and economic reasons underpins the change in government land policy. The capacity of the communal land ownership system to promote European and indigenous capitalist growth was important in changing the ideas of British government officials about the economic potential of the existing land ownership system. Moreover, the chiefs and their educated subjects made it clear to British Governors that they were unwilling to cooperate with colonial rule unless their communal land ownership system was defended. The change in government land policy was therefore a strategic political trade-off that enabled the British colonial governments to secure political cooperation from the chiefs and their subjects. I discuss below how the British dominant ruling coalition incorporated chiefs and non-chief educated political elites into the dominant ruling coalition, from 1916 to 1953. The reforms enabled the British-led ruling coalition to reform chieftaincy organizations into accountable agencies of land administration.

## 5.2 Reforming the Dominant Ruling Coalition: Incorporation of Chiefs and Non-chief Educated Elites into the Legislative and Executive Councils

Here, I discuss the nature of political incorporation of chiefs and non-chief educated political elites into the British-led dominant ruling coalition.<sup>138</sup> By 1902, all the traditional states in the Gold Coast had been militarily defeated by British-led armies. However, as Governor Nathan and Captain Stewart realized after the conquest of the Asante states, British colonial government officials required political strategies other than military coercion to ensure the ‘good conduct’ of the chiefs and their subjects. Aside abandoning the policy of state appropriation of the ‘native lands’, British government officials also adopted the political strategy of incorporating chiefs and non-chief educated political elites into the dominant ruling coalition. Table 9 and 10 below show how chiefs and non-chief educated political elites were gradually incorporated into the Legislative and Executive Councils.<sup>139</sup>

**Table 9: Incorporation of Chiefs and Non-Chiefs into the Legislative Council**

Date of reform	Ghanaian Representatives		European Representatives		Total
	Chiefs	Non-chiefs	Official Members	Unofficial Members	
1915	1	1	5	2	
1916 <sup>140</sup>	3	3	11	3	20
1926	6	3	16	5	30
1946 <sup>141</sup>	13	5	7	6	31
1951 <sup>142</sup>	17	58	5		80
1954 <sup>143</sup>	0	104	0		104

<sup>138</sup> The term ‘dominant ruling coalition’ is used here to refer to the Executive Council and the Legislative Council. Later it shall be used to include the National House of Chiefs.

<sup>139</sup> The data used has been compiled from various official documents (reports, letters, legislative council proceedings, etc.) in Metcalfe (1964, documents Nos. 448-452, 468, 496) and Austin (1964).

<sup>140</sup> The non-chief representatives would have been two if a literate paramount chief had been found in the Western Province to represent the ‘native population’. As a result an educated non-chief of the Western Province was nominated to represent the region (see Speech of Governor Clifford, Legislative Council, 25 September, 1916, Metcalfe, No. 452).

<sup>141</sup> In 1946 and 1951, the Joint Provincial Council of Chiefs and the Ashanti Confederacy Council chose to fill some of their seats with non-chiefs. For theoretical purpose the representatives are considered as chiefly representatives.

<sup>142</sup> The 58 non-Chief Seats comprised 33 Rural Electoral Colleges, 5 Municipal Councils, 19 Northern Electoral College, and 1 Southern Togoland Council (Austin 1964:103). The “specially constructed Northern Electoral College” was based on the Northern Territories Council and the existing native authorities (Austin 1964: 105-106). Not surprisingly, at least four chiefs – namely, the Kabachewura, the Wa-Na, the Tali-Na and the Katua-Na – were elected among the 19 representatives elected by the Northern Electoral College (Austin 1964:148).

<sup>143</sup> Internal Self-Government was granted Ghana in April 1954 as the final stage of independence. This ended the representation of Europeans in the Legislature.

**Table 10: Incorporation of Chiefs and Non-Chiefs into the Executive Council**

Date of reform	Ghanaian Representatives		European Representatives		Total <sup>144</sup>
	Chiefs	Non-chiefs	Official Members	Unofficial Members	
1915	0	0	5	0	5
1916	0	0	5	0	5
1926	0	0	5	0	5
1946	1	1	5	0	7
1951	0	8	4	0	12
1954	0	11	1	0	12

Table 9 shows that before 1951 the chiefs were the dominant political representatives of the Ghanaian population in the Legislative Council. From Table 10, however, it could be seen that the Executive Council remained out of the reach of the chiefs and the non-chief Ghanaian educated elites until 1946. By 1946, the fragile traditional-federal state created in 1831 had made a gradual transition to what I call the traditional-unitary state. Within the traditional-unitary state, the political authority of chiefs across all the sovereign traditional states and the authority of the British colonial government became unified within a national dominant ruling coalition and within a unified system of local government.

From 1949, however, the non-chief educated Ghanaian political elites began to reverse all the political settlements that unified the authority of chiefs and government. By 1954 the non-chief Ghanaian political elites had forced out the chiefs from the dominant ruling coalition as well as the local government system. The state turned backwards to the defaulting path of traditional-federalism with divided authority between chiefs and government. From 1949, the political rivalry that emerged between chiefs and the non-chief educated political elites set the pattern of constitutional settlements in which state legislative authority concerning the reform of matters affecting chieftaincy was divided between chiefs and government. The division of state authority between chiefs and government impacted on the power of government to autonomously reform stool land administration and the rules of customary law governing chieftaincy-society relationships of accountability. How the chiefs were kicked out of the dominant

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<sup>144</sup> The total includes the Governor who retained his 'reserve-powers' to veto or enforce legislation as he deemed fit, until Ghana became independent in 1957.

ruling coalition by non-chief political elites and the consequence for chieftaincy-government relations in land administration are discussed in the next chapter.

### **5.2.1 Monarchical Democracy versus Republican Democracy: The Paradox of Subject-Citizen Representation in the Dominant Ruling Coalition**

In 1816, the African Committee of Merchants in the Gold Coast recommended that “it would be a most important advantage if the King of Ashantee and some of his chiefs could be prevailed upon to send one or more of their children...to be educated at the expense of the Committee.”<sup>145</sup> Before Britain formally declared colonial rule over the Gold Coast in 1821, the Company of Merchants and many Christian Missionaries that operated in the Gold Coast deliberately targeted the children of chiefs to be educated about Western civilization because the chiefs were considered to be the centres of authoritarian rule and barbaric acts across the traditional states. By 1890, as many as 5,076 children had been enrolled in numerous Christian Mission schools and in Government schools.<sup>146</sup> In 1915, Governor Clifford reported that “at the present time, there is a considerable number of literate chiefs, both in the Eastern and the Central Provinces, and the tendency throughout the Colony is markedly in the direction of the annual increase of that number.”<sup>147</sup> By the mid-1920s the Gold Coast was turning out annually some 4,000 to 5,000 elementary school graduates.<sup>148</sup> In 1948 a University College was opened in the Gold Coast. The point that I am driving at is how the spread of Western educational values of democratic representation led to conflicts between chiefs and their educated subjects.

From the second decade of the C20th, when the British colonial Government decided to incorporate chiefs into the dominant ruling coalition to help build a developmental state, the emerging class of non-chief educated Ghanaians opposed chiefly representation in the dominant ruling coalition. The non-chief educated elites argued that it is against the customary laws in the Gold Coast for a chief to communicate

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<sup>145</sup> African Committee to the Governor and Council, London, 15 November, 1816 (Metcalf, No. 27).

<sup>146</sup> Report of the Educationists’ Committee Appointed by the Governor on 5 March, 1920, to advise the Government on educational matters (Metcalf, No.459).

<sup>147</sup> Letter of Governor Hugh Clifford to Lewis Harcourt, 15 April, 1915 (Metcalf, No. 449).

<sup>148</sup> Governor Guggisberg, Legislative Council, 6 March 1924 (Metcalf, No. 467).

directly with another person but only through his linguist (or spokesperson).<sup>149</sup> The non-chief educated elites also argued that “according to the African system, no Headman, Chief, or Paramount Ruler has an inherent right to exercise Jurisdiction unless he is duly elected by the people to represent them, and that the appointment to political offices also entirely depends upon the election and the will of the people.”<sup>150</sup> Therefore, the non-chief educated elites “from time to time agitated for the recognition of the elective principle.”<sup>151</sup> There emerged conflict between the chiefs and their educated subjects over who has the right to represent the ‘subject-citizen’ (Mamdani 1996) in the dominant ruling coalition. British Governors used the “unwholesome differentiation”<sup>152</sup> between political representatives for educated urban communities and representatives for uneducated rural communities.

In 1916, Governor Clifford argued that the critical challenge to state building in the Gold Coast was that “The Gold Coast...is not a single entity, but instead a mosaic composed of a number of mutually independent, and often mutually antagonistic, Native States, who derive such cohesion as they possess from their common loyalty and allegiance to His Majesty the King.”<sup>153</sup> Many subsequent Governors agreed with Governor Clifford’s position that the dominant ruling coalition should be reformed to incorporate “the Paramount Chiefs, who are the natural leaders of the people, live in close communication with them, and are intimately acquainted with their needs and interests”;<sup>154</sup> rather than introduce elective representation for diverse interests, tribes and states as demanded by the non-chief educated elites. The chiefs were considered to possess widespread legitimacy, public authority to ensure public order, and “intimate knowledge of native affairs or first-hand experience in local provincial administration.”<sup>155</sup> Governor Clifford argued that the non-chief educated communities should move from “a good deal of rather loose talk on the subject of representative government” to put forward a practical proposal “which would be

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<sup>149</sup> See the Legislative Council debate between Casely Hayford and Nana Ofori Atta on this matter, Proceedings in Legislative Council, 18 March, 1926 (Metcalf, No. 469). Governor Sir Alan Burns wrote about how this customary norm made the Asantehene and other chiefs to reject offers of a seat on the Legislative and Executive Councils (Burns 1949).

<sup>150</sup> Petition of the National Congress of British West Africa, 19 October, 1920 (Metcalf, No. 461).

<sup>151</sup> Letter of Governor Hugh Clifford to Lewis Harcourt, 15 April, 1915 (Metcalf, No. 449).

<sup>152</sup> Casely Hayford, Legislative Council Proceedings, 18 March, 1926 (Metcalf, No. 469).

<sup>153</sup> Sir Hugh Clifford, Legislative Council, 25 September, 1916 (Metcalf, No. 452).

<sup>154</sup> Sir Hugh Clifford to Lewis Harcourt, 15 April, 1915 (Metcalf, No. 449).

<sup>155</sup> Clifford to Harcourt, 15 April, 1915.

applicable to local conditions.”<sup>156</sup> On this challenge, it appears that it is rather the chiefs who later innovated an indigenous solution to the problem of how to group together several traditional states for the purpose of electing representatives.

In 1926, Governor Gordon Guggisberg did not only increase the representation of chiefs in the Legislative Council, but, he assured the Chiefs that “they will be supported by the full force of the Central Government” to develop their institutions.<sup>157</sup> He argued that “If the people of the Gold Coast are ever to stand by themselves, it must be by the gradual development of their own institutions and customs to meet the demands of more modern and advanced civilisation.”<sup>158</sup> Guggisberg asked the Ghanaian representatives in the Legislative Council to protect their natural institutions and customs in the interior from the “disintegrating influence” of the gradual extension of education, trade, and mining. He emphasized that “there is a danger that what are called Western civilization and Western customs will swamp the natural institutions and customs of the interior.”<sup>159</sup> During Guggisberg’s nine-year transformational leadership he supported chiefs to reform the organizations of chieftaincy governed every African in the Gold Coast; “In order to preserve their nationality, their racial characteristics, their institutions and customs, and yet at the same time to retain their position as a free people in the world.”<sup>160</sup>

With the support of Governor Guggisberg, the most important innovation that was made by chiefs in their organization of chieftaincy was the development of higher level organizations called Provincial Councils (now called the Regional House of Chiefs) and, later in 1932, the Joint Provincial Council (now called the National House of Chiefs). The Provincial Councils of Chiefs grouped together the chiefs of the traditional states within a Province for the purpose of electing their representatives to the Legislative Council, resolving chieftaincy conflicts between Paramount Chiefs, and to unite the chiefs “in defence of native rule and institutions against the disintegrating effect of modern civilization, while at the same time giving them an opportunity of conferring on the problems which the advent of modern

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<sup>156</sup> Clifford to Lewis Harcourt, 15 April, 1915.

<sup>157</sup> National Archives, Accra, ADM 14/2/11. Original in bold.

<sup>158</sup> Governor Sir Gordon Guggisberg, Legislative Council, 22 February, 1926 (Metcalf, No. 468)

<sup>159</sup> Governor Sir Gordon Guggisberg, Legislative Council, 22 February, 1926.

<sup>160</sup> Governor Sir Gordon Guggisberg, Legislative Council, 22 February, 1926.

civilization must inevitably introduce into any country.”<sup>161</sup> The educated elites, particularly the lawyers led by Casely Hayford, initially opposed the use of Provincial Councils as the political mechanism for elective representation on the grounds that “the choice of men elected to the Legislative should be the choice of the people and not the choice of the *Amanhene* [Paramount Chiefs].”<sup>162</sup> Nana Ofori Atta, Paramount Chief (*Omanhene*) of the Akyem Abuakwa State, quoting from the book of Casely Hayford (1903) to debunk the criticisms, emphasized:

At the head of the Native State stands prominently the *Ohin* (King) who is the Chief Magistrate and Chief Military Leader of the State. He is first in the Councils of the Country, and the first Executive Officer. ...He it is who represents the State in all its dealings with the outside world; and, so long as he keeps within constitutional bounds, he is supreme in his own State.<sup>163</sup>

Nana Ofori Atta rightly asked the non-chief educated political elites, “Why then suggest now that an *Omanhene* cannot constitutionally represent his state in its dealings with other States or with the Government?”<sup>164</sup> Nana Ofori Atta then argued that “If the Gold Coast is to remain under the present system of monarchical democracy and not come under republican democracy, then I should submit that the principle of the new Constitution is a perfect one. It gives the people of this country a chance to develop through their own system of rule.”<sup>165</sup> He urged the “so-called guardians of native customs” to help develop native institutions and custom in the interest of the country whenever it was thought possible and necessary. He emphasized, “To say that the old and ancient customs which had been found incompatible with the present state of affairs should remain without any change could only mean one thing;...to render us impotent, and to make it impossible for us to march with the times.”<sup>166</sup> The non-chief educated elites, who appeared to have been deflated by the educated chiefs with their own earlier intellectual works, gradually cooperated with the chiefs to reform chieftaincy organizations and strengthen chieftaincy administration (Adu-Boahen 2000).

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<sup>161</sup> Governor Sir Gordon Guggisberg, Legislative Council, 22 February, 1926.

<sup>162</sup> Casely Hayford, Legislative Council, 18 March, 1926.

<sup>163</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

<sup>164</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

<sup>165</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

<sup>166</sup> Speech of Nana Sir Ofori Atta in Legislative Council, 4 March, 1943 (Metcalf, No. 493).

In 1934, a joint delegation of chiefs and the non-chief intelligentsia went to England to submit a petition demanding diverse political reforms.<sup>167</sup> Among the political demands, they proposed that the Provincial Councils of chiefs should “be empowered to elect as Provincial Members of the Legislative Council any persons who are certified as able to read and speak the English language sufficiently well to enable them to take an active and intelligent part in the proceedings of the Council, irrespective of whether or not such persons are Chiefs.”<sup>168</sup> The delegation also demanded that Africans should be represented on the Executive Council.

Interestingly, the 1934 joint delegation to England also petitioned that the ‘Kumasi Part One Land’ that was vested in the British Crown after the 1901 Yaa Asantewaa war should be returned to the Asantehene. The petition read as follows:

The Africans whom they represent are seriously concerned with the land question of Kumasi, the Ashanti capital town. The land within a one mile radius of the centre has been for a long time treated as Government property. ...the land outside the radius never was and is not now Government property and its treatment as Government property threaten the whole security of tenure of land in Ashanti.<sup>169</sup>

In 1942, according to Governor Burns, the Asantehene rejected an offer of a seat on the Executive Council because “he feared that he would lose the confidence of his chiefs.”<sup>170</sup> It is not surprising that in 1943 the British-led government returned to the

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<sup>167</sup> ‘Petition of the Delegation from the Gold Coast and Ashanti, 1934 (Metcalf 482). The delegation was led by Nana Sir Ofori Atta. Their petition was favourably received. Strangely, in the same year, in November 1934, the Aborigines Rights Protection Society (ARPS) that had been formed in the 1870s to resist land reforms in the Gold Coast tried to reassert its old representative role by sending another delegation to London to press for certain constitutional reforms (Metcalf, No. 483). Their petition however opposed any role for chiefs in the Legislative and Executive Councils. Nana Sir Ofori Atta and the Chiefs rejected the ARPS delegation. And the ARPS deputation was not received at the Colonial Office. The different delegations signified cracks within the class of African intelligentsia. On the one hand was a moderate African intelligentsia that was sympathetic to the role of Chieftaincy in the modern state; and, on the other hand was a radical African intelligentsia that was opposed to any role of Chieftaincy in the governance of the modern state.

<sup>168</sup> ‘Petition of the Delegation from the Gold Coast and Ashanti, 1934, to the King’s Most Excellent in Council’ (Metcalf, No. 482).

<sup>169</sup> ‘Petition of the Delegation from the Gold Coast and Ashanti, 1934, to the King’s Most Excellent in Council’ (Metcalf, No. 482).

<sup>170</sup> Governor Sir Alan Burns wrote, “On the 29<sup>th</sup> September, 1942, I was able to announce the appointment to the Executive Council of Sir Ofori Atta, K.B.E., Omanhene of Akim Abuakwa, and Mr. K. A. Korsah, O.B.E., Barrister-at-Law. The inclusion of these two gentlemen in the Executive Council gave great satisfaction to the African population. I also offered a seat on the Executive Council to Sir Agyeman Prempeh, K.B.E., the Asantehene but he did not feel able to accept the offer, as he feared that he would lose the confidence of his chiefs” (Burns 1949:196).

Asantehene the 'Kumasi Part One Lands'. It was an important step taken by the Government to win the hearts of the chiefs and people of Ashanti.

The 1946 Burns Constitutional reform provided, for the first time, an African majority on the Legislative Council and two African representatives to the Executive Council. The Joint Provincial Council of Chiefs elected two non-chiefs among its representatives to the Legislative Council "to disperse the allegation that the Chiefs were selfish as they were unwilling to cooperate with that section of the country known as the intelligentsia."<sup>171</sup> For the first time in the history of Ghana the 1946 constitutional reform incorporated two Ghanaian representatives on the Executive Council. By 1946, the Chiefs and the intelligentsia had made significant progress, and had shown practical commitment, towards a solution of the paradox of 'subject-citizen' elective representation to the dominant ruling coalition.

I suggest that by 1946 the traditional-federal state had been replaced with the traditional-unitary state which "combined the Central Government and the native authority into one body; and provided that the native authority continued to command popular support" (Ward 1967:364-5). Ward (1967:364) rightly noted that "By 1944, the old distinction between direct and indirect rule was becoming meaningless. To talk of direct rule implies that Government, native authority, and the people are three distinct entities." David Apter (1955:80) hypothesized that "Some of the structures crucial to the maintenance of the tribal system substantively conflict with and would, *if maintained*, contravene crucial Western patterns of social and political organization around which a structural reintegration of society is taking place".<sup>172</sup> In contrast to some scholars (CDD-Ghana 2001), I argue that the resilience of chieftaincy in Ghana today confirms Apter's hypothesis concerning the survival of chieftaincy in the process of Ghana's political modernization (Apter, 1955, 1960, 1963). Nana Ofori Atta had equally shared Apter's view by emphasizing, "To say that the old and ancient customs which had been found incompatible with the present state of affairs should remain without any change could only mean one thing; to render us impotent, and to make it impossible for us to march with the times." Many chiefs used their 'new interpretive frames' of modernization acquired through

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<sup>171</sup> Minutes of Joint Provincial Council, December, 1946 (in Austin 1964:51).

<sup>172</sup> The original is all in italics. I deliberately left the much neglected conditional clause in italics.

Western education to reform their traditional institutions. I now move on to discuss how the dominant ruling coalition of British officials, chiefs and non-chief intelligentsia cooperated to develop an accountable system of local government through which chiefs administered stool lands and local development.

### **5.3 Negotiating Accountability in Chieftaincy Administration: 1927-1944 Local Government Reforms**

Here, I analyze how British government officials, chiefs and non-chief educated elites negotiated formal-legal accountable institutions of local government to govern the administration of chiefs in local communities. I shall also discuss how the rules were enforced horizontally by government and vertically by the subjects of chiefs to achieve the desired results. Conceptually, accountability has been defined in this study as the process of holding agents (individuals or collective actors) responsible for their actions in the context of specified mandates (Fearon 1999; O'Donnell 1994; McGee and Gaventa 2011; Przeworski et al. 1999; Schedler et al. 1999; Taylor 1989). The complex theoretical assumptions underlying the concept and practice of accountability has already been discussed in chapter 2. It should be noted that the commitment of all interests groups to consolidate organizations of chieftaincy and the stool land ownership system were the pre-requisites for demanding the accountability of chiefs in stool land administration.

#### **5.3.1 Reforming Informal Rules of Chieftaincy Administration into Transparent and Accountable Formal-Legal Rules**

At the critical juncture of colonial state formation in 1821-1831 the chiefs of the numerous traditional states governed their subjects according to the informal customary rules governing chieftaincy-society relationships. Before 1900, British Governors commonly secured the cooperation of chiefs to create peaceful political conditions for commerce by paying stipends and offering gifts to chiefs. The use of economic incentives complemented the fragile political settlement that underpinned the traditional-federal state. In 1871 Governor Sir Arthur Edward Kennedy<sup>173</sup> argued

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<sup>173</sup> Governor-in-Chief of the West African Settlements, February 1868-January 1872.

that “the system of giving stipends to native chiefs surrounding settlement has proved beyond doubt to be the cheapest and most effectual mode of keeping peace and keeping the roads open for commerce.”<sup>174</sup> It was not until the 1880s that the colonial government begun the process of changing the personal character of government-chieftaincy relations into impersonal formal-legal rules that clearly specifies the authority and responsibilities of chiefs within the colonial state.

The gradual transformation of chieftaincy organizations into accountable local government agencies started when the government passed the 1883 Native Jurisdiction Ordinance. However, as we have already seen, the era of state-making through violent wars was not yet over until the 1901 Yaa Asantewaa war. Therefore the 1883 Native Jurisdiction Ordinance which sought to define the mandates of chiefs did not work. It was only when the British government incorporated many chiefs and non-chief educated elites into the dominant ruling coalition from the second decade of the C20th that the triple ruling elites negotiated the transformation of chieftaincy into an effective local government system.

In 1926, following repeated failures of Government to reform chieftaincy administration in a manner acceptable to all ruling interests, the Paramount Chiefs on the Legislative Council, led by Nana Ofori Atta, requested for permission to introduce a new Native Jurisdiction Bill to replace the 1883 Native Jurisdiction Ordinance.<sup>175</sup> Nana Ofori Atta outlined the principles of the new Bill as follows:<sup>176</sup>

1. To recognise the customary rights and powers of the State or Oman Councils in the management of affairs connected with Stools.
2. To recognise the Government as Central Authority to have the final decision in regard to all political differences and disputes affecting Stools within the legitimate purview of recognised native institutions and customary law.

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<sup>174</sup> Governor Sir Arthur Edward Kennedy to the Earl of Kimberly (John Wodehouse), 8 November, 1871 (Metcalf, No. 277).

<sup>175</sup> It was the first time that an Unofficial Member of the Legislative Council had been allowed to introduce a Bill. Prior to that, it was the official members of the Executive Council that initiated legislative Bills in the Legislative Council. Nana Ofori Atta was knighted in 1928. He was first invested with the Order of Commander of British Empire (C.B.E) in 1919 (Addo-Fening, 2006).

<sup>176</sup> Speech by Nana Ofori Atta on the Native Jurisdiction Bill, 19 April, 1927 (Metcalf, No. 472).

3. To regulate and place on a sound basis the powers and jurisdictions of the Tribunals, in their order of precedence and within their territorial limits, with the necessary powers for enforcing their judgements and verdicts.
4. To facilitate the means for preventing and checking abuses in the Tribunals by Government through its Commissions.
5. To utilize the Provincial Councils for administrative and judicial purposes, subject to the Executive Government and to the Judiciary.
6. To provide means for codifying the Native Customary Laws.

Two important things concerning the definition of the mandate of chiefs in the new local government system need to be highlighted. First, it is important to note the dual nature of the mandates of chiefs in the new local government system. The Native Jurisdiction Ordinance sought to recognize the customary mandates of chiefs defined by their subjects within the territorial limits of the traditional state. In the context of this study the crucial bottom-up mandate of chiefs was the mandate to manage stool lands on behalf of the traditional state. Granting state recognition to the bottom-up negotiated mandate of chiefs therefore implied the recognition of Government as the Central Authority to horizontally enforce the customary mandate of chiefs “within the legitimate purview of recognised native institutions and customary law.” Second, the chiefs realized that the informal nature of their customary laws promoted disputes among chiefs and with their subjects, and, therefore, the chiefs sought the codification of their informal customary laws to ensure legal interpretive certainty, administrative transparency and effective accountability (Addo-Fening 2006). The enactment of the 1927 Native Jurisdiction Ordinance helped to formally define some of the customary mandates of chiefs within their traditional states. The complete codification of the informal rules of customary law that governed chieftaincy-society relationships however never occurred in any of the traditional states.

The increasing level of trust and cooperation between chiefs, non-chief educated elites and British Government officials was crucial in the development of an accountable Native Administration system in the Gold Coast. Firmin-Sellers (1995:871) noted that “Ofori Atta convened a series of meetings with both chiefs and educated men of the Eastern Province to draft the new legislation.” However, generally, the reform of chieftaincy organizations in traditional states into

accountable agencies of local government depended more on political cooperation between chiefs and British government officials than on the support of the non-chief educated elites. This is shown in the discussion that follows.

The 1930s global economic depression had affected government revenues and the people were also noted to “have developed that sort of irritated militant spirit which is quite foreign to them.”<sup>177</sup> In 1931, Governor Sir Alexander R. Slater asked Members of the Legislative Council to support the passage of legislation to raise internal revenue through direct taxation in spite of the fact that “Government fully understands and appreciates the objection which people have to a poll-tax, and a hut-tax”.<sup>178</sup> The educated elites sought to use the opportunity to negotiate for their increased representation in the Legislative Council. The non-chief educated elites argued that their support for direct taxation would be based on the “strictly and inviolate...principle that taxation goes with effective representation.”<sup>179</sup> Dr. Nanka Bruce, who was very influential among the intelligentsia, summed up the position of the educated elites as follows:

Is Government prepared to give to this country full representation, and is Government prepared to give the control of our finances to the people of this country? If not, it is better that we remain where we are and try to balance out budget in some other way.<sup>180</sup>

The Paramount Chiefs in the Legislative Council also complained to Governor Slater that in comparison to Governor Guggisberg’s “Government of co-operation”, they had “on three successive occasions brought to the notice of Government their lack of co-operation with the Unofficial Members.”<sup>181</sup> However, the Joint Conference of Provincial Councils of chiefs passed a resolution that “Government should introduce measures enabling the States to assume properly and adequately the requisite responsibilities’ so that ‘the duties and responsibilities of Government towards such

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<sup>177</sup> Dr Nanka Bruce, Legislative Council, 24 September, 1931 (Metcalf, 477b).

<sup>178</sup> Governor Sir Slater in the Legislative Council, 24 September, 1931 (Metcalf, No. 477).

<sup>179</sup> Petition of the National Congress of British West Africa (NCBWA) to the Secretary of State for the Colonies, 19 October, 1920 (Metcalf, 461).

<sup>180</sup> Dr Nanka Bruce, Legislative Council, 24 September, 1931.

<sup>181</sup> Nana Ofori Atta, Legislative Council, 23 February 1931 (Metcalf, No. 476).

states may be lightened.”<sup>182</sup> Thus, the support of the chiefs was conditioned on the enactment of a legislation that would empower them to collect the taxes and to use the taxes for local development.

Governor Slater chose the political option offered by the chiefs. He argued that “The Most important condition for the proper development of native administrations is the delegation to the Native Authorities of financial responsibility, which can only be fully exercised if the duty of raising revenue locally, as well as of disbursing it, is entrusted to them.”<sup>183</sup> Logically, Governor Slater chose the negotiation package offered by the chiefs because the chiefs did not only outnumber the non-chief educated elites on the Legislative Council, but, also possessed legitimate organizational mechanisms to collect the taxes. Moreover, the demands that were made by the non-chief educated elites were not within the powers of Governor Slater to fulfil. Reform of the constitution of the ruling coalition would have required a lengthy process of securing support from the British Government in London.

The establishment of a Treasury was used by the British-led Government as the key condition for granting authority to chiefs to implement the 1831 Native Revenue Administration Ordinance in their traditional states. The Native Administration agencies with established Treasuries also had to prepare annual budgets of revenue and expenditure estimates that were approved by the Government through Provincial Commissioners. Further, the Audit Service was empowered to enforce the horizontal accountability of chiefs to government and the vertical accountability of chiefs to their subjects. The new institutions of accountability were widely accepted by chiefs, non-chief educated elites and ordinary subjects of chiefs.

In 1933, Governor Sir Shenton Thomas noted that only a few of the State Councils operated effective systems of financial administration and, therefore, it was necessary “to exercise proper supervision over the...expenditure of stool revenue.”<sup>184</sup> Lord Hailey who had written a confidential report to the British

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<sup>182</sup> Address by Governor Sir Alexander Slater, Legislative Council, 1 March, 1932 (Metcalf No. 477).

<sup>183</sup> Address by Governor Sir Alexander Slater, Legislative Council, 1 March, 1932.

<sup>184</sup> Speech of Governor Sir Shenton Thomas in Legislative Council, 22 March, 1933 (Metcalf, 479).

Government, after his journeys to the Gold Coast and other African countries in 1939-40, observed the situation in the Gold Coast as follows:

In the absence of any provision for the establishment of Treasuries or for their control when established, Chiefs and their Councillors were left free to dispose of the proceeds of concessions or of the revenues derived from the sale or leasing of Stool lands, with only such check as might be provided by the discontent of those who had not shared in the proceeds (Hailey 1951a:201).

It was not until 1939 that the dominant ruling coalition passed the Native Administration Treasuries Ordinance which compelled Chiefs to establish central and divisional treasuries within their states to be managed by qualified Finance Committees (Crook 1986; Firmin-Sellers 1995; Hailey 1951; Ward 1948).

Perhaps what the chiefs did not foresee was that the enforcement of the 1931 Native Administration Revenue Ordinance in their traditional states would lead to increasing demands from their subjects for political participation in traditional governance, as well as increasing demands for the accountability of chiefs (Addo-Fening 2006; Firmin-Sellers 1995). Internal pressures for reform increased particularly from educated citizens who failed to find jobs in the Native Administration system. It was the numerous internal pressures for reform that led to the 1942 Blackall Committee of Inquiry<sup>185</sup> into the Native Administration system. There is agreement among scholars (Crook 1986; Hailey 1951; Rathbone 2000a, 2000b) that the damning report presented by the 1942 Blackall Committee of Inquiry and strong external pressures from Whitehall for reform fortified the Government to pursue radical reforms in chieftaincy administration in 1944. It must also be acknowledged that the chiefs did not resist reforms in chieftaincy administration. Nana Ofori Atta, stating the position of the chiefs, emphasized:

Provided there is nothing which is in direct conflict with some of the fundamental principles of the native constitution, we will co-operate with Your Excellency in bringing up any measure which in the judgement of the Government will help to smoothen the administration of this country.<sup>186</sup>

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<sup>185</sup> Report of the Native Tribunals Committee of Enquiry (also called the Blackall Inquiry), 1943.

<sup>186</sup> Nana Ofori Atta, Legislative Council Debates, 4 March, 1943 (Metcalf No. 493).

In 1944, the Legislative Council passed the Native Authorities Ordinance and the Native Courts Ordinance to create three state agencies of local government administration; namely, the Native Authority, the State Council, and the Native Courts. The organs of local government were to be Native Authorities who were to be appointed by Government and not Chiefs. The Ordinance specified that if the Governor found it inexpedient to appoint a Chief, a Native Council or a group of Native Councils to function as the Native Authority, he might appoint either any person from among the natives of a given area or an Administrative Officer to function as the Native Authority. Native Authorities were given authority to perform a wide range of responsibilities including the maintenance of a treasury, police, prisons, native courts, health facilities, and schools. On the fiscal side, the Native Authority Ordinance appropriated all stool revenues – inclusive of stool land revenues – for the Native Authorities.

The State Councils were to perform functions relating to the declaration of customary laws; the election, installation or deposition of a Chief; and the recovery or delivery of Stool property. Such functions were considered to be concerned with the constitutional matters of the traditional states. Customary laws declared by a State Council were however to have the force of law only if it were approved by the Governor. Today, the functions of Traditional Councils remain generally the same as in 1944. The only difference is that the declaration of customary laws now passes through a lengthy procedure involving the National House of Chiefs, Parliament and the President. The Native Courts Ordinance transformed the Native Tribunals of the traditional states into Native Courts under the judicial apparatus of the modern state (Crook 1986; Hailey 1951, 1956; Rathbone 2000a, 2000b).

The uniqueness of the 1944 reforms lies in the fact that the independent authority of Chiefs became integrated into a unitary state organizational framework. In practice, it was in rare cases that the Governor failed to appoint chiefs to manage the Native Authorities (Hailey 1956).<sup>187</sup> The radical nature of the reform lies in the fact that Chiefs who were appointed as Native Authorities now discharged their functions as Government employees who could be fired for bad governance. Ward (1958:363)

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<sup>187</sup> See the Report of the Committee on Constitutional Reform (Coussey Committee) presented to the Governor, 1949.

captured the effect of the 1944 Native Administration Ordinance as follows: “The Ordinance abandoned the old conception of the central Government and the native authorities as two separate powers, which might co-operate but need not. It replaced this by a new conception: both central Government and native authorities were parts of one unified Governmental system.” In essence, the gradual reforms in the dominant ruling coalition and chieftaincy administration shaped the transition of the traditional-federal state to a traditional-unitary state.

During the same year, 1944, British government officials, chiefs, and the non-chief educated elites completed their negotiation of reforming the dominant ruling coalition.<sup>188</sup> For the first time in the history of the country, one chief and one non-chief educated Ghanaian were appointed into the Executive Council. Moreover, as shown in Table 9 above, the 1946 Burns Constitutional reform gave the majority of seats on the Legislative Council to the elected Ghanaian representatives. The reforms were described by Governor Burns as “a historical event of some significance.”<sup>189</sup> It was critical step towards self-government. From 1902 to 1946, the traditional-federal state that was initially created in 1821-1831 had made a gradual transition into the traditional-unitary state in which the separate powers of Chiefs and British government became fused at the national and local levels of government.

By 1946, organizations of chieftaincy and the dominant ruling coalition were reformed from what North et al. (2009) call ‘limited access’ organizations into ‘open access’ organizations. The sharing of new interpretative frames of democratic governance among British government officials, chiefs, and the subjects of chiefs appears to be the most important variable that underlies the reforms within the dominant ruling coalition as well as chieftaincy administration in local communities. North et al (2009:148) point out that “Societies do not leap from limited to open access. Transitions occur in two steps where first the relations within the dominant coalition transform from personal to impersonal, and then those arrangements are extended to the larger population.” We have seen that the larger population in the Gold Coast did not play a passive role in the creation of inclusive and accountable systems of governance at the national and local levels (Adu-Boahen 2000).

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<sup>188</sup> Sir Alan Burns, Speech in Legislative Council, 4 October, 1944 (Metcalf, No. 496).

<sup>189</sup> Sir Alan Burns, Speech in Legislative Council, 4 October, 1944 (Metcalf, No. 496).

### 5.3.2 The Practice of Accountability in Chieftaincy Administration: Bottom-up Enforcement of Chieftaincy Accountability

“An ounce of experience is better than a ton of theory”, said Nana Ofori Atta.<sup>190</sup> Therefore I examine below how accountability in chieftaincy administration worked in practice and whether the new system of Native Authorities earned the trust of the subject of chiefs. There were 95 functioning Native Authorities with legally established treasuries – 48 in the Colony, 35 in Ashanti, and 12 in the Northern Territory – through which the state reached local communities to offer social services, maintain law and order, and mobilize revenue.<sup>191</sup>

Table 11 below shows the nature of revenue mobilization by the Native Authorities created in Nana Ofori Atta’s Akim Abuakwa state, the Asantehene’s Kumasi state, and the Ga state where the capital of Colonial state was located. The period 1947-48 is used here because it was the period preceding the famous 1949 Coussey Committee political settlements in which chiefs and the educated Ghanaian elites agreed to separate organizations of chieftaincy from the local government system. This will later help us to understand the nature of the Coussey Committee political settlements concerning chieftaincy-government relations in land administration.

**Table 11: Sources of Revenue for Native Authorities, 1947-1948**

Sources of Revenue	NATIVE AUTHORITIES		
	Ga	Kumasi Division	Akim Abuakwa
	£	£	£
Annual rate (direct tax)	3,171	58,877	13,551
Native courts	4,223	21,722	10,316
Lands	6	51,685	29,434
Fees and Tolls	116	7,884	12,468
Licences	155	3,233	1,339
Interest	-	112	44
Miscellaneous	951	1,636	1,003
Grants-in-aid	-	19,937	13,013
Transfers from Reserve Fund	-	-	2,601
<b>Total Revenue</b>	<b>8,622</b>	<b>165,086</b>	<b>83,769</b>

Source: National Archives of Ghana, Accra, ADM 5/1/49

<sup>190</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

<sup>191</sup> Gold Coast Report, 1949, National Archives of Ghana, Accra, ADM 5/1/49.

From Table 11 above, one can see that the Kumasi Division and the Akim Abuakwa Native Authorities derived significant revenues from their Stool lands. The Asantehene Lands Office that had been established in 1943 to manage the Kumasi Town lands was very instrumental in the mobilization of land revenue. Stool land revenue derived by the Kumasi Division accounted for about 36% (£51,685) of internally generated revenue (£143,401).<sup>192</sup> In Accra where land was largely owned by Government and families it is understandable why the Ga Native Authority derived almost nothing from land transactions. The dependence on chiefs on stool land revenues help us to understand why there has been conflicts between chiefs and government over the sharing of stool land revenues after the chiefs were kicked out from the local government system, the Executive, and the Legislative Assembly.

Throughout Ashanti and the Colony, receipts from stool lands constituted the second largest source of internally generated revenue for Native Authorities.<sup>193</sup> It was important for the subjects of chiefs to ensure that Stool land revenues were brought to the treasuries. Creating institutions of accountability is one thing. And the enforcement of the institutions by the subjects of chiefs is another thing. As we shall see later, to date, many educated Ghanaians share the view that it is considered customarily inappropriate for the subject of a chief to publicly demand accountability from the chief. Particularly, in a period during which the subjects of chiefs were beginning to change their ideas of political governance and human rights, the demand for the accountability of the traditional rulers was more likely to be culturally challenging. In Ashanti, Hailey (1951b:30) noted:

The introduction of the Native Authority system in Ashanti has encountered a number of obstacles, not least of which has been the disinclination of Divisional Chiefs to agree that monies received from the sale or lease of communal lands or similar sources (such as Forest or Mining concessions) should be brought to account in the Native Treasury, thus enabling a distinction to be drawn between the amount to be allocated for the expenditure of the Chiefs or their Stools and that available for expenditure on local services.

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<sup>192</sup> The total internally generated revenue for the Kumasi Division Native Authority was calculated by using revenue generated from Native Courts, Lands, Fees and Tolls, Licences, and Interests. I excluded Grants-in-aid, Transfers from Reserve Fund, and Miscellaneous.

<sup>193</sup> See Hailey (1951a:209) and Gold Coast Annual Reports, 1948 (ADM 5/1/49 & ADM 5/1/50)

The elementary school graduates who had learnt about the “strictly and inviolate...principle that taxation goes with effective representation”<sup>194</sup> were also beginning to back their demands with violence (Addo-Fening 2006, Firmin-Sellers 1995). In 1936, a year after the introduction of the Native Treasury Ordinance in Ashanti, youth groups forcefully demanded accountability from their chiefs. The relationships between chiefs and youth groups deteriorated to the extent that the Asante Confederacy Council unanimously made the following resolution to abolish the positions of the representatives of youth groups from the hierarchy of chieftaincy organization: “The positions of *Nkwankwaahene* and *Asafoakye*, also *Asafo* should be abolished from the whole of Ashanti in view of the fact that they are the cause of political unrest in Ashanti.”<sup>195</sup> But the chiefs could not stem the tide of political demands for change. In 1948, it was reported, “The Kumasi Divisional Council now includes a representative of each ward of the Town of Kumasi and representatives of the geographical areas in which the Division is organized; this organization is arranged for administrative convenience and takes the place of the previously very centralised system.”<sup>196</sup> The chiefs were slow to recognize that the educational and economic revolution that had taken place by the C19th “were changing orientations and undermining traditional attitudes of docility” (Addo-Fening 2006:335).

In the Akyem Abuakwa State, the State Council also offered seats to “two representatives of the Scholar’s Union, three of the ‘strangers’ community, the Legal Advisor of the Council (a barrister) and two representatives of the Church” (Hailey 1951a:206). Nana Ofori Atta had long realized that “the easy-going days are gone, and they must be prepared to march with the times” of democratic governance no matter the “inconvenience.”<sup>197</sup> Nana Ofori Atta emphasized that “There was a time when an illiterate chief thought it was no good to send his heir to school. That has very nearly brought us to the verge of ruination and complete national disaster. The effect was discovered just in time, and the need for sending heirs to school to be

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<sup>194</sup> Petition of the National Congress of British West Africa (NCBWA) to the Secretary of State for the Colonies, 19 October, 1920 (Metcalf, 461).

<sup>195</sup> Ashanti Confederacy Council Minutes, January 1936 (in Austin, 1964:23-4). The *Nkwankwaahene* and *Asafoakye* are the chiefly leaders of the young men and the *Asafo* is a group of young men.

<sup>196</sup> Annual Report on the Gold Coast, 1948, p.105 (NAGA, ADM 5/1/49)

<sup>197</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

given as much education as possible is much more emphasised.”<sup>198</sup> Changes in the ideas of the chiefs did matter as much as changes in the ideas of their subjects.

Hailey (1951a:206) noted that there was a growing tendency by State Councils to include ‘commoners’ in their membership and “an analysis of the composition of the State Councils as a whole, shows that about 30 per cent do not belong to the category of Divisional or Sub-Chiefs, stoolholders, or traditional title holders.” Table 12 below suggests that local communities in the Kumasi state and Akim Abuakwa state placed great value on the role of education in promoting change. This was translated into greater expenditure of Native Authorities on formal education.

**Table 12: Nature of Expenditure of Native Authorities**

Nature of Expenditure	NATIVE AUTHORITIES		
	Ga	Kumasi Division	Akim Abuakwa
	£	£	£
Administration	3,034	29,143	16,688
Treasury	1,314	10,460	4,489
Native Courts	2,228	11,895	4,975
Police	1,351	6,732	4,499
Prisons	-	1,180	1,924
Agriculture	-	126	279
Forestry	-	327	-
Medical	-	42	107
Health	59	4,711	10,849
Education	200	30,282	16,302
Recurrent works, communications and services	276	8,364	4,213
Miscellaneous	1,131	14,781	7,490
Extraordinary	81	27,441	16,811
Contributions to reserve fund	-	7,783	1,000
Total Expenditure	9,674	157,285	89,626

Source: National Archives of Ghana, Accra, ADM 5/1/49

It seems that the huge expenditure on education in Ashanti and Akyem (Akim) Abuakwa states were influenced by the value that the subjects of chiefs placed on education. Ideational change among chiefs and their subjects about the nature of governance was influential in shaping demands for political institutional reforms in chieftaincy administration as well as in the dominant ruling coalition. The perception

<sup>198</sup> Nana Ofori Atta, Legislative Council, 18 March, 1926.

among some historical institutionalists that the critical juncture-path dependence theoretical model is incapable of comprehending “endogenous developments that often unfold incrementally” (Mahoney and Thelen 2010:2) is quite erroneous. Paying attention to the ideas, interests, power and resources of actors at the critical juncture of institutional development can help us “comprehend both exogenous and endogenous sources of institutional change” (Mahoney and Thelen 2010:7). Blyth (2002a, 2002b) and Lieberman (2002) have pointed out that many historical institutionalists have failed to take seriously the role of ideational transformations in their explanations of institutional change. Leftwich (2004, 2007, 2008, 2009) and Moe (2005, 2006) have also noted that the nature and role of human agency in institutional formation and change is yet to be taken seriously by many historical institutionalists. I shall return to this matter in the concluding part of the study.

The accountability of chiefs to their subjects is also influenced by the capacity of their subjects to demand accountability and enforce sanctions against non-responsiveness. We can see that the chiefs in Ashanti and Akyem Abuakwa tried to respond to the interests of their subjects, particularly in matters of education. In formal and informal institutional environments, interest-responsiveness could be used as a yardstick for measuring the accountability of political leaders to their citizens. In political and administrative systems where the mandates of political agents are vaguely defined or not directly negotiated with citizens (as is largely the case in many countries), the best standard for assessing the accountability of such political agents is the extent to which they are responsive to the interest of citizens.

Firmin-Sellers (1995) has strongly argued that the analysis of chieftaincy accountability in Ghana during the historical period under review, 1902-1950, suggests that the more chiefs responded to the interests of their subjects, the more the subjects provided revenue to their chiefs to be used in the interest of subjects. Table 13 below suggests that such positive correlation between chieftaincy accountability to their subjects and increased internal revenue mobilization is very plausible.

**Table 13: Native Authorities Revenue and Expenditure, 1942-1948**

Territorial division	1942-3	1943-4	1944-5	1945-6	1946-7	1947-8	1948-9	Total
	REVENUE							
	£	£	£	£	£	£	£	£
Colony	143,899	186,185	242,563	293,194	373,974	460,902	625,324	2,326,041
Ashanti	49,841	72,329	109,920	167,035	264,500	343,489	468,673	1,475,787
N.T's	71,375	85,715	105,035	132,727	133,737	266,535	302,929	1,098,053
<b>Total</b>	<b>265,115</b>	<b>344,229</b>	<b>457,518</b>	<b>592,956</b>	<b>772,211</b>	<b>1,070,926</b>	<b>1,396,926</b>	<b>4,899,881</b>
	EXPENDITURE							
Colony	133,035	174,470	229,390	287,829	366,375	465,301	569,713	2,226,113
Ashanti	44,745	58,497	87,207	137,576	235,476	307,774	387,413	1,204,688
N.T's	66,891	79,648	92,504	114,950	136,856	185,484	254,327	930,660
<b>Total</b>	<b>244,671</b>	<b>312,615</b>	<b>409,101</b>	<b>540,355</b>	<b>738,707</b>	<b>958,559</b>	<b>1,211,453</b>	<b>4,415,461</b>

Source: National Archives of Ghana, Accra, ADM 5/1/49 & ADM 5/1/50

We can clearly see that successive increases in expenditure were rewarded with successive increase in revenue mobilization across the three territorial divisions of the colonial state. Subjects became convinced that chiefs were not using public revenues for their private benefits (Firmin-Sellers 1995; Ward 1958). I suggest that the successive increase in the revenue of chiefs is more likely to be explained by the responsiveness of the chiefs to the developmental interests of their subjects. Data on government revenue during the period (Table 14 below) shows that the increase in the revenue of chiefs was not due to an expansion of the Gold Coast economy.

**Table 14: Gold Coast Trade and Revenue, 1942-1946**

Date	1942-3	1943-4	1944-5	1945-6	1946-7
	£	£	£	£	£
Imports	9,877,298	10,167,566	9,828,094	10,103,940	12,633,612
Exports	12,550,174	12,631,282	12,314,200	15,126,147	19,616,874
<b>Revenue</b>	<b>4,331,894</b>	<b>4,720,394</b>	<b>5,866,665</b>	<b>7,171,618</b>	<b>7,567,589</b>

Source: Metcalfe (1964, Appendix D)

It could be seen that from 1942 to 1946, the chiefs increased their revenue by 191% (from £265,115 to 772,211) while Government increased its revenue by only 74% (from £4,331,894 to 7,567,589). Particularly, the increase in revenues of chiefs and government in 1945 and 1946 demonstrate the developmental appeal of chiefs to their subjects. While the chiefs increased their revenue by 30%, the Government increased its revenue by only 5%. It is clear that the interest-responsiveness and accountability of chiefs to their subjects increasingly produced positive results for both the chiefs and their subjects. Firmin-Sellers (1995:879) point out that the politics of chieftaincy administration reform shows that “Institutional creation is both coercive and contractarian in nature.” Historical research across traditional states is required to know the relative weight that the subjects of chiefs put on coercive or contractarian mechanisms to ensure the accountability of their chiefs.

It is quite strange that notwithstanding the positive political progress made by chiefs and their subjects in reforming chieftaincy administration, organizations of chieftaincy were kicked out from the local government system from 1951. The politics of state reform that led to the return of the traditional-unitary state to the default path of traditional-federalism, and its consequences for land administration reform, is discussed in the next chapter. Here, I suggest that the politics of colonial state reform from 1902 to 1950 contain important lessons for current attempts to re-create accountable agencies of chieftaincy for stool land administration.

#### **5.4 Conclusion: Institutional Legacies, Ideational Change, and Political Power Matter for Understanding Institutional Change**

I have sought to show how British government officials, chiefs and non-chief educated elites negotiated the reform of chieftaincy organizations into accountable local government systems through which chiefs administered stool lands and mobilized internal revenue for local community development. The historical analysis shows that the development of accountable organizations of chieftaincy administration in local communities occurred through the complex interaction of political, economic, social and ideational processes of change in the country. They include (a) the consolidation of the stool land ownership system, (b) the incorporation of chiefs into the dominant ruling coalition, (c) the willingness and

commitment of government and chiefs to share state authority, responsibilities, and revenue through an impersonal system of local government, and (d) the emergence of a class of educated subjects of chiefs who demanded political participation and accountability in chieftaincy administration. The interaction of these factors played a crucial role not only in the development of an accountable system of chieftaincy administration in local communities but, also, in the gradual transition of the traditional-federal state to a traditional-unitary state in which both central government and chieftaincy were parts of one unified governmental system.

We have seen that after the military conquest of the traditional states by the British colonial state makers, the latter turned its attention to building developmental organizations capable of promoting their economic, political and ideological interests. However, British government officials realized that the task of building a developmental colonial state required political stability and the widespread support from the population rather than the use of military coercion. To achieve its goals, the British government strategically traded-off with the chiefs and their subjects the initial government policy to expropriate the native lands. British government officials in the Gold Coast and England then committed themselves to defend the customary land ownership system. In return, the chiefs and their educated subjects co-operated with the British colonial state-makers to build a developmental state that could promote their common interests.

The commitment of the British government, chiefs and the larger population to defend the customary land ownership system was a necessary preliminary to building political trust and cooperation among these actors in the process of developmental state building. It was also the pre-condition for the development of transparent and accountable institutions of customary land administration within organizations of chieftaincy. The credible commitment of all the political stakeholders to defend communal land ownership is the precondition for realising the economic developmental potential of communal land.

British colonial state-makers also realized that the politics of developmental state building required more than simply leaving the land to the chiefs and their subjects to secure political order and widespread support. Crucially, it required that political

leaders possess “intimate knowledge of native affairs” and the creation of institutions that are accepted by the population as legitimate. British governors realized that beyond their effective coercive capacity they lacked both intimate knowledge of contextual conditions and internal political legitimacy. To fill the intellectual and political gaps they incorporated the chiefs and the non-chief educated elites into the dominant ruling coalition. Political cooperation between the ‘triple ruling elites’ enabled them to reform indigenous organizations of chieftaincy into accountable developmental agents of the colonial state.

It should be noted that British government officials could not have bridged the communication and political gaps identified in the dominant ruling coalition if the ideas of the chiefs and their subjects had remained the same as at the critical juncture of colonial state formation. Ideational change among the chiefs and their subjects, through formal education, did matter in enabling British government officials to support endogenous processes of institutional change. Historical institutionalists should pay attention to ideational change among actors who initiated critical junctures of institutional development to explain endogenous sources of institutional change (Blyth 2002; Lieberman 2002).

The analysis also shows that the capacity of the stool land administration system to produce public revenue for local community development is dependent on the commitment of government, chiefs and citizens to transform the informal customary institutions formal-legal institutions. Chiefs gradually realized that “the old and ancient customs which had been found incompatible with the present state of affairs” should change to make it possible for them to “march with the times”. It was clear to them that informal institutions of customary law are not supportive of the governance principles of transparency and accountability. The chiefs and their subjects therefore sought help from British Government officials to provide the means for codifying the ancient customary laws. In other words, the Chiefs advocated the need for a transition from their ancient informal-legal rules to modern formal-legal institutions of administration. It is not surprising that the chiefs took the initiative to design the 1927 Native Jurisdiction Ordinance and also establish Provincial Councils of Chiefs that helped them stem the tide of political conflicts with their subjects. The institutional reforms initiated by the chiefs to protect their

organizations from extinction have played a significant role in enabling the survival of chieftaincy. The crucial point is that a transition from informal rules of customary law to formal-legal institutions is inevitable for the delineation of transparent mandates, rewards, and sanction mechanisms in the administration of chiefs. Without formal-legal institutions there cannot be an effective democratic system of accountability.

Finally, the analysis suggests that citizens are more likely to strongly demand and enforce accountability in chieftaincy administration if they are made to invest economic resources in chieftaincy administration. We saw that the demand by the subjects of chiefs for interest representation and accountability in chieftaincy administration was largely influenced by the annual direct taxes collected by chiefs from their subjects. The maxim of 'no taxation without representation' soon caught up with the traditional ruling elites. It is unlikely that citizens will strongly demand accountability from their chiefs if the chiefs make no economic or political demands on their subjects. In the absence of economic and political incentives to demand accountability from chiefs, what remain are cultural motivations. We shall later see that the termination of the functions of chiefs in revenue mobilization through direct taxation has led to a general lack of interest among citizens to demand accountability in chieftaincy administration. Cultural motivations have not been found to be appropriate incentives for demanding accountability from traditional rulers. The developmental potential of chieftaincy and communal land ownership is intricately linked to the economic and political interest of government and citizens.

## Chapter 6

### **Reproduction of the Traditional-Federal State in Ghana, 1948-1957: The Politics of Nationalism, Electoral Democracy and Federalism**

The whole institution of chieftaincy is so closely bound up with the life of our communities that its disappearance would spell disaster. Chiefs and what they symbolise in our society are so vital that the subject of their future must be approached with the greatest caution (*Coussey Committee for Constitutional Reform, 1949: paragraph 36*).

This is a critical time for the Gold Coast. ...The Gold Coast is about to make a great constitutional advance. The world...is asking whether the people of the Gold Coast have the capacity and the determination to shoulder their new responsibilities and undertake their complex task of building up and carrying on a good government under a new constitution (*Governor Sir Charles Arden Clarke, 1949-1957, Speech in Legislative Council, 19 January, 1950*).

#### **Introduction**

Here I discuss how the legacies of the traditional-federal state were renegotiated by Ghanaian political elites, from 1948-1957, to set the pattern for the current constitutional bifurcation of state authority between chiefs and government over land administration. Ghanaian political elites separated the unified authority of Chiefs and Government in the local government system and in the dominant ruling coalition to return the traditional-unitary state to the path of traditional-federalism. Chiefs retained control over stool land ownership but they lost the transparent and accountable formal-legal institutions of the local government system. It would thereafter become more difficult for government, state agencies, chiefs and citizens to ensure transparency and accountability in stool land administration. Theoretically, the politics of reversing the institutional choices that created the traditional-unitary state sits uncomfortably with institutionalists who tend to privilege the role of institutions over human agency. I argue that the role of human agency in the politics of institutional creation does not support the view that once a particular institutional option is selected, it becomes progressively more difficult to return to the initial point. Political institutions persist because of the dynamics of power relations that underly them, and not because of the self-reinforcing role of institutions.

The chapter is divided into five sections. In section 6.1, I discuss the 1948 political riots that accelerated the transition from colonialism to political independence. In section 6.2, I consider some key state reform ideas provided by a three-member all-British Commission of enquiry into the 1948 political riots. In section 6.3, I discuss the two critical political settlements reached by the 39-member all African Coussey Committee for Constitutional Reform. In section 6.4, I discuss the political conflicts and settlements between Chiefs and non-Chief ruling elites over the integration of chieftaincy into the Ghanaian state. Section 6.5 concludes the chapter by emphasizing that the legacies of the critical juncture of state formation do matter in shaping the politics of state development.

### **6.1 The 1948 Political Riots: Cocoa Disease and Nationalist Politics**

The turbulent political crisis that shaped the road to Ghana's independence in 1957 has received extensive research attention from scholars (Apter 1955; Austin 1964; Crook 1986; Killingray 1983; Rathbone 1968, 2000a). I will therefore not delve deeply into it but only outline the nature of the crisis of rule and how it shaped subsequent political events of state-making by Ghanaian political elites.

In the late 1930s, a viral disease called the 'swollen shoot disease' began to attack cocoa farms in the Gold Coast. There was no known cure for the disease and the golden basket of cocoa was faced with the possibility of total destruction. By 1945, the swollen shoot disease was spreading at an alarming rate and the Government was forced to invoke its powers to adopt the unpopular policy of cutting-out diseased cocoa trees with or without the consent of cocoa farmers. In the face of strong opposition from cocoa farmers, the Government persuaded Chiefs to help implement the policy of cutting-out diseased cocoa trees. In the Ashanti region, the Ashanti Confederacy Council passed its own swollen shoot disease control ordinance but "opposition from farmers was so great that disease control had to be stopped."<sup>199</sup>

Generally, as opposition to the cutting-out policy mounted, the Chiefs – many of who were cocoa farmers and leaders of farmers associations (Austin 1964; Hill

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<sup>199</sup> Ashanti Confederacy Council (ACC) Minutes record (in Austin 1964:60, note 23).

1963) – and the non-chief African political elite withdrew their support for the unpopular Government policy of cutting-out diseased cocoa trees. To some extent, opposition to the cutting-out of diseased cocoa trees “was largely politically-inspired” by African political elites.<sup>200</sup> Opposition to the policy was also influenced by the failure of the Cocoa Research Institute (CRI) to convince cocoa farmers, Chiefs, and non-chief African political elites about the efficacy of the measures adopted to combat the disease. For instance, the Ashanti Confederacy Council travelled to the CRI to see what scientific measures could be adopted to deal with the crisis, but they were not provided convincing answers.<sup>201</sup> The Chiefs therefore supported the opposition to the cutting-out of their cocoa trees. This affected the cordial political relations between Government and Chiefs (Austin 1964).

In August 1947, Dr J. B. Danquah – who had been part of the 1934 delegation to England to demand constitutional reforms and financial support for Chieftaincy administration – now led some of his companions to form a nationalist movement called the United Gold Coast Convention (UGCC) to demand a bigger role for educated non-chief elite in the governance of the country. Interestingly, the UGCC also argued that (a) the contact of chiefs and government is unconstitutional, and (b) the position of the chiefs on the Legislative Council is anomalous.<sup>202</sup> It is important to emphasize that the demand of the UGCC was not for the immediate decolonisation of the Gold Coast, but full self-government for “the people and their chiefs in the shortest possible time” (quoted from Austin 1964:53).

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<sup>200</sup> Report of the Commission of Enquiry into the Swollen Shoot Disease of Cocoa in the Gold Coast, Appendix 11A, in Annual Report of the Gold Coast, 1948, p.152).

<sup>201</sup> ACC Minutes, February 1948 in Austin (1964:62-3). Austin presents an interesting dialogue between the Ashanti Chiefs and Dr C. J. Voelcker, Director of the CRI: “*Berekumhene*: How do you prevent the mealybugs from falling on healthy trees when the infected ones are being cut? *Answer* [by *Dr Voelcker*]: One healthy and strong man pulls the tree during the cutting, and it is made to fall away from healthy trees. *Berekumhene*: Don’t you see that these mealybugs drop from the leaves at every stroke of the axe and the chances are many that they fall on healthy trees? *Answer*: Yes, I do agree with you. *Berekumhene*: Do you realise that the wind can blow the mealybugs to healthy trees? *Answer*: yes. It is possible. *Berekumhene*: What is the use of cutting then? ... [Dr Voelcker and the Chiefs then visit a cocoa farm for further education] *Dr Voelcker*: We have seen what happens with swollen shoot disease when it is not controlled. This afternoon we are going to walk through farms where the disease is under control by cutting off diseased trees. The Ashantis are known to be intelligent. You see things with your own eyes; this farm was attacked nine years ago, but it has been kept under control. *Assamanghene*: Has any of these trees ever been infected? *Answer*: One tree was infected, but was cut off 5 years ago. *Assamanghene*: (Coming along with a pod) Aren’t these mealybugs I see on the pod? *Answer*: Yes, definitely they are. *Assamanghene*: And you say these trees are not infected?” Surely, the intelligent Ashanti chiefs saw things with their own eyes and afterwards became extremely suspicious of the CRI.

<sup>202</sup> UGCC, Working Committee, Minute Book, entry for 20 September, 1947, in Austin (1964:53).

The return of Kwame Nkrumah from London to the Gold Coast in December 1947, to take up the position of UGCC General Secretary brought new radical ideas into Gold Coast politics. In addition to the widespread opposition of cocoa farmers and Chiefs to the swollen shoot disease cutting-out policy, the UGCC also took advantage of discontent among ex-servicemen about post-war resettlement packages, the effect of post-war economic hardship, shortage of goods in shops, and sharp price increases. In February-March 1948, the UGCC, energised by the fresh radical ideas of Kwame Nkrumah, was actively involved in the widespread organization of violent demonstrations, trade boycotts, and looting of merchant shops. The violent activities “cripple[d] the forces of imperialism”,<sup>203</sup> and shocked the world (Apter 1955). Government suspended the cocoa ‘cutting-out’ policy. The violence claimed 29 lives, and 266 people were seriously injured.<sup>204</sup> It was this violent nationalist politics that threw the country into a crisis of rule and hastened decolonization. The top 20 issues that caused the 1948 riots are presented in Table 15.

**Table 15: Top 20 issues that influenced the 1948 riots**

No.	Matters Discussed in Memoranda	References as cause of riots	Ranking
1	High prices and distribution of goods	42	1 <sup>st</sup>
2	Swollen shoot and cutting out of cocoa trees	39	2 <sup>nd</sup>
3	Constitutional development and self-government	27	3 <sup>rd</sup>
4	European settlement and allegations of racial discrimination	22	4 <sup>th</sup>
5	Africanisation of the civil service	20	5 <sup>th</sup>
6	Education	20	5 <sup>th</sup>
7	The disturbances	19	6 <sup>th</sup>
8	The boycott	16	7 <sup>th</sup>
9	Industrial development	15	8 <sup>th</sup>
10	Political position of the Chiefs	15	8 <sup>th</sup>
11	Emergency powers and detention of six men	14	9 <sup>th</sup>
12	Ex-servicemen’s grievances	13	10 <sup>th</sup>
13	Gold	12	11 <sup>th</sup>
14	Agricultural development	12	11 <sup>th</sup>
15	Local government; Native administration finance; Position of District Commissioners	12	11 <sup>th</sup>
16	Individual grievances connected with disturbances	12	11 <sup>th</sup>
17	Trading discrimination	9	12 <sup>th</sup>
18	Land acquisition	9	13 <sup>th</sup>
19	Public relations and the press	8	14 <sup>th</sup>
20	Cocoa Marketing Board	6	15 <sup>th</sup>

Source: The Watson Commission, 1948, Analysis of 187 Memoranda, Appendix 5.

<sup>203</sup> Kwame Nkrumah (1949:3), ‘What I mean by Positive Action’ (see also Metcalfe, No. 502).

<sup>204</sup> Report of the Watson Commission, Appendix 8, “Casualties Occurring During the Disturbances”.

In Table 15, it can be seen that out of the top 20 issues discussed by individuals and groups in the memoranda submitted to the Watson Commission, the number of references made to the position of Chiefs in the ruling coalition as grounds for the riots ranked 8<sup>th</sup> while references that concerned the administration of Chiefs in the local government system ranked 11<sup>th</sup>. Grievances concerning the communal land tenure system – specifically, issues about land acquisition – ranked 13<sup>th</sup>, and thus of less concern to the Gold Coast population. The successful organization of the crisis of rule by nationalists was largely made possible by the post-war effect on economic conditions, the economic effect of the swollen shoot cocoa disease in local communities, and lack of employment of the educated youth in the civil service. Governor Guggisberg had been proved right that the annual production of 4000-5000 unemployed youth by the educational system would certainly “lead to disaster in the not distant future” because “they fall a natural victim to discontent and consequently to unhappiness.”<sup>205</sup> The nationalists used the unemployed educated youth to their political advantage (Adu-Boahen 2000; Austin 1964).

Richard Rathbone (1968:209) argued that the inability of the country to successfully manage “the worst civil disturbances ever seen in the Gold Coast” was due to a period of weak governments that began from mid-1947 until the end of 1949.<sup>206</sup> The capacity of a government to deal with political crisis is crucial for political stability. It is doubtful whether the existence of a strong colonial government would have been enough to effectively deal with the global political support for decolonization and the harsh economic conditions that were unleashed in the aftermath of the Second World War (Adu-Boahen 2000). From 1951 to 1957, during a period of strong government, the political crisis did not vanish but manifested in diverse forms (Austin 1964; Nkrumah 1957). For instance it took many years for the swollen shoot disease to be brought under control. Governor Sir Charles Noble Arden-Clarke, who presided over the transition of the Gold Coast into independence, between 1949 and 1957,

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<sup>205</sup> Governor Guggisberg. Address to Legislative Council, 6 March, 1924 (Metcalf, No. 467).

<sup>206</sup> When Governor Alan Burns left in June 1947, caretaker governments held the fort until the formation of a stable government in 1949. Rathbone (1968:212) argues that “The caretaker government had scrupulously refrained from taking any steps that might involve the new Governor in any policy which he might not approve of or could not easily reverse.” In fact, Sir Gerald Creasy, a new Governor who arrived in January 1948, was immediately plunged into the riots of February-March 1948. Governor Sir Creasy fell sick within a month of his arrival and he went back to London on sick leave, never to return again. Governor Sir Charles Arden-Clarke arrived on 11 August, 1949.

commented that “During that time we lived in an atmosphere of perpetual crisis” (Arden-Clarke 1958:35). The key argument is that the explanation of the success of the 1948 organized riots should go beyond the analysis of the capacity of ‘strong’ or ‘weak’ government in dealing with the crisis. It is important to examine the nature of the exogenous political variables that interacted with favourable antecedent political conditions to shape the crisis of rule.

## **6.2 The Watson Commission Reform Proposals: Exogenous Ideas?**

Following the 1948 political crisis, a three-member all-British Commission chaired by Mr. Aiken Watson was established to enquire into the underlying causes of the political disturbances; and to make recommendations for reform. The Watson Commission pointed out two major causes of the political crisis. First, it pointed out that “the 1946 Constitution was outmoded at birth” because it had been “conceived in the light of pre-war conditions.”<sup>207</sup> Second, that there had been “A failure of the Government to realise that with the spread of liberal ideas, increasing literacy and a closer contact with political developments in other parts of the world, the star of rule through the Chiefs was on the wane.”<sup>208</sup> I shall focus on the Watson Commission’s reform proposals concerning, first, the role of chieftaincy in the state, and second, the communal land tenure administration system.

The Watson Commission argued that the chiefs should have a limited role to play in the future political and economic development of the country otherwise it would constrain development. In their own words, the Commission stated:

We are unable to envisage the growth of commercialisation in the Gold Coast with the retention of native institutions... Our sole concern is to see that in any new constitutional development there is such modification as will prevent existing institutions standing in the way of general political aspirations.<sup>209</sup>

From the historical analysis of the process of state-building in the Gold Coast, it is difficult to see how the retention of native institutions had constrained development. The Watson Commission’s opposition to the role of chieftaincy in the state had

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<sup>207</sup> Report of the Watson Commission, paragraph 101.

<sup>208</sup> Report of the Watson Commission, paragraph 20 (iii).

<sup>209</sup> Report of the Watson Commission, paragraph 113.

received support from some influential African political elite. The chairman of the UGCC, Mr A. G. Grant (a timber merchant), had told the Commission:

We were not being treated right, we were not getting the licences for the import of goods, also we were not pleased with the way our Legislative Council handled matters, because we had not the right people there. ...The chiefs go to the Council and approve loans without submitting them to the merchants and tradesmen in the country. Thereby we keep on losing.<sup>210</sup>

During the public hearings of the Watson Commission, stronger opposition to the role of Chiefs in the Legislative Council had come from youth associations in many parts of the country (Austin 1964; Rathbone 2000a). For instance, the Ashanti Youth Association (AYA) stated its opposition to the role of the Chiefs on the Council as follows: “The public vehemently disapproves the representation of Chiefs at the Legislative Council...we want a complete upheaval of the present Constitution of the Gold Coast Legislative Council...the removal of our chiefs from the council.”<sup>211</sup> However, the Watson Commission realized that the position of Chiefs on the Legislative Council is “a matter upon which Africans themselves are not in agreement.”<sup>212</sup> Therefore, in the Watson Commission’s reform proposals concerning the composition of the Legislative Council, “the door [was] left open to any Chief to climb the political ladder to a seat in the legislative chamber.”<sup>213</sup> The position of chieftaincy in the state was a major political issue that was left for African political elites to decide for themselves. The Commissioners conceded:

We found great difficulty in getting any universal agreement on the precise place to be occupied by the Chief in any new political system. In our discussions we endeavoured to press the matter to its logical conclusion without result. There appears to be no doubt that so long as he occupies the Stool the Chief partakes of some measure of divinity. But it is a divinity with territorial limitations. Equally it is a divinity he loses the moment he is destooled.<sup>214</sup>

In the opinion of the Watson Commission, the middle course suggested by “Africans with modern political outlook”<sup>215</sup> was that “[the Chief] must either remain on his

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<sup>210</sup> Minutes of Evidence submitted by Mr A. Grant before the Watson Commission (Austin, 1964:51).

<sup>211</sup> Memorandum presented by the AYA to the Watson Commission, (in Austin, 1964:57).

<sup>212</sup> Memorandum presented by AYA to the Watson Commission.

<sup>213</sup> Report of the Watson Commission, paragraph 114.

<sup>214</sup> Report of the Watson Commission, paragraph 109.

<sup>215</sup> Report of the Watson Commission, paragraph 110.

Stool and take no part in external politics or forgo the office – he should not attempt a dual role.”<sup>216</sup> Here lies the root of the 1992 constitutional provision (Article 276(1)) that states that “A Chief shall not take part in active party politics; and any chief wishing to do so and seeking election to Parliament shall abdicate his stool or skin.” This is one of the legacies of the project of traditional-federal state building. It clearly illustrates the historical institutional argument concerning the path dependence of current institutional configurations and political outcomes. Certainly the Ghanaian state is an historical product of the ideas and power of diverse political interests. The position of chieftaincy in the state was a matter that became the most hotly debated issue in the Gold Coast. I shall return to this later.

The Watson Commission proposed that chieftaincy and local government structures should be separated and “the administration of local government in relation to purely local affairs should be entrusted to Local Authorities.”<sup>217</sup> Whatever is meant by ‘purely local affairs’ was not defined. The Commission however proposed that a specified proportion of non-Chief adult males should be represented on the Local Authorities. The existing Native Authorities had appropriated the management of stool land revenues. Therefore, as we shall see, the separation of chieftaincy from local government structures would have far reaching consequences on the politics of stool land revenue administration between chiefs and government.

Perhaps due to the post-war economic hardship across the country, the Watson Commission also proposed the abolition of the direct annual taxes imposed by Native Authorities. It is important to note that annual deliberations by members of local communities over local taxes had shaped not only their participation in local government but also the nomination of non-chiefs to the State Councils. The abolition of direct taxation was therefore likely to have an effect on bottom-up interest in local democracy.

The Watson Commission recognized that “problems of land tenure could not strictly be described as a proximate cause of recent disturbances.”<sup>218</sup> In Table 15 above, we

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<sup>216</sup> Report of the Watson Commission, paragraph 110.

<sup>217</sup> Report of the Watson Commission, paragraph 83.

<sup>218</sup> Report of the Watson Commission, paragraph 388.

saw that out of the 187 memoranda received from the general public, there were only 9 references made to land matters – specifically matters of land acquisition – as a cause of the disturbances. The Watson Commission however remarked:

The general fear of the African...is that if alienation of tribal lands continues unrestricted there is a great danger that a landless peasantry may result. ... We are of the opinion that some positive steps should now be taken to prevent the possibility of an avaricious chief, with the assent of venial elders, effectively alienating tribal lands for personal gain or some temporary enrichment of the tribe. On the other hand if industrialisation of the country is to succeed to any extent accompanied by the expansion of commerce, not only must security of tenure be given to those who invest capital, but land which is alienated must become an asset capable of providing real security for borrowed capital.<sup>219</sup>

In the opinion of the Watson Commission, since the issue of land tenure is intimately connected with future development, it was important that fundamental land tenure administration reforms should be undertaken to ensure the following: “(i) securing that the alienation of tribal lands shall only take place for approved purposes; (ii) that the consideration passing on such alienation shall accrue for the benefit of the community selling and (iii) securing to a purchaser on these terms an indefeasible title.”<sup>220</sup> The Commission also proposed that a Land Court should be established to deal with cases of land litigation, approve the purchase price of 99-year leases, and issue a Certificate of indefeasible leasehold title to land purchasers.

The Commission noted that not every form of stool land alienation required intervention by the judiciary. Therefore it recommended that the proposed customary land tenure administration reforms should “exclude what may be termed customary alienation where the interest in the land passing to the grantee is limited to user for a specific purpose for a term not exceeding 14 years with no right of renewal.”<sup>221</sup> This implied that the acquisition of land for long term projects such as cocoa farming, the backbone of the Gold Coast economy, was to be removed from the control of chiefs. We shall see that the removal of stool land administration from the chiefs is not a matter that the Ghanaian political elites have been willing to entertain.

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<sup>219</sup> Report of the Watson Commission, paragraphs 391-2.

<sup>220</sup> Report of the Watson Commission, paragraph 394.

<sup>221</sup> Report of the Watson Commission, paragraph 394.

The Watson Commissioners had recognised that the informal nature of ‘customary Native Law’ administered by the Native Courts were in a “state of uncertainty” and needed to be formally codified and fused into the common laws of the country. The general concern about the role of chiefs in stool land administration was that the unwritten rules of customary law had made it difficult for members of local communities to hold chiefs accountable through the formal-legal rules that had been negotiated to govern chieftaincy administration. The uncertain nature of informal rules of customary law was one of the key reasons why the chiefs had demanded in 1927 that government should help to provide the means for codifying the rules of customary law. We shall see that this is a problem that has continued to plague the effectiveness of the Audit Service and the Courts to horizontally hold chiefs accountable in the use of stool revenue. The uncertainty of informal rules of customary law continues to undermine the efforts of horizontal state agencies to ensure transparency and accountability of chieftaincy administration.

The reform proposals made by the Watson Commission required the approval of the British Government in England as well as the approval of the people of the Gold Coast if they were to be implemented. I discuss below how these political constituencies of power received the proposed reform ideas.

### **6.2.1 The British Government’s Response to the Watson Commission**

In a period of political crisis, British Government officials in England, as well as in the Gold Coast, were very cautious in dealing with matters of chieftaincy and land tenure administration reform. These were highly inflammable political matters. The British Government largely agreed with the proposed reforms concerning the structure of central and local government. The British Government however opposed the view that the annual local taxes imposed by Native Authorities on local communities should be abolished because it would be “inconsistent with the process of decentralisation and the building up of a local sense of responsibility.”<sup>222</sup> Furthermore, the ideas of the Watson Commission concerning the reform of customary land administration were rejected by the British Government. The British

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<sup>222</sup> Statement by His Majesty’s Government on the Report of the Watson Commission, p.7.

Government argued that there were legislative regulations in the Gold Coast that adequately catered for the concerns raised about the developmental potential of customary land administration. The British Government pointed out that the Joint provincial Council of Chiefs had taken steps to resolve the remaining problems. The fears of the British Government to support land tenure administration reforms can be seen from the following statements made by His Majesty's Government:

The Gold Coast Government have long recognised the need for security of tenure, for the protection of tribal lands from alienation, for some form of registration of titles and for the settlement of tribal and private boundaries. The subject is a highly technical one and must be handled with the utmost care since...the public is intensely suspicious of any action taken by the Government with regard to land. ...The recommendations with regard to the control of alienation will be considered by the Gold Coast Government; but it must be pointed out that all customary alienation would have in any case to be excluded from them, and not merely customary alienation for periods not exceeding fourteen years...since customary alienation is not limited to any term of years.<sup>223</sup>

The position of the British Government that all customary alienations would have to be excluded from the proposed land tenure administration reforms meant an outright rejection of the reform proposals made by the Watson Commission. As I have already shown in previous chapters, the issue of land tenure administration reform in the Gold Coast was more than a 'highly technical' issue. It had been a highly political issue that threatened the political stability of the country whenever reform attempts were initiated. The British Government's rejection of the customary land tenure administration reforms proposed by the Watson Commission was a safer course of political action during a period of unprecedented political crisis.

The views of the British Government and of the Watson Commission had to be accepted by the people of the Gold Coast before they could be implemented. The British Government, the chiefs, and the new African nationalist movements agreed that an all-African Committee for Constitutional Reform should be established to examine the reform proposals. I discuss next the political settlements reached by the all-African Committee for Constitutional Reform, commonly known as the Coussey Committee. I shall focus on the political settlements concerning chieftaincy-government future relations in the state and stool land administration.

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<sup>223</sup> Statement by His Majesty's Government on the Report of the Watson Commission, p.18.

### 6.3 The Coussey Committee Political Settlements: Endogenous Ideas?

In December 1948, the 39-member all-African Committee,<sup>224</sup> chaired by Justice J. H. Coussey, was established to examine the reform proposals made by the Watson Commission, the British Government's statement on the proposals, and advise on the question of constitutional reform (Arden-Clarke 1958).<sup>225</sup> In August 1949, the Coussey Committee completed its work. Their political settlements, with slight modifications, became the 1951 Coussey Constitution. It was the first constitution designed by Africans in the Gold Coast. The Coussey Committee did not make any significant changes to the reform ideas proposed by the Watson Commission. However, the political agreement reached by the Committee over the administration of stool land revenue defined a new path that has lasted to the present.

Before I examine the relevant political settlements reached by the Coussey Committee, it is important to first examine the composition of the Committee which has been described by some scholars as “packed with chiefly representatives” (Crook 1986:84, note 22). In fact, the Committee was made up of 9 Chiefs and 30 non-Chiefs.<sup>226</sup> It included 14 members of the Legislative Council and six leading members of the UGCC. Kwame Nkrumah was not invited into this Committee

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<sup>224</sup> The Coussey Committee was not made up of 36 members (Gocking 2005:87, Adu-Boahen 2000:164, Ward 1967:336) or 40 members (Apter 1963:176, note 4; Austin 1964:81). The 39-member Committee comprised the following people: Mr Justice J. H. Coussey, Rev. G. R. Acquah, Hon. B. D. Addai, Mr. Asare Adjabeng, Nana Adjaye Bonsra, Mr. E. Akufo Addo, Mr. J. P. Allotey Hammond, Hon. Nana Amanfi III (C.B.E), Hon. E. O. Asafu-Adjaye, Hon. Dr. I. B. Asafu-Adjaye (M.B.E), Hon. Rev. C. G. Baeta, Mr. K. A. Bossman, J. A. Braimah (Kabachewura), Hon. Dr. J. B. Danquah, Mr. M. Dowuona, Canon C. H. Elliott, Mr. W. G. Essien, Mr. J. H. Gambrah, Hon. Nana Kwame Gyebi Ababio, Mr. George A. Grant, J. A. Karbo (Lawra Na), Mr. Cobina Kessie, Hon. Nene Azu Mate Kole, Mr. A. L. K. Menka, Hon. G. E. Moore, Hon. Dr. F. V. Nanka-Bruce (O.B.E), Hon. E. O. Obetsebi Lamptey, Nana Ofori Atta II, Hon. N. A. Ollenu, Hon. E. C. Quist (O.B.E), Mr. J. A. A. Salaam, Mr. Magnus Sampson, Mr. W. E. G. Sekyi, Hon. C. E. Tachie-Menson (O.B.E), Yakubu Tali (Tali Na), Mr. W. W. Taylor, Hon. Nana Sir Tsibu Darku IX (Kt., O.B.E), Mr. S. Wood, Mr. J. T. N. Yankah (M.B.E), and Mr. N. Yenli (Report of the Committee on Constitutional Reform (hereafter the Coussey Committee) presented to the Governor, 1949, Appendix III).

<sup>225</sup> Concerning the Watson Commission reform proposals, the terms of reference of the Coussey Committee was to examine paragraph 122, Chapter V Report that concerned the powers of Local Authorities, Regional Councils, Town Councils, the Legislative Assembly, the Executive Council, and the Governor. The Coussey Committee however argued that since paragraph 122 of the Report was based on the preceding discussions under Chapter V, it was more appropriate to examine the entire issues of Constitutional and Political reform discussed under that chapter.

<sup>226</sup> David Apter also described the composition of the Committee made up of “a high proportion” of members who “either were members of royal families or had been in long association with the outstanding chiefs” (Apter 1963:176). Crook (1986) made reference to David Apter's description of the composition of the Committee. It is difficult to understand why the Committee should rather not be viewed as packed with non-chiefly urban representatives.

because the British Government perceived Nkrumah to be affiliated with communist networks (Austin 1964; Nkrumah 1957; Report of Watson Commission 1948). The 39 members of the Coussey Committee were however the *crème de la crème* of the African political elite in the Gold Coast at the time. Now I move on to discuss their political settlements concerning the constitutional organization of the state.

The Coussey Committee unanimously rejected the Watson Commission's negative view about chieftaincy and its role in the future development of the country. In what was to become a famous statement for scholars, Chiefs, and post-independent constitutional makers, the Coussey Committee stated its strong support for the retention of chieftaincy in the African state with the following words:

The whole institution of chieftaincy is so closely bound up with the life of our communities that its disappearance would spell disaster. Chiefs and what they symbolise in our society are so vital that the subject of their future must be approached with the greatest caution. No African of the Gold Coast is without some admiration for the best aspects of chieftaincy, and all would be loath to do violence to it any more than to the social values embodied in the institution itself. Criticisms there have been, but none coming from responsible people whom we have known or met is directed towards the complete effacement of chiefs.<sup>227</sup>

The strong support of African political elites for the retention of chieftaincy in the state cannot simply be explained by pointing to the composition of the Coussey Committee as allegedly packed with Chiefs or people with royal connections to chieftaincy (Apter 1963; Crook 1986). This is because radical non-chief political elites like Kwame Nkrumah, who was not a member of the Coussey Committee, also strongly supported the consolidation of chieftaincy (Nkrumah 1957, 1961). The basis of widespread support for the institution of chieftaincy in modern Ghana is not a matter that I shall delve into in the study. Other scholars have examined the reasons for the resilience and increasing power of chieftaincy in Ghana (Logan 2008, 2011; Owusu 1996). However, I wish to emphasize that researchers have to go beyond the recent processes of democratization to examine exactly how the whole organization of chieftaincy has been, and continues to be, so closely bound up with the life of members of local communities since the pre-colonial period (Owusu 1989).

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<sup>227</sup> Report of the Coussey Committee, paragraph 36.

The Coussey Committee unanimously agreed that Chiefs should be retained in the legislature. However, there was strong disagreement over whether the Chiefs should be retained within a unicameral legislature or within the Second Chamber of a bicameral legislature. This was the only issue which the Coussey Committee decided to settle by using the rule of secret voting. The secret voting revealed that the majority of 20 to 19 members supported the creation of the bi-cameral legislature to accommodate the Chiefs in the Second Chamber. The 19 members who disagreed argued that their alternative preference should be outlined in the final report to the British Government. I shall later discuss the conflict and negotiations that emerged over the position of Chiefs in the legislature.

The Coussey Committee unanimously agreed with the Watson Commission that organizations of chieftaincy should be separated from the local government system. In the opinion of the Coussey Committee, if the State Councils of Chiefs are separated from the administration of Local Authorities it would promote democratic participation of the majority of the people in local government. The State Councils of Chiefs were however to “retain their power to declare native customary laws, and to settle constitutional disputes connected with the stools.”<sup>228</sup> The formal institutions of accountability that governed local government agencies no longer covered the State Councils. While the Audit Service Department would continue to audit the public accounts of State Councils, the revenue and expenditure of Chiefs were no longer subject to government approval. The new political settlement took the state backwards to the era of strong traditional-federalism where organizations of chieftaincy existed as semi-autonomous entities beyond the direct reach of central government. In the post-colonial era, chiefs and the non-chief political elites would negotiate new constitutional rules that limit the authority of government to reform institutions of chieftaincy, including those governing stool land administration.

One of the legacies of the Coussey Committee political settlements is the recurrent theme of whether or not to maintain the separation of chieftaincy from the local government system in the dynamic political process of state building. This theme is also at the core of how to develop an effective and efficient indigenous system of

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<sup>228</sup> Report of the Coussey Committee, paragraph 83.

stool land administration in local communities (Quan et al. 2008; Toulmin et al. 2004). It is therefore appropriate that I highlight the reasons given by the Coussey Committee for separating chieftaincy from the local government system. The Coussey Committee provided four reasons that informed their settlement:

[First] The existing system of local government has proved unable to meet the requirements of an efficient and democratic administration. This failure has arisen from the narrow basis of representation in the Chief's Councils. The Head, the Chief, is chosen from members of a group or groups who by tradition are heirs to the stool in question, and the Councillors, with a few exceptions, are appointed by virtue of certain social and historical reasons. The addition, by nomination, of a few other persons from outside these traditional interests tends to accentuate rather than to weaken the privileged position of the overwhelming majority of the traditional members of the Councils. A second defect is the predominance of illiteracy among members, which is a serious handicap under modern conditions. In the third place there is the large size of the councils, especially in relatively small states. They are, therefore generally expensive and unwieldy, and their leisureed procedure, due in part to illiteracy, makes them still more cumbrous. A fourth defect of the existing system is the lack of a sufficient number of suitably trained and qualified personnel on the staff of the Native Authorities.<sup>229</sup>

From the above reasons, it can be inferred that non-chief political elites, chiefs, and the general population accepted the view that organizations of chieftaincy were not the appropriate vehicles to meet the “popular cry throughout the country for universal adult suffrage”<sup>230</sup> in the election of local and national representatives of government. The two new political parties that had emerged in the Gold Coast (i.e. the UGCC and CPP) maligned the organizations of chieftaincy with British imperialism in the ideological battle to wrestle political leadership (Amamoo 1958; Nkrumah 1957). Particularly, local leaders of the CPP orchestrated “spasmodic waves of destoolment of chiefs which swept the country between the period 1949 to 1952” (Amamoo 1958:99). In the moment of national frenzy for electoral democracy, “The chiefs, therefore, felt that their position was at stake; and their institutions in danger of being abolished” (ibid). It is not surprising that “These Chiefs were not only aware of the limitations of the present system but were quick to respond to the suggestions put forward for reform.”<sup>231</sup> Thus, the separation of chieftaincy from the local government system was supported by all interests.

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<sup>229</sup> Report of the Coussey Committee, paragraphs 70-73.

<sup>230</sup> Report of the Coussey Committee, paragraph 42.

<sup>231</sup> Report of the Coussey Committee, paragraph 42.

The decision of the Coussey Committee to separate chieftaincy from the local government system, while maintaining the traditional role of the State Councils in local communities, was informed by the widespread view that chieftaincy exists to perform functions that are different from the promotion of electoral democracy. This view persists among Ghanaians. The general view that organizations of chieftaincy perform functions other than electoral democracy could help explain why chieftaincy in Ghana consistently enjoys strong support among citizens (Logan 2008, 2011). Moreover, the failure of the experiment of electoral democracy in Ghana, from 1951 to 1991, has influenced military rulers and the general population to support the re-integration of chiefs into national, regional and local state agencies (Austin and Luckham 1975; Owusu 1986, 1989, 1996). The Joint Provincial Council of Chiefs was renamed the National House of Chiefs in the 1969 constitutional redesign. The National House of Chiefs has played an influential role in the co-optation of chiefs into many state agencies in the attempt to ensure effective governance and political stability. The co-optation of chiefs into state agencies shall later be discussed.

The Coussey Committee did not comment on the land tenure administration reform proposals made by the Watson Commission. The Coussey Committee however realized that their decision to separate chieftaincy from the local government system had implications for stool land revenue administration. Stool land revenues were managed by chiefs through the local government system. The Coussey Committee recommended the sharing of the stool land revenues between the local government agencies and Chiefs.<sup>232</sup> The specific settlement was as follows:

We recommend therefore that in each Local Authority area, by agreement with the traditional authority, a fair proportion of the sums thus collected should be paid to the Local Authority. The actual proportion should be determined *in situ* and will depend on local circumstances and on the amounts involved. The remainder of the money will remain the perquisites of the traditional authority for the maintenances of the positions of the chiefs. In cases of disagreements the Regional Administration should decide the matter. In all cases the local government bodies should act as estate agents for the whole of the revenue accruing to the Stools. This will be necessary as they alone will have the necessary staff for this work.<sup>233</sup>

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<sup>232</sup> Report of the Coussey Committee, paragraph 107(d).

<sup>233</sup> Report of the Coussey Committee, Paragraph 207.

The politics of sharing stool land revenue between chiefs and local government agencies set the pattern of conflict between chiefs and government until political elites arrived at the current 1992 constitutional formula of sharing of stool land revenues. One can see how the nature of the critical juncture of state formation continued to shape conflicts and negotiations between chiefs and government. Following the recommendations of the Coussey Committee, the 1992 Constitutional makers would emphasize that the share of stool land revenues given “to the stool through the traditional authority [is] for the maintenance of the stool in keeping with its status.”<sup>234</sup> Interestingly, because the expenditure of chiefs was no longer governed by formal-legal rules of accountability, there would emerge conflicts between chiefs and development practitioners over how stool land revenues are used (Crook et al. 2007; Quan et al. 2008; Toulmin et al. 2004). The Coussey Committee emphasized that the role of the state in the administration of stool land revenues “should not, however, deprive the Stool of any rights of ownership over their lands.”<sup>235</sup> Chiefs and non-chief political elites ignored the reform proposals put forward by the Watson Commission concerning customary land tenure administration.

I wish to emphasize three key legacies concerning the Coussey Committee political settlements. First, the committee supported the consolidation of stool land ownership and administration. Second, the Committee agreed that stool land revenues should be shared between Chiefs and local government agencies. And, third, the Committee separated chieftaincy from organizations of local government. The legacies of these political settlements have defined the politics of Government-chieftaincy relations in land administration. The failure of Government and chiefs to create new formal-legal rules of accountability to substitute for those that govern the local government system, explains the attempt to create such rules under the 2001-2010 Land Administration Project (LAP). The politics and outcomes of the LAP shall later be discussed. I move on to discuss the conflicts and negotiations between Chiefs and non-chief political elites over the position of Chiefs in the dominant ruling coalition. It was this conflict that shaped the political settlements concerning the separation of chiefs from the Legislature and the Executive, and the negotiation of constitutional rules that insulated chieftaincy from government political interference.

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<sup>234</sup> 1992 Constitution, Article 267(6).

<sup>235</sup> Report of the Coussey Committee, Paragraph 207

## **6.4 Bifurcation of State Authority between Chiefs and Government Concerning Matters Affecting Chieftaincy: 1949-1957**

Notwithstanding the support of Ghanaian political elites for chieftaincy, the process of integrating the chieftaincy into the Ghanaian state did not occur without intense conflict and negotiation between chiefs, non-chief political elites, and British Government officials. I argue that the conflict that shaped state integration of chieftaincy was not influenced by support for or resistance to the retention of chieftaincy in the state. Instead, it was fuelled by non-chief political elites who competed to win the support of chiefs in the battle to capture state power through general elections. The integration of chieftaincy into the Ghanaian state should therefore not be seen as the result of a power struggle between Chiefs and non-Chief ruling classes. I discuss below the manifestations of this conflict and how it led to the bifurcation of state legislative authority between chiefs and government.

### **6.4.1 Chiefs Reject a Second Chamber of Legislature**

When the Coussey Committee submitted its report to the British Government in October 1949, the British Government rejected the creation of a bicameral legislature in support of a unicameral legislature. The key reason for the British Government's rejection of the bicameral legislature is stated by Mr Obitsebi Lamptey, one of the UGCC Legislative Council members who supported bicameralism:

[It] is purely a party reason, for the Labour Government had been clamouring to clip the wings of the Second Chamber in Britain and therefore cannot come to the Gold Coast here and give us a Second Chamber, for if they had done that we all know what the Conservatives would have told them during the last election.<sup>236</sup>

The Labour Government, following its electoral victory in 1945, had led the crusade to reform the House of Lords in England. Crucially, the Labour Government could not afford to pursue a contradictory policy in the Gold Coast when it was seeking re-election in 1950. The strong opposition of British Government officials in the Gold Coast towards the establishment of the bicameral legislature is therefore sufficiently accounted for by external events in England.

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<sup>236</sup> Obitsebi Lamptey, Legislative Council Debates, 1950, Issue 2, Vol. 2, p.269.

However, in the Gold Coast, the non-Chief African political elites were also preparing for their first ever general elections in 1951. The UGCC, led by Dr J.B. Danquah, was campaigning for the creation of a bicameral legislature to accommodate Chiefs in the Upper Chamber. Kwame Nkrumah who had broken away from the UGCC to form the CPP also supported the creation of a bicameral legislature for chiefs. On 20 November 1949, Nkrumah convened what he called the Ghana People's Representative Assembly (GPRA) "to coalesce public opinion against the Coussey Report and to urge the people into effective action" (Nkrumah 1957:113). The GPRA rejected the Coussey Report as "unacceptable to the country as a whole" (ibid); but, interestingly, they approved "a moderate draft constitution of a bicameral legislature (a Senate of chiefs and elders)" (Austin 1964:87).

In late 1949, Kwame Nkrumah and his CPP intensified their campaign of 'Positive Action' leading to lawlessness, violence, and a declaration of a state of emergency. In January 1950, Kwame Nkrumah was arrested, tried and sentenced to three years imprisonment. Between 28 February and 28 March 1950, while Kwame Nkrumah was in prison, the Legislative Council debated and accepted the Coussey Committee constitutional reform proposals, except the proposal for the creation of the bicameral legislature. On 22 March 1950, Dr J.B. Danquah moved the motion for the establishment of the bicameral legislature. Danquah made a very passionate appeal to the chiefs and their representatives to support the motion.

Interestingly, the chiefs were opposed to the creation of a Second Chamber for Chiefs and Elders. The Northern Territories Territorial Council (NTTC) made it clear that if the Legislative Council adopted the bicameral system they would not be interested because the Northern Territories "have not reached a sufficient stage of development to enable them adequately take part in a bicameral system of government."<sup>237</sup> The Ashanti Confederacy Council (ACC) also viewed the creation of a Second Chamber as an attempt to destroy chieftaincy because the Lower House of Commoners has been given power to override the power of their Chiefs in the Second Chamber. The Standing Committee of the Joint Provincial Council (JPC) of

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<sup>237</sup> Acting Chief Commissioner of Northern Territories, Legislative Council Debates, 1950, Issue 2, Vol. 2, p.282. The Chiefs of the NTTC had stated their position at a conference of Chiefs held in Kumasi. The Commissioner, corroborated by other Chiefs in the Legislative Council, was only presenting the position of the NTTC.

Chiefs also recommended to their members to accept a unicameral legislature<sup>238</sup> because “a Second House could never have any power but would be subordinate to the Lower House.”<sup>239</sup> Nana Sir Tsibu Darku IX, a member of the JPC, questioned the motive of the UGCC and other sponsors of the bicameral system as follows:

In the press, on the platform and in the highways and byeways, it has been suggested and re-echoed by the very people who clamour for Two Houses that Chiefs do not and should not take part in politics. As recently as 23<sup>rd</sup> December, 1949, the ‘*Ghana Statesman*’ the organ of the United Gold Coast Convention, under the heading ‘Chiefs in Politics’, categorically objected to Chiefs taking part in politics. Then the question arises, if Chiefs are not to take part in politics, what would be the role of the Chiefs in an Upper House? Would they be there merely for ceremonial purposes?<sup>240</sup>

The Chiefs opted to be part of a more powerful unicameral legislature even if it meant sitting with their subjects or commoners. After intense debate on the matter, the motion for the creation of a bicameral legislature was put to a vote. By a majority of 21 to 5, with one abstention, the motion was lost. Not a single Chief voted in favour of the motion. A highly disappointed Dr. J.B Danquah not only accused the Government of influencing the minds of the Chiefs; Danquah also ironically blamed the lack of support from Chiefs on Kwame Nkrumah’s “unfortunate” support for the motion.<sup>241</sup> Nene Azzu Mate Kole, *Omanhene* of Western Nzema, saw the conflict over the position of Chiefs in the legislature as needless, and he stated:

I wonder why we went to such length in debating this matter. There is one consolation I have and that is that it brought out forcefully, and is on record also, that everybody in this House is very jealous of our native institutions and is desirous to see that it is preserved and that it shall prevail at all times. That is sufficient. ...The most important thing that this new proposal for a constitutional reform has set out is that the body [Cabinet] that will initiate policy shall be the

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<sup>238</sup> Nana Amenfi (President of the JPC), Legislative Council Debates, 1950, Issue 2, Vol. 2, p.283.

<sup>239</sup> Nana Sir Tsibu Darku IX, Legislative Council Debates, 1950, Issue 2, Vol. 2, p.292.

<sup>240</sup> Nana Sir Tsibu Darku IX, Legislative Council Debates, 1950.

<sup>241</sup> J. B. Danquah stated, “I personally think that the greatest single achievement of our unfortunate compatriot, Mr. Kwame Nkrumah, was his acceptance of the Coussey majority recommendation that the future structure of the Gold Coast be not one chamber, but of two chambers. Whatever may be said against the methods of that Leader of the Convention People’s Party – and I am one of those who are much opposed to his methods – this much one can say, that in choosing a Second Chamber for the Gold Coast he showed, in a flash, that he was an agent neither of an imperialist power nor of a dictator power. I feel quite certain that had Mr. Kwame Nkrumah devised a clever diplomatic mistake to lead the C.P.P to accept a single Chamber in place of a Second Chamber, most of the Chiefs who now favour a single Chamber, would immediately have looked for their sandals and voted solidly for a Second Chamber” (Legislative Council Debates, 1950, Issue No.2, Vol. 2, p.254, ADM 14/2/60).

body which will be responsible to the Assembly and that it shall be the body which consist of members chosen by this country, and every other thing is a fitting in of this general structure.<sup>242</sup>

What was more important to the chiefs was to negotiate constitutional rules that would insulate their organizations from the power of government. The non-chief politicians who lost their demand for a bicameral legislature later repackaged their argument and demanded a federal form of Government. Led by J. B. Danquah, the opposition forces argued that a federal form of government would best protect regional political and economic interests as also promote the regional development of chieftaincy administration. The Asante Confederacy, the Akyem Abuakwa State, and many chiefs now supported the re-packaged demand for federalism (Austin 1964; Osei-Akoto 1992; Rathbone 2000a). The CPP also refined its position to champion the interest of the ordinary citizen against the “feudalistic” interests of chiefs (Nkrumah 1957). The outcome of this conflict is discussed below.

#### **6.4.3 Politics of Federalism: The Creation of a Unitary State or the Reproduction of Traditional-Federalism?**

I have argued that the organizational default of the modern Ghanaian state is the traditional-federal state created by British colonial state makers and chiefs in 1821-1831. Here, I further argue that the creation of constitutional rules – during the 1949-1957 politics of constitutional design – that guaranteed the existence of chieftaincy in the state, and also insulated chieftaincy from the political control of the CPP Government, was not simply a reflection of the will of “the people as a whole” (Arhin 1991:27), but it was a political settlement negotiated from the violent battle lines that were drawn between Nkrumah’s CPP and the chiefs.

The year 1951 changed the political fortunes of the CPP in the Gold Coast and the Conservative Party in the UK. The political changes brought some interesting swings in political support for, and resistance to, the creation of the bicameral legislature. I still argue that the complex politics over the position of Chiefs in the state that gripped the Gold Coast, from 1951 to 1957, was generated by non-Chief political

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<sup>242</sup> Nene Azzu Mate Kole, Legislative Council Debates, 1950, Issue 2, Vol. 2, p.283

interests. It is important to pay attention to the dynamics of this politics in order to understand not only the consolidation of the institution of chieftaincy in the state, but also state-chieftaincy relations of authority and power.

In the 1951 popular elections, the CPP won a landslide victory. Kwame Nkrumah who was still in prison was elected for the Accra Central municipal seat with “the largest individual poll so far recorded in the history of the Gold Coast” (Nkrumah 1957:134). The British Government was faced with no choice but to release Kwame Nkrumah from prison to form a parliamentary government. Governor Arden-Clarke (1958:33) gave the following reasons for releasing Nkrumah from prison:

It was...obvious that the CPP would refuse to cooperate in working the Constitution without their leader. Nkrumah and his party had the mass of the people behind them and there was no other party with appreciable public support to which one could turn. Without Nkrumah, the Constitution would be stillborn and if nothing came of all the hopes, aspirations and concrete proposals for a greater measure of self-government, there would no longer be any faith in the good intentions of the British Government and the Gold Coast would be plunged into disorders, violence and bloodshed. After all, one cannot govern effectively without the consent or, at least, the acquiescence of the majority of the governed, except by force. Force was out of the question and it was clear that that acquiescence would not be forthcoming. So Nkrumah was released.

The situation was a classic case of, first, the enabling role of political institutions (the 1951 Constitution) and, second, the instrumental role of political elite in the creation and functioning of political institutions. This reinforces the political institutionalist view that “institutions are empty boxes without leaders and staff who have the capacity to produce the public goods the public demands and the facility to evoke popular confidence even among those who disagree with particular policies” (Levi 2006:10). The success of the entire experiment of decolonization in the Gold Coast rested on cooperation between the British Government officials and the few African political elites rather than on the entire general population. Governor Sir Arden-Clarke would later describe the success of the transition as follows:

It was, indeed, unnerving at times to observe as we worked our way from one Constitution to the next, how much depended upon the personal relationships between a few leading personalities – between the Governor and the elected leaders of his Government, between one or two senior officials and the African Ministers (Arden-Clarke 1958:32-33).

When Kwame Nkrumah was released from Prison he also claimed that his CPP government had not only put on trial the 1951 Constitution which he had described as ‘bogus and fraudulent’, but he remained “unalterably opposed to imperialism in any form” (Nkrumah 1957:138). According to Nkrumah, the new situation demanded a changed of his political strategy from “positive action” to “tactical action” (Nkrumah 1957). Within the framework of the 1951 Coussey Constitution, one may describe the nature of the new system of government where power was shared between the CPP and the British Governor as a diarchy (Apter 1955; Austin 1964; Rathbone 2000a). However, the process of the transition to independence also depended on the strong cooperation of the opposition parties and the Chiefs.

In June 1952, Kwame Nkrumah initiated the process to review the 1951 Coussey Constitution. After Nkrumah formed his CPP Government, he no longer supported the creation of the bicameral legislature. He now strongly argued that “there is an inherent danger in having two Houses. ... It would be preferable, therefore, that the Territorial Councils [or Provincial Councils of Chiefs] should remain and so enable the Traditional Authorities to express their views on national questions in their own forum and convey them direct to the Government.”<sup>243</sup> Interestingly, the sponsors of the bicameral system of legislature also now appeared to have gained the political support of the Conservative Party Government in the UK. In 1952 the new Secretary of State for the Colonies, Sir Oliver Lyttelton conducted a tour of the Gold Coast. By 1953, the Asante Confederacy Council, the Joint Provincial Council of Chiefs, and the Northern Territories Territorial Council had suddenly changed their positions and strongly demanded for a Second Chamber as practised in the House of Lords. In fact, out of 131 interest groups that responded to the CPP Government’s request for memoranda on matters for constitutional reform, only the CPP and six other bodies were in favour of continuing with a single House.<sup>244</sup> The CPP Government faced a very formidable opposition from the advocates of bicameralism.

Notwithstanding the widespread demand for bicameralism, all the interest groups, including the CPP Government, agreed that matters’ concerning the internal organization of chieftaincy as well as chieftaincy-local community relations – or

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<sup>243</sup> Government Proposals for Constitutional Reform (1953), paragraph 41

<sup>244</sup> Government Proposals for Constitutional Reform, 1953, paragraph 37.

what was called ‘local constitutional matters’ – “should be kept outside the realm of politics.”<sup>245</sup> The general consensus was that “local constitutional affairs were entirely the business of the state or locality concerned, and the people should be left to settle their own problems according to their own customs without any outside influence.”<sup>246</sup> The CPP, the Asanteman Council, and the Joint Provincial Council of Chiefs favoured the creation of a national Judicial Committee consisting of all the Presidents of the Provincial Councils of Chiefs and a Judge of the Supreme Court to act as an appellate tribunal with the final authority for determining local constitutional matters.<sup>247</sup> The key issues of local constitutional matters under native customary law were defined to include the following:<sup>248</sup>

- a. The election, installation, deposition or abdication of any Chief, or the right of any person to take part in any such election, installation or deposition;
- b. The recovery or delivery of Stool property in connection with any such election, installation, deposition or abdication; and
- c. Political or constitutional relations between Chiefs.

What one is dealing with here is the internal organization of the rules of chieftaincy under native customary law. Undoubtedly, they include the rules that define the mandate and responsibilities of Chiefs in the administration of stool lands. It is interesting to note that while the general consensus was that the definition of the internal rules of chieftaincy should be left for the local communities concerned, it was also recognised that a national Judicial Committee was required to enforce local rules. Nkrumah and his CPP Government were not going to wait for all the traditional states or localities to clearly define their local constitutional rules of chieftaincy before political independence was granted. But the opposition parties used the delicate matters of chieftaincy to their political advantage.

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<sup>245</sup> The CPP’s view which was supported by all other interest groups, including the Provincial Councils of Chiefs (Government Proposals for Constitutional Reform (1953), paragraph 58).

<sup>246</sup> Summary of Memoranda presented by interest groups on Local Constitutional Matters, (Government Proposals for Constitutional Reform (1953), Appendix C, Summary of Representations on ‘Local Constitutional Matters, paragraph 43(1).

<sup>247</sup> Government Proposals for Constitutional Reform (1953), Appendix C, paragraph 43.

<sup>248</sup> Government Proposals for Constitutional Reform (1953), Appendix A, paragraph 14.

The contentious politics over the structure of the legislature was transformed by the opposition parties into a demand for a federal form of government (Austin 1964). The period 1954 and 1956 was defined by intense political struggles between the CPP and opposition political parties over the demand for federalism. In the Northern Territory, at the eleventh hour of the 1954 elections, the Northern Territories Territorial Council (NTTC) threw its political weight behind the formation of the Northern Peoples Party (NPP) to fight for the interest of the Northern region. The NTTC argued that the decolonisation process was being rushed to the disadvantage of the North's political, economic, and educational development. The politics of regionalism crept into the politics of independence. In the 1954 elections, the CPP managed to win only 8 out of 26 seats in the Northern Territory.

The most serious challenge to Nkrumah's decolonisation project was to come from Chiefs in the Ashanti region. Opposition groups in Ashanti, strongly backed by the Asanteman Council and the Kumasi State Council, formed the National Liberation Movement (NLM) to demand a federal form of government. The formation of the NLM was led by the Asantehene's Chief Linguist, Bafuor Osei-Akoto.<sup>249</sup> The NLM argued that a federal form of government was the best mechanism to manage their cultural, economic and political development (Osei-Akoto 1992). On 11 October 1954, over 50 Chiefs under the Kumasi State Council met at the Asantehene's palace to swear an oath of support for the NLM.<sup>250</sup> The Chiefs were also tasked to mobilise revenue from their stool lands, subjects and other sources to support the NLM.<sup>251</sup> Chiefs who refused to support the NLM were destooled by the Asanteman Council. The CPP Government responded by enacting the State Councils (Ashanti) Ordinance which gave the destooled Chiefs the right to appeal to the Governor.

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<sup>249</sup> The objectives of the NLM which included the protection of chieftaincy and traditional cultural values suggested a demand for the return to traditional-federalism rather than the demand for a federal form of government detached from Chiefs. Details of the nature of political and financial support given by the Asante Chiefs to the NLM can be found in Bafour Osei-Akoto's autobiography titled *Struggle Against Dictatorship*, 1992, and also in the Report of the Justice Sarkodie-Addo Commission, 1958, appointed to enquire into the Affairs of the Kumasi State Council and the Asanteman Council (hereafter the Justice Sarkodie-Addo Report). These political activities supported by the Asantehene and his Chiefs were to cost the Asantehene his management of the Kumasi Part 1 Stool Lands in 1958 (Ashanti Stool Lands Act, Act 25) after Ghana's independence. I shall return to the post-colonial politics of Stool land administration in subsequent chapters.

<sup>250</sup> 'Report of a Commission Appointed to Enquire into the Affairs of the Kumasi State Council and the Asante Council by Mr. Justice Sarkodie-Addo, together with the Closing Addresses by Counsel.' See Appendix 5 for the list of Chiefs who took the Oath to support the NLM (NAG, ADM 5/3/194).

<sup>251</sup> Report of Justice Sarkodie-Addo, 1958.

The intensity of the lawlessness, violence, and political campaign that characterised the NLM's demand for federalism forced the Governor and the Secretary of State for the Colonies to appoint Sir Frederick Bourne as Constitutional Advisor, to advise the Gold Coast Government and all the parties on the matter of federalism. The NLM refused to negotiate its demands with either the Constitutional Advisor or the CPP Government. The NLM and its allies<sup>252</sup> insisted on fresh general elections to determine the matter. As the final test of the CPP Government's popularity and the country's preparedness for independence, the die was cast by the British Government for general elections on 17 July 1956. The CPP once again won the elections.

Contrary to the interpretations of many Ghanaian scholars (Aryeetey et al. 2007; Ninsin 1991), I argue that the electoral triumph of the CPP over the NLM and its chiefly allies did not completely settle the question of federalism to produce "Unitary State Power" (Ninsin 1991:226). Rather, it produced a stable political platform for Nkrumah's CPP government, the leaders of the NLM, powerful Chiefs, and British government official mediators to negotiate a political settlement. The negotiated settlement was a constitution that restrained the powers of government and the legislature from reforming institutions of chieftaincy (Austin 1964; Rathbone 2000a). Crucially, the parties agreed the "The office of a Chief in Ghana as existing by customary law and usage shall be guaranteed."<sup>253</sup> The chiefs did not only secure a "constitutional chieftaincy" (Arhin 1991), but they had managed to reproduce the core legacies of the traditional-federal state. This shaped the path of the 1969, 1979 and 1992 constitutions that prohibit government and parliament from reforming institutions of chieftaincy without the authoritative consent of the chiefs.

The rules of customary law were also integrated into the laws of Ghana. The integration of the institution of chieftaincy into the Ghanaian state was now not simply based on untested general cultural support, but on the demonstrated power of

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<sup>252</sup> The allies of the NLM that supported the demand for federalism included the Northern People's Party, the Ghana Action Party, the Muslim Association Party, the Ghana Congress Party, the Asante Youth Association, the Anlo Youth Organization, the Togoland Congress, The Akim Abuakwa State Council, and the President of (the almost defunct) Aborigines Rights Protection Society (Report of the Constitutional Advisor, Sir Frederick Bourne, 17 December, 1955 (Metcalf, No. 513).

<sup>253</sup> The Government's Revised Constitutional Proposals for Gold Coast Independence, Article 30 (3a). This settlement that guaranteed chieftaincy was taken out of the 1960 Constitution, but after the overthrow of Nkrumah's regime in 1966 it was re-affirmed in the 1969, 1979, and 1992 Constitutions.

Chiefs to make or break the country. The rules of customary law that organized political relations within chieftaincy, and political relations between Chieftaincy and its local communities, became integrated into the constitutionally enforceable laws of Ghana. The rules of customary law differed from one traditional state to the other, if not from one local community to the other. Crucially, the definition of the constitutional relations between chiefs as well as between chiefs and their subjects was left to the chiefs and their subjects to determine by themselves.

On 6 March 1957 the country was decolonised with the new name Ghana. Ghana became the first sub-Saharan African country to gain independence from colonial rule. The African political kingdom that Kwame Nkrumah preached was reached. In the view of Austin (1964:357), the opposition parties and the chiefs “prided themselves on their ability to outwit the CPP in devising constitutional limits to the power of the new government.” Nkrumah was dissatisfied with the constitutional settlement. The political settlement that reproduced the core legacies of the traditional-federal state was necessary to pave way for the granting of independence from British colonial rule (Austin 1964; Gocking 2005). The state that was produced was not a ‘unitary state’ as propagated by the CPP Government (Nkrumah 1957) and generally conceptualized by Ghanaian scholars (Ninsin 1991). Nkrumah’s dissatisfaction with the bifurcation of state authority between chiefs and government explains why in the post-independent period he sought to reverse what he called the “feudalistic” features of chieftaincy from the 1957 Constitution (Nkrumah 1957:128). Subsequent chapters will show that while the chiefs have been unable to mobilize the huge resources required to reform their internal constitutional rules and informal institutions of customary land administration, governments have lacked the authority to autonomously reform the institutions of chieftaincy.

## **6.5 Conclusion: The Legacies of the Traditional-Federal State Matter**

Political settlements between Chiefs and non-chief ruling elites concerning the organization of the state authority over the nature of the dominant ruling coalition, land ownership, stool land administration, and chieftaincy are very crucial for understanding the nature of land administration in Ghana. There is no doubt that organizations of chieftaincy are part of the institutions of the post-colonial state.

However, the political settlements reached by chiefs and non-chief political elites to separate chiefs from the dominant ruling coalition, separate organizations of chieftaincy from the local government system, and limit the authority of government to reform institutions of chieftaincy, turned the Ghanaian state backwards to the organizational default of traditional-federalism. Chiefs have retained control over stool land administration but they no longer have the accountable formal-legal institutions of the local government system. It would thereafter become more difficult for government, state agencies, chiefs and citizens to ensure transparency and accountability in stool land administration. The consolidations of the traditional-federal state in the 1969, 1979 and 1992 constitutions have constrained government from reforming institutions of chieftaincy governing land administration.

Theoretically, from the above analysis, the reversal of organizational reforms in chieftaincy-government relationships of authority at the level of local government sits uncomfortably with the argument by some historical institutionalists that “once a particular [institutional] option is selected, it becomes progressively more difficult to return to the initial point when multiple alternatives were still available” (Mahoney 2001:113). Rather, the analysis supports the view that “There is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements. Rather, a dynamic component is built in; where institutions represent compromises or relatively durable though still contested settlements based on specific coalitional dynamics, they are always vulnerable to shifts” (Mahoney and Thelen 2010:8-9). States are created by political actors and specific institutional configurations persist because of the dynamics of power relations that underlies them. The historical institutional perspective should emphasize the role of political agency in the creation, maintenance and change of institutions – whether formal or informal. The structure-agency debate among diverse strands of institutionalists is needless.

Empirically, I emphasize that the legacies of the critical juncture of state formation matter in the process of state development. The lessons from the era of the traditional-unitary state reinforce the point that the reform of the informal rules of customary law that organize chieftaincy matters for ensuring transparency and accountability in chieftaincy administration of stool lands. The gradual evolution of Botswana’s Land Boards through cooperation between chiefs and non-chief political

elites also supports this perspective. Informal state institutions do not promote transparency and accountability in the governance of public resources. We shall see that the failure of post-independent governments and chiefs to reform the informal rules of chieftaincy governing stool land administration weaken the capacity of all stakeholders to ensure vertical and horizontal accountability of chiefs.

Towards an understanding of the empirical analysis in subsequent chapters, it is important to re-emphasize the political settlements negotiated by the Coussey Committee. The decision of the Coussey Committee that stool land revenues should be shared between Chiefs and local government structures would shape future constitutional negotiations over the sharing of stool land revenues. Moreover, the consolidation of stool land ownership under chieftaincy would require chiefs and government to cooperate in the reform of the land administration system. We shall see that in spite of strong external pressures from the World Bank on Ghanaian governments to reform the communal land tenure system into individual freehold interests, the political, economic, and cultural basis of power that support the bifurcated authorities of chiefs and government within the traditional-federal state reinforce the consolidation of communal land ownership. It is therefore crucial that government, chiefs, citizens and external interests cooperate to support the communal land administration system with transparent, accountable and effective formal-legal administration structures that promote development. The crucial point is that the post-colonial consolidation of the traditional-federal Ghanaian state matters in shaping the nature of the politics of land administration reform.

## **Chapter 7**

### **Public Sector Land Administration in Ghana: 1957-2000**

#### **Introduction**

This chapter discusses how the consolidation of political settlements over land ownership, chieftaincy, and government in the traditional-federal state has shaped the post-independent development of public sector agencies of land administration to manage the diverse interests of chiefs, government, ordinary citizens, and other actors. The public sector agencies that I discuss are the Office of the Administration of Stool Lands which collects and disburses stool land revenues, the Lands Commission which manages the power of government to compulsorily acquire communal land from local communities with compensation, the Land Valuation Board which manages the payment of compensation for lands compulsorily acquired by government, and the Land Title Registry which manages the registration of land titles. I argue that the legacies of state authority concerning land ownership, chieftaincy and government are what have largely shaped the development of these public sector agencies of land administration. The chapter emphasizes that the organization of state authority matters in shaping land administration reform.

The chapter begins with a discussion of the current distribution of land ownership in Ghana and the consolidation of the communal land ownership system. I then examine how the historical political settlements of state authority over land ownership have shaped the development of public sector agencies of land administration to govern the interests of chiefs, government, local communities and other actors with interests in gaining access to communal land. I also look at how the lack of effective institutions of horizontal accountability between the public sector agencies constrained the inter-organizational coordination of their functions concerning land title registration. I shall then discuss how the lack of an effective organizational framework for land administration shaped reform agendas. I conclude that the organization of state authority between chiefs and government over land administration has shaped the development of public sector land agencies.

## 7.1 The Nature of Land Ownership in Ghana

Ghana's turbulent quest for effective political leadership between 1957 and 1992 did not in any way affect the historical political settlements of state authority over communal land ownership and the institution of chieftaincy. Until the current fourth republic democratic state was created in 1992, the 34 years of post-independence politics of state organization was largely shaped by military rulers rather than democratically elected rulers. The country's chequered path in the search for an effective dominant ruling coalition is presented below in Table 16.

**Table 16: The search for effective Government since 1957**

Constitution	Government	Mode	Period
Independent member of the Commonwealth: 1957-1959	Convention People's Party (CPP) Government 1	Civilian	1957-1960
First Republic: 1960-1966	CPP Government 2	Civilian	1960-1964
	CPP Government 3	Civilian	1964-1966
Military Rule	National Liberation Council (NLC) Government	Military-Police	1966-1969
Second Republic: 1969-1972	Progress Party (PP) Government	Civilian	1969-1972
Military Rule: 1972-1979	National Redemption Council (NRC) Government	Military	1972-1975
	Supreme Military Council (SMC) Government 1	Military	1975-1978
	SMC Government 2	Military	1978-1979
	Armed Forces Revolutionary Council (AFRC) Government	Military	1979
Third Republic: 1979-1981	People's National Party (PNP) Government	Civilian	1979-1981
Military Rule: 1981-1992	Provisional National Defence Council (PNDC) Government	Military	1981-1992
Fourth Republic: 1992-Present	National Democratic Congress (NDC) Government 1	Civilian	1992-1996
	NDC Government 2	Civilian	1996-2000
	New Patriotic Party (NPP) Government 1	Civilian	2000-2004
	NPP Government 2	Civilian	2004-2008
	NDC Government 3	Civilian	2008-2012

The nature of governments in Ghana has not mattered for the consolidation of institutions of chieftaincy in the state. Indeed, the institutions of chieftaincy have enjoyed greater support from military rulers who sought to legitimise their rule at the local level (Austin and Luckham 1975; Arhin 2007; Owusu 1986, 1989, 1996). Military rulers did not attempt to reform the communal land tenure system nor the

institution of chieftaincy. Democratically elected governments also either barely had time to reform chieftaincy or were too afraid to tamper with the indigenous informal organizations that had enjoyed greater political support from military rulers. Both the communal land ownership system and the institution of chieftaincy were consolidated and strengthened under periods of military and democratic rule.

Many scholars have estimated that the land compulsorily acquired by Ghanaian governments (public land) is less than 20% of the total land, while traditional authorities manage about 80% (Antwi 2006; Kasanga and Kotey 2001; Quan et al. 2008; World Bank 2003c, 2011). From 1979 the state banned the creation individual freeholds from stool lands managed by Chiefs. Article 190(4) stated that “no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.” This legal prohibition has been consolidated in the 1992 Constitution. It appears that even the World Bank which sought to transform the communal land ownership system into individual freehold lands has now accepted the status quo (World Bank 2003c, 2011). Support for and resistance to the communal land ownership system shall be discussed later.

There are four types of land tenure ownership in Ghana namely (a) public land compulsorily acquired by Governments on behalf of the state, (b) stool lands owned by local communities, (c) family lands communally owned by families, and (d) individual lands privately owned by individuals. In 1994, the High Court<sup>254</sup> ruled that family lands are not bound by the constitutional restrictions that prohibit the creation of individual freeholds from stool lands. This means that communally owned family lands can be sold outright to individuals (Kasanga et al. 1996). Many Ghanaian scholars define ‘customary land tenure ownership’ to include lands that are communally owned by families, clans, and local communities (Amanor 2010; Kasanga and Kotey 2001). This is the definition that I also use. Given the rapid transformation of family lands into private lands, the question that arises is whether it is still the case that “The customary sector holds 80 to 90 percent of all the undeveloped land in Ghana” (Kasanga and Kotey 2001:13). In Table 17 below, the Lands Commission registers family land transactions under ‘private lands’.

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<sup>254</sup> Republic v Regional Lands Officer, Ho; Ex parte Kludze [1997-98] I GLR1028 – 1038.

**Table 17: Formal Registration of Land Transactions in 2007 and 2009**

Types of Land	Nature of Transactions	2007	2009	% increase (+) or decrease (-) in land registration
<b>State/Public Land</b>	Applications received	814	398	- 51.1%
	Allocations made	556	269	- 51.6%
	Leases executed	775	521	- 32.7%
	Consent to assign or sublet	250	277	+ 10.8%
	Consent to mortgage	180	134	- 25.5%
<b>Stool/Skin Land</b>	Applications for Concurrence	7153	5579	- 22.0%
	Concurrence granted	9558	2598	- 72.8%
	Consent to assign or sublet	714	1363	+ 90.8%
	Consent to mortgage	311	383	+ 23.1%
<b>Private Land</b>	Land documents lodged	6607	7213 <sup>255</sup>	+ 9.1%
	Documents Plotted	6593	5580*	- 15.3%
	Documents Queried	867	1287*	+ 48.4%

Source: Compiled from the 2007 and 2009 Lands Commission Annual Reports

It can be seen from Table 17 that from 2007 to 2009 while there was a decrease of 22% in applications to the Lands Commission for its concurrence in stool land transactions, there was an increase of 9.1% in private land transactions, from 6607 to 7213. The queries raised by the Lands Commission over the validity of many private land transactions, however, increased from 867 to 1287. Against the uncertain claim that about 80-90% of land is held under communal land tenure ownership, some officials of the Lands Commission point out that the low level (and decrease in) formal registration of stool/skin land transactions “could be due to the many bureaucratic processes that one has to go through within chieftaincy institutions.”<sup>256</sup>

Many scholars claim that people who have acquired stool lands are less interested in registering their transactions because they consider the authority of Chiefs as final (Antwi 2002; Kasanga et al. 1996; Kasanga and Kotey 2001). The point is that

<sup>255</sup>\* In the 2009 report it is recorded that “A total of 7,213 private land documents were lodged. Out of these, 5580 documents were plotted (77.36%) while 1,287 (23.06%) documents were queried” (p.vii). The conversion of the percentages into actual figures produces slightly different figures.

<sup>256</sup> This view was shared by Mr. Jonathan Abossey, former Director of the Survey Department (Interview with Mr. Jonathan Abossey, 22/12/2010). I interviewed two officials of the Lands Commission (Head office, Accra), namely Mr. Jonathan Abossey and Mr. Afoakwa (7/07/2011), to try to clarify the interesting statistics on landholdings in Ghana. The officials also expressed doubt about the authenticity of the statistics on customary land holdings. Mr Abossey said “sometimes we doubt the accuracy of that statistics.”

although the state has consolidated communal land tenure ownership in Ghana, the statistics on stool, communal or customary land ownership is unclear. I move on to explain why the communal land ownership system has been consolidated.

### **7.1.1 Explaining the Consolidation of the Communal Land Ownership**

There is no question about the fact that the system of communal land tenure ownership has been consolidated by post-independent Ghanaian governments. The question is why has the communal land tenure system not been transformed into individual freeholds? Samuel Huntington (1996:384), in his analysis of the politics of land tenure reform in changing societies asked the question, “Under what conditions...does land reform become feasible?” And he answered:

Like other reforms, changes in land tenure require the concentration and expansion of power in the political system. More specifically, they involve, first, the concentration of power in a new elite group committed to reform and, second, the mobilization of the peasantry and their organized participation in the implementation of the reforms. Analysts of land reform processes have at times attempted to distinguish ‘reform from above’ from ‘reform from below.’ In actuality, however, a successful land reform involves action from both directions.

If successful land reform depends on support from the political elites and peasants or farmers, does it mean that there has been the absence of reform action from both directions in the post-independent period? The simple answer is yes.

The consolidation of stool land ownership in the 1979 and 1992 Constitutions is clear evidence of the lack of support from the political elite to reform the communal land tenure system (Amanor 2010; Aryeetey et al. 2007; Ubink 2008; Amanor and Ubink 2008). In Kwame Nkrumah’s famous ‘Motion of Destiny’, made on 10 July 1953 in the Legislative Council, he extolled the ARPS for “its excellent aims and objects, and by putting up their titanic fight for which we cannot be sufficiently grateful” (Nkrumah 1957:199). Recently, in August 2011, Nana Akuffo Addo, presidential candidate of the major opposition party (the New Patriotic Party), extolled the work of the Aborigines Rights Protection Society (ARPS) at a public lecture: “The Society mounted an effective, successful campaign, mobilizing the chiefs and people, to oppose the infamous 1897 Crown Lands Bill, which sought to

expropriate our lands to the British Crown. ... Ghanaian control over Ghanaian lands was preserved through the agency of the Society” (Akuffo-Addo 2011:2).

If the ruling elites have not been willing to reform the communal land tenure system, what about the ordinary ‘peasantry’? Researchers have recognised that an important condition for the mobilisation of strong support from the peasantry for land reform is the existence of high concentration of land ownership in a small group of landlords (Huntington 1996; World Bank 1975). Ghanaian scholars generally agree that the system of communal land tenure ownership in the country prevents the concentration of land ownership in Chiefs, family heads, or traditional authorities (Asante 1975; Bentsi-Enchil 1964; Brobbey 2008; Nkrumah 1964; Ollenu 1964; Woodman 1996). The generally accepted legal position is that communal land belongs to every member of the family or community and not the Chief, family head or traditional authority. Therefore, it will be difficult to mobilise support from the ‘peasantry’ against the Chiefs, family heads, and traditional authorities who manage the land on behalf of all. In any case, since the colonial era, the unemployed educated youth have not been interested in land matters “owing to their disdain for manual labour”<sup>257</sup> and their condescension towards farming (Hill 1963; 1970).

Consequently, in the absence of strong political support from above and below – ruling elite, chiefs, intelligentsia, farmers, and the youth – to reform the communal land tenure system, communal land ownership has survived to date. The consolidation of communal land ownership in Ghana does not mean that there has been no attempt by some actors to end the legacy. I discuss below some recent attempts made by some actors to end the legacy.

### **7.1.2 Controversy over the Concept of ‘Customary Freehold’: Ending the Legacy of Communal Land Tenure?**

In 1973, Bentsi-Enchill who was a member of the Law Reform Commission at the time proposed that the term “customary freehold” (or its expanded form ‘customary law freehold’) should be used to describe lands apportioned by traditional authorities

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<sup>257</sup> Governor Guggisberg, Address to Legislative Council, 6 March, 1924 (Metcalf, No. 467).

of the land-owning community to members of the community (Woodman 1996). The term ‘customary freehold’ which was adopted by the Law Reform Commission in its 1973 report on the ‘Reform of Land Law in Ghana’ found its way into the 1986 Compulsory Land Title Registration Law. A revised version of the Law Reform Commission’s report was also used by members of the National Land Policy Committee to formulate the National Land Policy between 1994 and 1999.

Strongly opposed to the usage of customary law freehold are the traditional authorities (mainly chiefs). Chiefs argue that the land right held by indigenous members of the land owning community is only use right (or usufruct) which does not extinguish the community’s allodial title but only continues to persist on the authority of the land owning community. The National House of Chiefs proposed that the term ‘usufruct’ should be used instead of “that horrible terminology called customary law freehold”.<sup>258</sup> However, the notion of ‘usufruct’ favoured by chiefs has been strongly attacked by many scholars and development agencies as the basis of insecurity in customary land tenure. Surely, informal rules of customary law commonly create contradictory interpretations of the exact nature of the rules.

From the 1980s, internal and international (external) neo-liberal market forces have been actively advocating for the transformation of individual rights in communal land into individual freeholds (Aryeetey et al. 2007; Ninsin 1989). The World Bank has been the leading external actor in advocating for the conversion of communal land tenure rights into individual freehold rights. In line with its aim to promote competitive market structures, the Bank uses its Structural Adjustment Loans (SALs) as “the right ‘door’ through which to enter into dialogue with client countries on topics as sensitive as land policy reform.” (Bruce 2006a:20) The core sensitive matter is the transformation of rights in communal land tenure in developing countries such as Ghana into individual freehold rights in land (Bruce 2006a; Bruce et al. 2006; Deininger and Binswanger 1999; World Bank 1975).<sup>259</sup>

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<sup>258</sup> The *Mamponghe* (Paramount chief of the Mampong traditional area and occupier of the second highest traditional office in the Asante Kingdom) described the term customary law freehold in that manner during a workshop organized by the Land Administration Project Unit for members of the National House of Chiefs (NHC) at the National House of Chiefs in Kumasi. The workshop was held on 29 July, 2010, at the National House of Chiefs.

<sup>259</sup> John W. Bruce, former Senior Counsel in the Legal Vice Presidency of the World Bank, discusses in some detail the Bank’s Operational Policies that concern the reform of communal usage rights

In the early 1980s, the PNDC military government turned to the World Bank for financial assistance to deal with the crippling economic problems. The World Bank used the opportunity to pressure the PNDC government to shift the country from its colonial legacy of communal land tenure ownership into individual land ownership rights. This was a period when World Bank Country Task Managers were “comfortable with nothing less than full private ownership” (Bruce 2006a:34). There is agreement among some researchers (Herbst 1993; Hutchful 2002; Oquaye 2004) that until the PNDC Government began to implement World Bank sponsored neo-liberal economic reform programs in 1983, the PNDC Government did not know which way it was heading (World Bank 1984a, 1984b).<sup>260</sup> Ghana became the “Star Pupil” of the World Bank (Hutchful 2002). As part of the World Bank sponsored Structural Adjustment Programs (SAPs), the PNDC government was forced to enact the Land Title Registration Law (PNDC Law 152). In a military fashion, the law made it compulsory for all landowners to register their titles to land. The rationale for the shift from deeds registration to the title registration was given as follows:

The purpose of a system of land title registration is twofold: first, to give certainty and facilitate the proof of title; secondly, to render its dealings in land safe, simple and cheap and prevent frauds on purchasers and mortgagees. The effective characteristic of land title registration is that land is placed on the folio of the land register as a unit of property and transactions are recorded by reference to the land itself and not merely through instruments executed by the parties as is the case with deeds registration. Registration constitutes a warranty of title in the person registered as proprietor and as a bar to adverse claims.<sup>261</sup>

The World Bank sponsored land titling project sought to achieve nothing less than the creation of individual freehold titles. The objective remained the same in the

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(Bruce 2006a). Paragraph 17 of the Bank’s Operational Policy 4.10 (May 2005) set forth an action plan for the legal recognition of “Conversion of customary usage rights to communal and/or individual ownership rights.” (Bruce 2006a:19) In February 2006, John Bruce was hired by the World Bank and the UK’s DFID as a private consultant to review and advice on legal and institutions issues affecting land administration reform in Ghana (Bruce 2006b). I shall talk more on that later in chapter 9. The key point is that the main focus of the World Bank in supporting land administration reform is on the promotion of stronger private property rights in support of competitive market structures.

<sup>260</sup> Brigadier Nunoo-Mensah, one of the seven original members of the PNDC ruling coalition, wrote in his resignation letter: “Right from the beginning of the 31<sup>st</sup> December Revolution I have had serious reservations about the way and manner certain policies have been formulated and executed but I had always cherished the hope that with time the dust would settle and common sense and pragmatism would prevail. It is almost eleven months now since we launched the country unto a revolutionary path yet it is not clear to most people including myself, which way we are heading.” (Letter of Resignation from the PNDC, 22 November, 1982, in Oquaye 2004:128)

<sup>261</sup> Land Title Registration Law, 1986 (PNDC Law 152), Memorandum, paragraph 5.

World Bank's support of the Ghana Land Administration Project implemented from 2001-2010 (Bruce 2006a; World Bank 2003c). Towards the 'smooth' conversion of individual rights in communal land into individual freehold rights, the 1986 Land Title Registration Law used the concept of 'Customary Law Freehold' to describe the individual customary rights in communal land to be registered. A customary law freehold (also referred to as 'customary freehold') was defined as follows.

Rights of user subject only to such restrictions or obligations as may be imposed upon a subject of a stool or a member of a family who has taken possession of land of which the stool or family is the allodial owner either without consideration or on payment of a nominal consideration in the exercise of a right under customary law to the free use of that land.<sup>262</sup>

The alienation of customary freeholds would gradually extinguish the authority and power of chiefs over communal land (Blocher 2006; Woodman 1996). In the 'revolutionary' military political culture prevailing under the PNDC, described by opposition groups and writers as a "culture of silence" (Adu-Boahen 1992; Baffour 1987), Chiefs saw the naked threat to their power over communal land administration but they were largely silent (Adu-Boahen 1992; Oquaye 2004). Between 1990 and 1992, when the PNDC government initiated a process to return Ghana to constitutional democracy, the chiefs used the political space of constitution making to consolidate the historical political settlement that "no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described." The chiefs appeared to have struck the *coup de grace* to the military progress of the capitalist forces.

Although the 1992 Constitution clearly prohibited the creation of freehold interest "howsoever described" from stool lands, the concept of customary freehold was still used by interest groups who sought to end the legacy of communal land ownership. The conflict over the term customary freehold boils down to whether the community that holds the allodial title have the right or authority to expropriate the right of the customary freeholder or to restrict the uses to which the freeholder put the land (Woodman 1996). Woodman argues that "Customary law has reached the point

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<sup>262</sup> Land Title Registration Law, 1986 (PNDCL 152), Section 19b.

where the community's allodial title is effectively extinguished when a customary freehold arises in the land" (Woodman 1996:80). Some officials within the MLF have also argued that the customary freehold "assumes indefinite duration and prevails against the whole world including the allodial titleholder" (MLF 2003:9). The implication of these definitions for the continued existence of communal land is clear. With time, communal lands would become extinguished. The creation of customary freeholds would also undermine the basis for the state to invest in the creation of transparent and accountable formal institutions to govern communal lands because such institutions would become dead in the short term.

In the absence of a prevailing power among the stakeholders who produced the 1999 National Land Policy, contentious interpretations of the nature of the rules of customary law were accommodated in the Policy. A circular definition accommodating the contentious concepts of 'usufruct' and 'customary freehold' was provided in the glossary of the policy as follows: "Usufruct: Rights in land held by a member of the land-holding community or a stranger, who has obtained an express grant from the landholding community, using customary mode of alienation. It is at times referred to as customary freehold, proprietary occupancy or determinable title" (MLF 1999:26). It has been noted that prior to the implementation of the LAP in 2004 not a single land had been registered by the Land Title Registry under the term customary freehold (Blocher 2006). Perhaps it is the consequence of a policy that was "not intended to be law" (Kotey et al. 1998:59). The debate about the nature of 'customary land tenure' persisted into the design and implementation of the land administration reform project from 2001-2010. I analyse the politics and outcomes of the Land Administration Project in chapter 9.

The point is that the consolidation of the legacy of communal land ownership now faces strong opposition from internal and external forces of capitalism. The question is whether democratically elected governments have the ideological and political will, as well as widespread support, to change the constitutional settlements that constrain the transformation of communal land into individual freeholds. Are the chiefs powerful enough to continue their resistance to the ideological strength of capitalism? Will the powerful unelected chiefs get support from their subjects who have embraced democratic governance? The prospect for the security of communal

land ownership looks gloomy for a country that has become largely aid-dependent on external development agencies that seek to promote competitive market structures. However, under the fourth republic constitutional democracy, the government cannot reform matters affecting chieftaincy without the cooperation of chiefs.

I move on to discuss how the consolidation of communal land ownership in the state (at least for now) has so far shaped the development of state agencies of land administration. I shall first discuss the development of the so-called ‘public sector’ organizational framework of land administration and then the complex ‘customary sector’ organizational framework of land administration.

## **7.2 The Public Sector Organizational Framework of Land Administration**

The argument here is that the consolidation of historical political settlements of state authority over land ownership, more than any other factor, have shaped the creation of public sector agencies of land administration (or the public sector land agencies as they are commonly referred to). For the purposes of my analysis of the politics and outcomes of the LAP-PSLAs organizational reform, I shall focus my discussion on the six PSLAs that were involved in the reform. The six LAP-PSLAs are the Lands Commission, the OASL, the Town and Country Planning Department, the Land Valuation Board, the Survey Department, and the Land Title Registry. In fact, the term ‘public sector land agencies’ is used by the Ministry of Lands and Forestry to refer to these six agencies (MLF 2003; World Bank 2003c).

Generally, Ghanaian scholars and political elites recognised the lack of inter-organizational coordination of functions and cooperation that existed between the six PSLAs (Kasanga 2000a, 2000b; Kasanga and Kotey 2001; Larbi 2006; Somevi 2001). In 1991, the Committee of Experts that drafted the 1992 Constitution had noted that there was “lack of effective coordination among the various agencies concerned with land management.”<sup>263</sup> Kasanga and Kotey (2001:6) also wrote that “Indeed, departmental jealousy, bickering and lack of cooperation have characterised relations between these...institutions.” There is no gain emphasizing a problem that

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<sup>263</sup> Report of the Committee of Experts (Constitution) on Proposals for a draft Constitution of Ghana, 31 July, 1991, paragraph 302.

everybody recognised. I argue that the problems existed due to the lack of legally enforceable institutions of horizontal accountability between the PSLAs to compel them to cooperate in the performance of their functions. In other words, the PSLAs functioned autonomously from the authority of each other.

The six PSLAs existed by 1991. The question therefore is why the Committee of Experts that drafted the 1992 Constitution recognised the problem of lack of effective coordination among the various PSLAs and yet did not create effective institutions of horizontal accountability between the PSLAs. I argue that the political elites were more interested in creating state agencies of land administration that fulfil the obligations imposed on them by historical political settlements over land ownership, the authority of chiefs and the authority of government within the traditional-federal state. These historical political settlements shaped the creation of public sector agencies of land administration.

For the purpose of this study, I shall group the origins of the PSLAs into three types. The first type is the ‘colonial originated agencies’ of land administration, which include the Survey Department (1907) and the Town and Country Planning Department (1945). The second type is the ‘constitution originated agencies’ of land administration, which include the Lands Commission (1969, 1979, and 1992) and the OASL (1979 and 1992). The third type is the ‘World Bank-Structural Adjustment Program (SAP) originated agencies’ of land administration, which include the Land Valuation Board (1986) and the Land Title Registry (1986). The origins and functions of the six PSLAs are discussed in turn.

### **7.2.1 Colonial Originated Public Sector Land Agencies**

The colonially created agencies of land administration include the Survey Department and the Town and Country Planning Department (TCPD). The TCPD had continued to operate mainly on the basis of its 1945 legal authority (CAP 84).<sup>264</sup> In 1993, in line with the decentralisation of local government to the district level, the

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<sup>264</sup> The decentralisation of its functions became linked with the following legal instruments: National Development Planning Commission Act, 1994 (Act 479), National Development Planning (Systems) Act, 1994 (Act 480), National Building Regulation, 1996 (LI 1630), and Local Government Act, 1993 (Act 462).

TCPD was also decentralised as one of the departments of the District Assembly.<sup>265</sup> Prior to the LAP, the TCPD had decentralised its operations to 80 districts (WaterAid 2009). The TCPD however had a complex organizational structure. As a decentralised department under the District Assembly, the TCPD functioned under the Ministry of Local Government and Rural Development (MLGRD). At the national policy level, it was the Ministry of Environment, Science and Technology (MEST) that had oversight responsibility over the operations of the TCPD. The TCPD was the only agency of land administration that was not under the Ministry of Lands and Forestry. In chapter 9, I shall discuss how the complex organizational structure of the TCPD somehow strengthened its resistance to be merged with the other PSLAs into a single agency of land administration.

The Survey Department was originally created in 1907. When the 1925 Guggisburg Constitution was reformed in 1946, the Survey Department never again featured in the constitutional arrangements of the state. Significantly, the Survey Department had lost its Lands Section in 1928 to the new Lands Department. The Lands Department also took over the registration of deeds and began to play a prominent role in the increasing importance of land questions to both government and Chiefs. This shaped the path of bitter inter-departmental conflict between the two agencies (Somevi 2001). In the post-independent period, its legal existence was consolidated in 1962 by the Survey Act (Act 127). Its functions however remained almost the same; namely, to undertake geological, soil and land surveys. The only significant addition to its functions was the authority to license private surveyors to ensure that only qualified surveyors are employed to survey land.

The important point is that the Survey Department and the TCPD continued to operate as independent agencies of land administration largely on the basis of their colonial functions. Notwithstanding the crucial technical roles that these two agencies played in land administration, the post-independent political elite rather created new agencies of land administration to accommodate their constitutionally negotiated conflicting interests in land ownership. I move on to discuss the new constitutionally created agencies of land administration.

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<sup>265</sup> Local Government Act, 1993, Act 462 (Eight Schedule, Section 161). In the Local Government Act, the TCPD is referred to as the Department of Town and Country Planning.

### **7.2.2 Constitutionally Originated Public Sector Land Agencies: Managing the Conflicting Interests of Chiefs and Government**

I emphasize that the legacies of historical political settlements over land ownership, the authority of chiefs and the authority of government, more than anything else, shaped the creation of the Lands Commission and the Office of Administrator of Stool Lands (OASL). The historical political settlements date back to the 1949 Coussey Committee. The political agreement of the Coussey Committee to consolidate stool land ownership meant that the conflicting interest of Chiefs and Government have to be managed by an appropriate agency of land administration. Moreover, the Coussey Committee agreement that stool land revenues should be shared between Chiefs and local government structures also called for an appropriate agency to manage the collection and sharing of the revenues. Managing these historical political settlements explain the origins of the Lands Commission and the OASL. I shall begin with the political emergence of the OASL.

#### **(i) The OASL and the Politics of Sharing Stool Land Revenues: The Legacy of the 1949 Coussey Committee Political Settlements.**

Despite the 1949 Coussey political settlement that stool land revenues should be shared between Chiefs and local government agencies, Chiefs and the CPP Government officials were unable to reach an agreement over how the revenues should be shared. In 1962, the Minister of Lands was given the authority to collect all stool land revenues which “includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands.”<sup>266</sup> The revenue was put into a Stool Lands Account to be shared between local government agencies and Traditional Authorities, according to whatever formula was determined by the Minister as appropriate.<sup>267</sup> The discretionary powers of the Minister in the sharing of the stool land revenues not only created conflicts between Chiefs and the CPP Government, but it also became a tool for rewarding and punishing Chiefs who supported or did not support the CPP (Austin 1964; Ninsin 1989; Rathbone 2000a).

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<sup>266</sup> Administration of Lands Act, 1962, Section 17(2).

<sup>267</sup> Administration of Lands Act, 1962, Sections 17-23.

Following the military overthrow of the CPP Government in 1966, the 1969 constitutional makers decided that the collection and disbursement of stool land revenues should be undertaken by the Regional Councils.<sup>268</sup> However, the 1969 constitutional makers could not agree on any specific formula for sharing the stool land revenues. They could only recommend that: “Where any Stool, traditional authority, Council or District Council is dissatisfied with the apportionment determined by the Regional Council it may appeal to the Lands Commission which shall determine the issue taking into consideration the relative needs of the Stool, traditional authority or the Councils concerned.”<sup>269</sup> Certainly, determining the relative needs of traditional authorities and local government agencies was bound to produce dissatisfaction and conflicts. The matter was therefore to be put on the reform agenda of the next constitutional designers.

In 1979, the Third Republican state constitutional makers decided to establish the Office of the Administrator of Stool Lands (OASL) to collect and disburse the stool land revenues between Chiefs and local government agencies.<sup>270</sup> Crucially, the contentious politics surrounding the specific formula for sharing the stool land revenues could not be settled. Once again the matter was to be put on the agenda of the next politics of constitutional reform which occurred in 1991-1992.

The 1992 Constitution makers succeeded in negotiating a mutually acceptable formula for the sharing of stool land revenues between Chiefs and local government agencies.<sup>271</sup> The agreed formula is this: 10% of the revenue shall be paid to the OASL to cover administrative expenses, and the remaining 90% shall be disbursed in the following proportions – (i) 25% to the Stool through the traditional authority for the maintenance of the Stool in keeping with its status, (ii) 20% to the traditional

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<sup>268</sup> 1969 Constitution of Ghana, Article 164 (4).

<sup>269</sup> 1969 Constitution of Ghana, Articles 164(5).

<sup>270</sup> Strangely, the Act of Parliament enacted in 1980 to establish the Lands Commission (Act 401) created the office of the OASL within the Lands Commission. It has been argued that the OASL could not survive without gaining access to the records and personnel of the Lands Commission because the Lands Commission also assumed the functions of deeds registration (Kasanga 2000, Kasanga and Kotey 2001, Somevi 2001). This technical marriage between the two constitutionally separate agencies later created inter-organizational conflicts when the OASL finally gained its organizational autonomy from the Lands Commission from 1994.

<sup>271</sup> According to Kasanga and Kotey (2001:4), prior to the 1992 Constitution, the PNDC Government distributed the stool land revenue as follows: (i) Stool - 10%, (ii) Traditional Council - 20%, (iii) Local Government Council - 60%, and (iv) OASL - 10% (for administrative expenses).

authority, and (iii) 55% to the District Assembly, within the area of authority of which the stool lands are situated.<sup>272</sup>

Apart from the agreed formula for the sharing of stool land revenues and the administrative role of the OASL, it is clear that the language of the 1992 settlement originated from the 1949 Coussey Committee. It had taken 43 years for the Chiefs and non-chiefs political elite to finally reach a constitutional settlement over how stool land revenues should be shared between traditional authorities and local government agencies. Clearly, the 1949 Coussey Committee political settlement shaped the origins and functions of the OASL. Notwithstanding the country's unstable historical path of governance, it appears that the political elite still had faith in constitutional settlements. For that matter, Chiefs and Government also sought to settle the historical legacies of their conflicting interests in land ownership through constitutional mechanisms.

**(ii) Lands Commission and the Politics of Compulsory Land Acquisition and Payment of Compensation to Chiefs.**

The failure of colonial powers to obliterate the powerful traditional states shaped the emergence of a new state in which both the new central Government and the traditional states had conflicting interests in the acquisition, ownership, and administration of stool land. The consolidation of stool land ownership in the Ghanaian state, as already discussed above, is the legacy of the traditional-federal state. The consolidation of that legacy called for an appropriate agential-organization that could manage the conflicting interests of Chiefs and Government in land. The Lands Commission was to be that state agency. The interesting political processes through which the Lands Commission evolved is what I discuss in turn.

During the post-independent reign of the CPP Government, from 1957-1966, the Chiefs complained bitterly about the increasing tendency of the government to compulsorily acquire large acres of stool lands for state farms without compensation (Amanor 2001; Kasanga et al. 1996). The Chiefs were alarmed at extensive intrusion

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<sup>272</sup> 1992 Constitution, Article 267(6)

of the CPP Government in the management of stool lands.<sup>273</sup> The intrusion of the CPP Government into stool land administration violated the terms of the political settlement that limited the authority of government to interfere in matters affecting chieftaincy administration. Government was using its powers to gradually dismantle the historical political settlements that affirmed stool land ownership and guaranteed chieftaincy. Nkrumah's government was overthrown by the military in 1966.

When the country decided to return to constitutional democratic rule, the Chiefs and the non-chief political elites negotiated the creation of the Lands Commission in the 1969 Constitution to perform the following responsibilities: (a) to manage the process of compulsory government acquisition of land and the payment of compensation; (b) to grant concurrence to stool land alienations; and (c) to manage, to the exclusion of any other person or authority, any land or minerals vested in the President, or in the Commission, or acquired by the Government.<sup>274</sup> The constitutional makers however reaffirmed the historical political settlements that "All stool lands in Ghana shall vest in the appropriate Stool on behalf of, and in trust for, the subjects of the Stool."<sup>275</sup> The Secretariat of the colonially established Lands Department unofficially became the home of the Lands Commission (Kasanga and Kotey 2001). The second republican state lasted for only three years, and from 1972 to 1979 the military once again seized political power to rule the country.

When the third republic state was created in 1979, the constitutional makers reaffirmed the role of the Lands Commission. Furthermore, it was decided that the administrative independence of the Lands Commission should be constitutionally insulated from government political interferences. The administrative control of the Lands Commission was therefore subject to only the Constitution and no other person or authority.<sup>276</sup> Furthermore, the representatives of interest groups such as the National House of Chiefs, the Ghana Institution of Surveyors, and the Ghana Bar Association were included on the governing body of the Lands Commission.

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<sup>273</sup> Many legal instruments by the CPP Government for the compulsory and management of stool lands included the Akim Abuakwa (Stool Revenue) Act, 1958 (Act 78), the Ashanti Stool Act, 1958 (Act 28), the Stool Lands Control Act, 1960 (Act 79), the Administration of Lands Act, 1962 (Act 122), and the State Lands Act, 1962 (Act 125).

<sup>274</sup> 1969 Constitution of Ghana, Articles 162-164.

<sup>275</sup> 1969 Constitution of Ghana, Articles 164(1).

<sup>276</sup> 1979 Constitution of the Republic of Ghana, Article 189(7)

It is interesting to note that in the 1969 and 1979 Constitutions, the Lands Commission and the OASL were the only constitutionally established PSLAs. The reason, I have argued, is that Chiefs and the non-Chief ruling elite were more interested in consolidating their historical political gains. Although the overall political environment had proved to be very volatile to attacks from military coup makers, the non-military political elite still had faith in the endurance of constitutional settlements. The third republic state however lasted for only two years. It was overthrown in 1981 by the same military ruler, Jerry John Rawlings, who had handed over power to a democratically elected government in 1979.

Jerry John Rawling's PDNC military government ruled until 1992 when the country was returned to democratic rule under the 1992 fourth republic constitution. According to Kasanga and Kotey (2001:3), "in the mid-1980s, however, the Lands Department was officially turned into the Secretariat of the Lands Commission"; and, the Lands Commission "carried out all the day to day land administration functions" concerning deeds registration (ibid). It appears that the military politics that enabled the Lands Commission to capture the Lands Department and its Lands Registries did not legally transfer the assets and obligations of the Lands Registry to the Lands Commission. The military politics of organizational capture that took place appears to have been so successful that Ghanaian scholars with interest in land administration have not considered it necessary to delve into this process of organizational reform.<sup>277</sup> In 2008, the "assets, obligations and rights" of both the Lands Commission and the Lands Registry would be transferred to a new Lands Commission. The politics of this organizational reform is discussed in chapter 9.

The Committee of Experts that drafted the 1992 Constitution questioned the functional basis for the 1979 constitutional guarantee of the autonomy of the Lands Commission.<sup>278</sup> The Committee of Experts made the following argument:

Whatever the merits of autonomy in the abstract sense, it would seem unrealistic to insulate a vital economic agency from the entire apparatus of Government

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<sup>277</sup> Commonly, scholars mention that the Lands Department was the predecessor of the Lands Commission. Research on how the reform process occurred is lacking.

<sup>278</sup> Report of the Committee of Experts (Constitution), Proposals for a draft Constitution of Ghana, 31 July, 1991, paragraph 306.

concerned with the management of the economy. One of the serious impediments to effective land management in this country is the lack of co-ordination among the various agencies with responsibility in this area. In principle, a constitutionally guaranteed autonomy of any one of such institutions seems unrealistic.<sup>279</sup>

The constitutional rule that guaranteed the autonomy of the Lands Commission was therefore removed and the authority of the Lands Commission was subjected to the authority of the Minister of Lands and Natural Resources. Interestingly, the 1992 constitutional designers did not create any institutions of horizontal accountability between the Lands Commission, the OASL and the other related-related agencies. The Committee of Experts only urged the Lands Commission and the OASL to cooperate with each other in the performance of their related functions.<sup>280</sup>

In the absence of formally specified authoritative institutions of horizontal accountability between the PSLAs, it became impossible for the PSLAs to compel each other to cooperate in the performance in related functions. The question of how far the Minister of Lands and Forestry uses his ministerial authority to ensure inter-organizational co-ordination of functions between unwilling autonomous public agencies is an age-old contentious subject in the field of public administration (Svara 2008). In the opinion of Kasanga (2000a), the decision to subject the Lands Commission to the authority of the Minister of Lands mainly enhanced the sharing of public lands between the non-chief ruling elite.

In a nutshell, it is clear that the creation of the OASL and the Lands Commission were shaped by the obligations imposed by historical political settlements of state authority over land ownership and the administration of stool land revenues. These settlements reflected the legacies of the traditional-federal state created in 1821-1831. However, African state-makers consolidated the legacies of the traditional-federal state and also created new path dependent processes concerning the administration of stool lands. Theoretically, it could be argued that the developmental obligations imposed by political settlements are more likely to be achieved if the conditions that shaped the political settlements are present or

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<sup>279</sup> Report of the Committee of Experts (Constitution), paragraph 306.

<sup>280</sup> 1992 Constitution, Article 258(1) and Article 267(7-8). See also OASL Act, 1994, (Act 481) Sections 9-10 and Lands Commission Act, 1994 (Act 483), Section 2(1).

sustained. The failure of governments to sustain the condition of constitutional democracy that shaped the 1949 Coussey Committee settlement over the sharing of stool land revenues prolonged the fulfilment of the terms of that settlement for a period of 43 years. It appears that the constant interventions of the military in Ghana's democratic advancement have been developmentally costly. While the military governments truncated the path of constitutionally negotiated conditions for state development, they were unable to create alternatives that were acceptable to the majority of the non-military political elite. I move on to discuss the nature of the 'World Bank originated agencies' of land administration that were established by the PNDC military government in 1986.

### **7.2.3 World Bank Originated Public Sector Land Agencies: External Pressures for Reform of Customary Land Tenure into Freeholds**

I discuss here the origins and functions of the Land Valuation Board and the Land Title Registry created through World Bank sponsored neo-liberal economic reform programs in the 1980s. I analyse the functions of the Land Valuation Board and the Land Title Registry, both created in 1986, largely within the context of the World Bank sponsored land administration reform programs in the 1980s.

#### **(i) The Land Valuation Board: Property valuation and the payment of compensation for compulsory acquired lands**

One of the key areas on which the World Bank sponsored reforms focused was how to help the government generate enough internal revenue from property taxation (World Bank 1985). The PNDC Government was advised to merge into a single agency all the property valuation units scattered under various Ministries. This reform program produced the Land Valuation Board, under Section 43 of PNDC Law 42. The World Bank argued that "with budgetary and administrative autonomy, the LVB [Land Valuation Board] would provide a better vehicle for updating the tax base of Accra and other urban areas" (World Bank 1985:2). The main functions of the Land Valuation Board included: (i) the valuation of landed property for taxation and compulsory government acquisition, (ii) the preparation of valuation lists for purposes of property taxation by government; and (iii) the payment of compensation

for lands compulsorily acquired by government. The Land Valuation Board operated on its military legal foundations even when the country was returned to constitutional rule in 1992. The Board's lack of an enabling legislative Act constrained the development of its human and material resource capacity and made it dependent on the resources of other PSLAs (Kasanga 2000a).

When the Land Valuation Board took over the functions of the Lands Commission concerning the payment of compensation for land compulsorily acquired by government, the Board began to be served with legal suits against Government over the failure to pay compensation for compulsory acquired lands (Kasanga and Kotey 2001). Professor Kasim Kasanga, chairman of the Land Valuation Board, from 1998-2001, reported that "outstanding compensation claims owed by Government nationwide as at December 1999 was estimated at 800,000,000,000 cedis (US\$110m at current rates of exchange)" (Kasanga and Kotey 2001:24). Unfortunately, "the Land Valuation Board has no legal staff of its own and has to rely on the stretched legal staff of Lands Commission and the Attorney General's Department in all those cases" (Land Valuation Board 2008 Annual Report, Appendix D). The Land Valuation Board therefore always cooperates with the legal staff of the Lands Commission to map out strategies of defence at the Courts. In the absence of incentives for cooperation with the Lands Commission to perform related functions, officials of the Land Valuation Board sometimes argued that "the laws that govern the Lands Commission do not bind the Land Valuation Board" (Somevi 2001:17).<sup>281</sup> This shows that horizontal accountability between state agencies cannot be based on voluntary cooperation but on negotiated authoritative institutions.

## **(ii) The Land Title Registry and Compulsory Land Title Registration**

The Land Title Registry was the new agency created to implement the Land Title Registration Law enacted by the PNDC Government in 1986. Kasanga (2000a) argues that the establishment of the land title registration system should have been built on the institutional foundations of the system of deeds registration. It appears

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<sup>281</sup> The World Bank also reported that its sponsored property revaluation projects led by the Land Valuation Board, from 1994-2003, successfully achieved the project targets but encountered problems of coordinating the activities of the various land-related agencies (World Bank 2003e).

that historical legacies did not seem to matter to either the World Bank or the PNDC military government. The new organizational structure for the registration of land title became a complex process that involved the Land Title Registry, the Lands Commission, the Survey Department, and the Land Valuation Board and other agencies. Rebecca Sittie, Chief Registrar of Lands at the Land Title Registry, summarises the process of land title registration as follows:

As part of the registration process the Survey Department is required to prepare a parcel/cadastral plan which is recorded in the records of the Survey Department and the Land Title Registry to prevent multiple registration. The plan is vital to the whole process. Until an applicant's plan is received from the Survey Department, publication cannot be placed in the newspaper, a search cannot be conducted at the Lands Commission and there can be no spatial description in the Land certificate to be issued (Sittie 2006:5).

The imperative for strong inter-organizational cooperation and coordination of functions between the agencies involved in land title registration cannot be over-emphasized. Between 1991 and 1999, the World Bank sponsored the implementation of land titling pilot projects in two urban cities – Accra and Kumasi. The Land Title Registry was able to issue 1,200 land titles as against the target of 1,000 titles (World Bank 2000:7). In spite of the success, it was noted that “differences between the newly created land title registry and the old deeds registry hindered the progress of land titling activities” (World Bank 2000:6). According to the World Bank, the lessons from many World Bank sponsored land titling pilot projects provided government “the basis for initiating major land reforms, including the merger of the deeds and title registries” (World Bank 2000:10). The process of setting the agenda for a comprehensive reform was completed in 1999 when the National Land Policy was formulated by the Ministry of Lands and Forestry (Ministry of Land and Forestry 1999). The politics of National Land Policy making and the land administration reforms pursued are discussed in chapter 9.

The development of public sector agencies of land administration is just one part of the story of land administration in the traditional-federal state. The other part concerns customary land administration controlled by organizations of chieftaincy. In the next chapter I analyse how the consolidation of the political settlements concerning land ownership and chieftaincy have constrained the development of

transparent and accountable institutions of customary land administration. It is clear that the unwavering commitments of political elites to historical settlements may enhance or constrain the development of an effective state.

#### **7.4 Conclusion: Political Settlements over State Organization Matter**

The consolidation of the legacy of communal land ownership now faces formidable opposition from internal and external forces of capitalism advocating the creation of individual freeholds. The development of an effective organizational framework for land title registration continues to be a reform agenda that is largely pushed by external development actors rather than by Ghanaian governments. Since the 1980s, the World Bank has strongly advocated the transformation of communal land into individual freeholds. Chiefs and governments have so far resisted reform.

The legacies of the traditional-federal path of state organization have shaped the creation of public sector land administration agencies to manage the interests of traditional authorities, the non-chief ruling class, and citizens in land. The Lands Commission, the Office of the Administrator of Stool Lands, and the Land Valuation Board all derive their functional existence from the consolidation of communal land ownership by the state. The consolidation of the political structures of chieftaincy, communal land ownership, and modern government, explains the origins of the above public sector land administration agencies. Chiefs and the non-chief political elites have demonstrated unwavering commitment to abide by their historical political settlements and develop appropriate agencies to manage their interests. The historical political settlements have both enabled and constrained the development of effective state agencies of land administration in the post-colonial period.

The consolidation of stool land ownership, the authority of chiefs and the authority of government in the post-independent state led to the creation of the Lands Commission to manage the conflicting interest of Chiefs and Government. Similarly, the Land Valuation Board was created to manage the payment of compensation for communal lands compulsorily acquired by government. The OASL also emerged in direct response to the 1949 Coussey Committee political settlement over the sharing of stool land revenues between Chiefs and government. The theoretical significance

of these findings is that developmental obligations imposed by constitutionally negotiated political settlements are more likely to be pursued, and achieved, by the Ghanaian political elites if the constitutional settlement is sustained.

The study makes an interesting finding that developmental intentions and obligations negotiated between political elites under conditions of constitutional democracy are more likely to be achieved if the conditions of constitutional democracy are sustained. The failure of the political elites to sustain colonial conditions of constitutional democracy appears to be the main reason why it took 43 years for the chiefs and non-chief political elites to finally reach agreement over how to share stool land revenues between chiefs, local communities, and local government agencies. In spite of constant military interventions in government, the non-military political elites are still committed to their colonial democratic agreements.

It should however be noted that the sustainability of political settlements within the organizational sphere of land administration is dependent on the stability of the entire state. The failure of political ruling elites to meet their economic developmental obligations to citizens might result in interventions from internal or external actors that threaten the stability of political settlements within the sphere of land administration. In the next chapter I show how the failure of chiefs to develop the largely informal institutions in the organizational sphere of chieftaincy – without the intervention of government as historically agreed – has affected transparent and accountable customary land administration.

## Chapter 8

### **The Organization of Chieftaincy in the Post-Colonial State and the Politics of Customary Sector Land Administration: 1957-2000**

#### **Introduction**

This chapter discusses the role of chieftaincy in stool land administration. The informal-legal institutions of chieftaincy simultaneously complement and substitute for formal-legal institutions concerning land administration. Particularly I will show that the informal rules of customary law integrated into the laws of Ghana tend to substitute for formal-legal institutions of accountability that seek to hold chiefs responsible for the performance of their fiduciary functions in stool land administration. Although chiefs continue to emphasize the need for governments to support the ascertainment and codification of the rules of customary law, governments have not responded. It is therefore difficult to ensure transparency and accountability in customary land administration. Moreover, in the absence of formal-legal rules specifying how chiefs are to use stool land revenues, it has become difficult for both the courts and Audit Service to ensure effective transparency and accountability in traditional governance. My objective is to show how state integration and consolidation of the institutions of chieftaincy have mattered in shaping the role of chiefs in land administration.

The chapter is divided into five sections. It begins with a discussion of how institutions of chieftaincy have been integrated into the Ghanaian state. I also discuss the formal role of chiefs in stool land administration. Second, I discuss the nature of state integration of customary law. Third, I discuss some attempts made by the political elites to develop horizontal institutions of accountability to govern the fiduciary role of chiefs in communal land administration. Fourth, I discuss how the failure of governments and traditional authorities to effectively reform informal rules of customary law has constrained transparency and accountability in communal land administration. I conclude that the path towards the creation of accountable institutions of chieftaincy for stool land administration lies in effective cooperation between government, chiefs and other actors with interests in land administration.

## 8.1 State Integration of Formal Organizations of Chieftaincy

At the dawn of independence on 6 March 1957, the formal organizations of chieftaincy that had been developed and integrated into the state were the State Councils, the Provincial Councils, and the Joint Provincial Council of Chiefs. These local, regional, and national organizations of chieftaincy were largely innovated by chiefs and their local communities. Today, these formal organizations of chieftaincy have been consolidated in the state under new names. The State Councils are now known as Traditional Councils, the Provincial Councils are now known as Regional Houses of Chiefs, and the Joint Provincial Council of Chiefs have metamorphosed into the National House of Chiefs. The major difference between the colonial and the post-colonial periods is that these formal organizations of chieftaincy no longer elect their representatives into Parliament. However, they continue to exercise important judicial, administrative, and political statutory functions that I discuss below.

There are 196 Traditional Councils of Chiefs that have been given original jurisdiction to hear and determine matters affecting Chiefs who are below the rank of a Paramount Chief.<sup>282</sup> Above the Traditional Councils are 10 Regional Houses of Chiefs with original and appellate jurisdiction to hear and determine chieftaincy disputes.<sup>283</sup> Each Regional House of Chiefs also appoints a representative to the Lands Commission that manages lands acquired by Government within the region.<sup>284</sup> A Regional House of Chiefs also elects two of its members to the Regional Co-ordinating Council which is responsible for the co-ordination and direction of the administrative machinery in the region.<sup>285</sup> Above the Regional House of Chiefs is the National House of Chiefs made up of five Paramount Chiefs elected from each Regional House of Chiefs. The National House of Chiefs supervises the activities of the Regional House of Chiefs and the Traditional Councils. The National House of Chiefs has representation on the governing Board of the Lands Commission.<sup>286</sup>

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<sup>282</sup> Chieftaincy Act, 2008 (Act 759), Section 29. There are Divisional Councils of Chiefs below the Traditional Councils and their composition and functions are outlined under Sections 19-21 of Act 759. According to officials interviewed at the Ministry of Chieftaincy and Culture, there are about four formally organized Divisional Councils recognised under the House of Chiefs. The officials interviewed were, however, not very certain about the number of Divisional Councils.

<sup>283</sup> 1992 Constitution, Article 274.

<sup>284</sup> 1992 Constitution, Article 261.

<sup>285</sup> 1992 Constitution, Article 255(c).

<sup>286</sup> 1992 Constitution, Article 259.

The 50-member National House of Chiefs has been given original and appellate jurisdiction in any cause or matter affecting chieftaincy.<sup>287</sup> Cases determined by the National House of Chiefs can only be appealed at the level of the Supreme Court (Brobbeey 2008; Kludze 1998, 2000).<sup>288</sup> It is important to emphasize that outside the judicial committees of the Traditional Councils, the Regional Houses of Chiefs, and the National House of Chiefs only the Supreme Court has final appellate jurisdiction over all matters concerning chieftaincy. Chieftaincy in Ghana therefore wields statutory authority within the judicial system of the state.

Chiefs are also somewhat connected to the highest level political decision-making by the Presidential-Executive. In policy decision-making, as well as in the appointment of many high level political positions within the state, the Presidential-Executive is advised by a 25-member Council of State of which the President of the National House of Chiefs is an automatic *ex-officio* member.<sup>289</sup> Usually, many of the members of the Council of State are Chiefs who have been elected by their Regional Coordinating Councils to represent the region on the Council of State. And through the Council of State Chiefs influence policy decisions of the Presidential-Executive.

Crucially, due to the history of political conflicts between Chiefs and the non-Chief ruling elite, the Presidential-Executive and Parliament cannot reform matters concerning chieftaincy without the cooperation of Chiefs (Brobbeey, 2008). The constitutional veto points specify that “Parliament shall have no power to enact any law which (a) confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever; or (b) in any way detracts or derogates from the honour and dignity of the institution of chieftaincy.”<sup>290</sup> The authority of the Legislature is further constrained in Article 106(3) of the Constitution which states that “A bill affecting the institution of chieftaincy shall not be introduced in Parliament without prior reference to the National House of

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<sup>287</sup> 1992 Constitution, Article 273.

<sup>288</sup> 1992 Constitution, Article 273. In 1995, the Supreme Court unanimously ruled, in *The Ghana Bar Association v. The Attorney-General*, that under the 1992 Constitution the High Court and the Court of Appeal have no jurisdiction in chieftaincy matters. (Unreported, Writ No. 14/93, Supreme Court, Accra, 7 February, 1995) The ruling is the subject of an interesting legal analysis by Kludze (1998) in an article titled ‘Chieftaincy Jurisdiction and the Muddle of Constitutional Interpretation in Ghana.’

<sup>289</sup> 1992 Constitution, Article 89-92.

<sup>290</sup> 1992 Constitution, Article 270(2-3).

Chiefs.” The National House of Chiefs thus functions as a quasi-Second Chamber of legislature.<sup>291</sup> The political implications of these constitutional constraints are that the successful reform of stool or customary land administration cannot be achieved by any democratically elected Government without the cooperation of Chiefs.

The organization of state-chieftaincy relations in the fourth republic constitution consolidated the crucial political settlements that underpinned the formation of the traditional-federal state during the colonial era. A Supreme Court judge, Justice S.A Brobbey, commented that the constitution not only entrenches institutions of chieftaincy, but, more crucially, “takes away the power of the government or Parliament to control chiefs” (Brobbey 2008:3). From the lowest level of local communities to the highest level of the Presidential-Executive, we can see that organizations of Chiefs (Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs) have significant state authority and power to shape support for or resistance to Government policies concerning land administration.

In light of the constitutional authority and power of Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs within the state, the view of Kludze (2000:556) that “the Constitution does not provide for a formal position for the institution of chieftaincy or for chiefs as part of the organs of national government” does not reflect the reality of state organization. Moreover, Kludze’s view that “the chiefs do not share power with the executive, the legislature or the judiciary” (ibid) is untenable. The formal authority of chieftaincy within the judiciary system is taken more seriously by other legal scholars (Brobbey 2008; Kunbour 2002). I turn next to discuss the role of chieftaincy in land administration.

### **8.2.1 Is There a Formal Role for Chiefs in Stool Land Administration?**

Defining the specific functions or mandates of Chiefs in customary land administration within the state is important in knowing exactly what specific responsibilities Chiefs could be held to account for, and to whom they are to account. Interestingly, none of the four republican Constitutions categorically defines the

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<sup>291</sup> It is important to note that these constitutional constraints on the power of Parliament are historical political settlements that date back to the 1957 Independent Constitution (Article 32).

authority of Chiefs to manage or administer stool lands. The 1992 constitutional position is that “All stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with customary law and usage.”<sup>292</sup> The affirmation of land ownership is however not synonymous with the formal definition of the responsibilities of Chiefs in stool land administration.

Kotey et al. (2004:39) point out that “It is difficult to reconcile the notion of stools, families and individuals owning land and managing it from day to day, whilst the government and its officials control important decisions affecting the land, including the collection and disbursement of the income accruing from their land.” Perhaps, one can logically assume that the rules and actors of chieftaincy, as established in accordance with the rules of customary law for the purpose of stool land administration, are constitutionally guaranteed within the state.<sup>293</sup> Chiefs are not constitutionally constrained from performing their functions of managing Stool land on behalf of their subjects within the confines of the rules of customary law.

It should also be emphasized that Governments have also not been constitutionally constrained from creating agencies of land administration in public sector to administer Stool lands. In fact, the formal organizations of chieftaincy – Traditional Councils, Regional Houses of Chiefs, and National House of Chiefs – and the so-called public sector agencies of land administration – particularly, the Lands Commission and the OASL – are in constant conflict over matters concerning the administration of stool lands. The conflicts largely stem from the fact that the authority of chiefs in stool land administration has not been outlined within the constitution or in any legislative enactment. The public sector organizational framework of land administration controlled by government shall be discussed later.

In a nutshell, the institutions and actors of chieftaincy have been integrated into the state but the informal functions of Chiefs in Stool land administration have not been formally defined in the state. Within the state, Chiefs are legitimately authorised by their subjects to manage stool lands on behalf of the entire community, in accordance

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<sup>292</sup> 1992 Constitution, Article 276(1).

<sup>293</sup> The rules of customary law are inclusive of the laws of Ghana, 1992 Constitution, Article 11.

with the unwritten rules of customary law guaranteed within the state. The nature of the rules of customary law in Ghana is discussed next.

### **8.3 Informal Institutions of Chieftaincy: Who Defines Customary Law?**

There is no doubt among Chiefs, the Courts, and legal scholars that the laws of Ghana include the rules of customary law that organizes chieftaincy in specific local communities. After the dawn of independence in 1957, if anyone was still in doubt about the legal status of customary law in the state, then all the four republican Constitutions that followed the 1957 Constitution categorically emphasized that the laws of Ghana include the rules of customary law applicable to particular communities.<sup>294</sup> Moreover, it is also stated categorically that “the land law of Ghana is the customary law and no other law.”<sup>295</sup> The unsettled question is what exactly is customary law? It is important that we know the answer to this question before we attempt to understand the nature of the rules that the LAP project tried to create to govern the administration of land by the CLS.

Political elites and legal scholars in the newly independent Ghana were fully aware of “a problem common to Ghana and to other emergent African states with a legacy of imperial and colonial laws; namely, the relationship between those laws and the customary laws of the country.”<sup>296</sup> Knowing the problem is one thing; and finding an appropriate solution to deal with the problem is another thing. The official definition of ‘customary law’ was to lay the foundation for “official legal pluralism” (Crook et al. 2007:26) in the ascertainment of customary law.

In 1960, Mr. Ofori Atta, then Minister of Local Government, presented to the Constituent Assembly the Interpretation Bill that sought to define, among other concepts, the meaning of customary law. The Bill stipulated that the rules of customary law that had been assimilated by the Courts shall prevail over any informal rule of customary law, in the case of inconsistency.<sup>297</sup> Mr Ofori Atta

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<sup>294</sup> Article 40 (f) of 1960 Constitution; Article 126 (2-3) of 1969 Constitution; Article 4 (2-3) of 1979 Constitution; and, Article 11 (2-3) of 1992 Constitution.

<sup>295</sup> Section 66 (1), rule 4 of The Courts Act, 1960 (quoted from Ollenu 1971:148).

<sup>296</sup> Official Report of Proceedings of the Constituent Assembly, 1960, p.250, (ADM 14/6/80).

<sup>297</sup> Section 17 (2) of the 1960 Interpretation Act.

explained that this legal approach to the ascertainment of customary law “envisages the development of a distinctive common law of Ghana embracing rules of customary law suitable for general application.”<sup>298</sup> But after Mr Ofori Atta’s presentation, the legal implications of the Bill were not understood by every Member of the Constituent Assembly. Mr. Abayifaa Karbo, the Member representing the Lawra Nandom local community, outlined his confusion to the Minister as follows:

It will appear that we will have to get the Courts Act of 1960, which this House has not at present, before we will be able at least to discuss this Bill properly. At present we do not know what that Act contains. The position is that we have to administer our customary rules in so far as they are not contrary to equity. But, as it is, we do not know whether the provision in the existing Courts Ordinance will be included in the Courts Act. ... As it is, it is very difficult to debate the whole Bill, because we do not know what rules are contained in the Courts Act, and how the rule is to be considered as an assimilated rule so as to enable it to prevail over the ordinary customary law obtaining in say, Lawra.<sup>299</sup>

Even if all the rules contained in the Courts Act were made available to Mr. Karbo, he would not have found any of the assimilated rules of customary law that operated within Lawra. The reality was that the assimilated rules existed in scattered documents of Court rulings. Thus, it was the turn of Mr. Ofori Atta to be confused by Mr. Karbo’s understanding of the new statute. Mr. Ofori Atta responded:

It is difficult for me to understand the point raised by the Hon. Member. The interpretation Bill is in short a legal dictionary. ... ‘While any of the statutes of general application continue to apply by virtue of the Courts Act, 1960 they shall be treated as if they formed part of the Common law, ... prevailing over any rule thereof other than an assimilated rule.’ I do not see why that, in any way, raises any sort of problem in his understanding of this Interpretation Bill.<sup>300</sup>

Generally, Chiefs and other traditional authorities do not agree that the authoritative expositions of the Courts on specific rules of customary law are what should prevail. It appears that the Interpretation Act sought to extinguish the authority, legitimacy, and power of Chiefs to make new rules of customary law or modify existing ones. Chiefs and other traditional authorities cleave to their own knowledge of specific rules of customary law, as well as their power to modify existing rules.

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<sup>298</sup> Official Report of Proceedings of the Constituent Assembly, 1960, p.250, (ADM 14/6/80).

<sup>299</sup> Official Report of Proceedings of the Constituent Assembly, 1960.

<sup>300</sup> Official Report of Proceedings of the Constituent Assembly, 1960.

According to the 1992 Constitution, “‘customary law’ means the rules of law which by custom are applicable to particular communities in Ghana. ...including those determined by the Superior Court of Judicature.”<sup>301</sup> Clearly, the rules of customary law are not exhaustive of those determined by the Superior Court of Judicature (High Court, Court of Appeal and the Supreme Court). However, it appears that the lawyers and judges have cleaved to their rules. According to the 1993 Courts Act (Act 459), “Any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact.”<sup>302</sup> Interestingly, other sub-sections of the Courts Act (Act 459) appear to contradict the entrenched view that the ascertainment of a rule of customary law is a question of law. The contradictory sub-sections stipulate the following:

If there is doubt as to the existence or content of a rule of customary law relevant in any proceedings before a court, the court may adjourn the proceedings to enable an inquiry to be made ...The court may request a House of Chiefs, Divisional or Traditional Council or other body with knowledge of the customary law in question to state its opinion which may be laid before the inquiry in written form.<sup>303</sup>

The above statements indicate a lack of certainty about the rules of customary law even within the Courts. Text-books cannot be considered as statements of law or rules of customary law assimilated by the Courts. Moreover, the recourse to Traditional Councils and other organizations of chieftaincy is not consistent with the view that there exist out there in the Courts uncontroversial principles of customary law applicable to local communities. While organizations of chieftaincy are clearly recognised as having original knowledge of customary law in local communities, as well as their authority to reform customary laws found to be inconsistent with the times, lawyers and judges have followed their assimilated versions of customary law (Asante 1975; Kludze 1987; Kunbour 2002).

The result is that there are now two types of customary law operating in Ghana. They are (a) the judicial customary law and (b) the practised customary law (Crook et al. 2007; Kludze 1987). Kludze (1987:108) offers a comprehensive definition of these

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<sup>301</sup> 1992 Constitution, Article 11(2-3).

<sup>302</sup> Section 55(2) of the Courts Act (Act 459), 1993.

<sup>303</sup> Section 55(3) (5) of the Courts Act (Act 459), 1993.

two types of customary law as follows: “The *practised customary law* consists of the rules of customary law sanctioned by general acceptance and long usage of the general populace of a community and which have crystallised over the years and are binding as rules of law”; and, “The *judicial customary law* is the body of rules, purportedly rules of ‘customary’ law, applied by the courts of the regular court system established under the various Courts Ordinances and Courts Acts.” In other words, the judicial customary law are the formal rules purportedly derived by the Courts from the informal rules practiced in local communities.

The problem is that while the ‘practised customary law’ changes in response to new ideas and practices in society, the lawyers and judges in the Courts cleave to the static ‘judicial customary law’. Legal scholars have observed that the Courts are very reluctant to enforce conflicting rules of ‘practised customary law’ “although the judicial customary law has often been wrong” (Kludze 1987:108). The Courts regarded their static expositions of customary law as authoritative and binding on traditional authorities and local communities. Later I will show how the prevailing conflict and contradictions between the two legal perspectives of customary law impacted on the effort of the LAP to help chiefs create transparent and accountable formal organizations of customary land administration.

The 2008 Chieftaincy Act (Act 759) provides the legal processes for the formal organizations of chieftaincy to voluntarily assimilate informal rules of customary law into the formal system of common law.<sup>304</sup> If a Traditional Council considers that an informal rule of customary law in force within its area is uncertain, and “considers it desirable that it should be modified or assimilated by the common law”,<sup>305</sup> the legal processes of assimilation are as follows. The Traditional Council drafts a declaration of what in its opinion is the customary rule and makes a representation on the matter to its Regional House of Chiefs which in turn considers the declaration and submits the final accepted draft to the National House of Chiefs. Where the National House of Chiefs is satisfied that the draft submitted is a correct statement of the customary rule in question, it submits a written request to the Minister of Chieftaincy that the

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<sup>304</sup> The 2008 Chieftaincy Act is an improvement on the 1971 Chieftaincy Act (Act 370) which also specified almost the same processes relating to the declaration, alteration, and assimilation of customary law. The making of the 2008 Chieftaincy Act predates the LAP-CLS project.

<sup>305</sup> Chieftaincy Act, 2008 (Act 759) (50).

customary law rule be given effect in the local area concerned. The Minister, after consultations with the Attorney-General, may cause a Legislative Instrument (LI) to be passed by Parliament to give effect to the rule of customary law in question. If the draft LI is passed by Parliament, the rule of custom is referred to as a Common law rule of customary origin. It must be added that, almost always, an Act of Parliament requires presidential assent.

Through the same legal processes of assimilation of informal rules of customary law, the existing rules of customary law – whether formal or informal – can be altered by Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs. The National House of Chiefs is authorised to “undertake the progressive study, interpretation and codification of customary law with the view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each Stool.”<sup>306</sup> The problem is that the above agencies of chieftaincy have continued to back their 1927 demand that governments should provide technical and financial assistance for the codification of informal rules of customary law. However, it appears that governments have refused to back down on the historical political settlement that the internal organization of chieftaincy is entirely the business of the traditional state or locality concerned.

At the inception of the LAP-CLS project in 2003, none of the 196 Traditional Councils in the country had formally declared or codified the rules of customary law governing customary land tenure administration in their local communities. The question is whether the time-bound LAP-CLS project had enough time to patiently go through the long legal processes of ascertainment and declaration of uncertain rules of customary law in local communities concerning stool or family land administration. In the absence of any set of codified rules that specify the fiduciary responsibilities of chiefs in stool land administration, one cannot expect to have any transparent, secure, and accountable system of stool land administration. As at 2010, only 11 out of the 196 Traditional Councils had successfully codified and declared their rules of customary law concerning the political succession, installation, and

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<sup>306</sup> 1992 Constitution, Article 272(b). This is restated in the Chieftaincy Act, 2008 (Act 759) (49).

destoolments of Chiefs.<sup>307</sup> The rules of customary law governing stool land administration in those 11 traditional areas are yet to be declared.

In sum, under the fourth republic constitution of Ghana, government does not have the authority to reform institutions of chieftaincy without the cooperation of Chiefs. This constitutional rule that limits the power of government to reform chieftaincy is nothing new. It is only a consolidation of the political settlements negotiated between chiefs and the non-chief ruling class since colonial rule. It has been one of the key pillars of the traditional-federal state. Today, the customary obligations of Chiefs to manage stool lands on behalf of their subjects are discharged through informal rules of customary law that obstruct legal certainty, transparency and accountability. Chiefs rightly argue that the internal organization of political relations between traditional authorities and their local communities are entirely the business of the traditional state or locality concerned, and the people should be left to settle their chieftaincy problems according to their own customs without any government interference. Governments have also been reluctant to provide the resources for the reform of chieftaincy. Informal state institutions of chieftaincy for stool land administration have remained undeveloped. In this dual system of state authority, the extent to which traditional authorities can be compelled by local communities, and state agencies of horizontal accountability, to account for their stewardship of communal land is left to anybody's guess. I move on to discuss some limited reforms that have been attempted by political elites.

#### **8.4 Military and Constitutional Politics over the Accountability of Chiefs**

The fiduciary responsibility of chiefs in stool land administration is derived from the constitutional rules of the Ghanaian state. There have been general demands that chiefs should account for their fiduciary responsibility over the management of stool land alienations and stool land revenues. I have already discussed how the organizations of chieftaincy were separated from the local government system and

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<sup>307</sup> Those 11 Traditional Councils are Atebubu Traditional Council, Lower Axim Traditional Council, Sunyani Traditional Council, Gonja Traditional, Yeji Traditional Council, Buem Traditional Council, Nkoranza Traditional Council, Kaleo Traditional Council, Prang Traditional Council, Kpone Traditional Council, and Drobo Traditional Council. The processes of codification and assimilation were financially and technically supported by the German international development agency, GTZ, under the 'Law Sector Reform Programme'.

lost the formal-legal rules of accountability, prior to the post-independent era. The issue of accountability of chiefs to their subjects however continues to draw the attention of government and constitutional makers. Military and democratic approaches have been used at different times to ensure the accountability of chiefs.

In 1985, the military government of the Provincial National Defence Council (PNDC) backed its revolutionary cry of “Probity and Accountability”<sup>308</sup> by issuing a decree that traditional authorities should be accountable to their local communities for their fiduciary roles. Interestingly, the accountability decree that was issued, PNDC Law 114, focused on only Heads of extended families and not Chiefs. According the Head of Family (Accountability) Law, 1985 (PNDCL 114):

A head of family or a person who is in possession or control of, or has custody of, a family property is accountable for that property to the family to which the property belongs. A head of family or a person who is in possession or control of, or has custody of, a family property shall take and file an inventory of the family property. Where a head of family fails or refuses to render account or file an inventory of the family property, a member of the family to which that property belongs who has or claims to have a beneficial interest in the property, may apply by motion to a Court for an order compelling the head of family to render account or file an inventory of the family property to the family.<sup>309</sup>

The PNDC military ruling elite clearly recognised that informal customary rules of authority commonly fail to enable individual family members to effectively hold their traditional authorities accountable. Without recourse to the view that governments – whether military or democratic – uphold the historical political settlements that guarantee the legitimacy, authority, and quasi-autonomy of Chiefs within the Ghanaian state, it would be difficult to explain why the law was targeted at only family heads without extending it to Chiefs. Crucially, the ‘Head of Family Accountability’ decree went beyond empowering individual family members to empower the Courts to order the accountability of head of families as follows:

A Court may make an order compelling the head of family to render account or file an inventory in respect of the family properties in the possession, control or custody of the head as the Court may specify in the order.<sup>310</sup>

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<sup>308</sup> Contained in the preamble of the 1992 Constitution.

<sup>309</sup> The Head of Family (Accountability) Law, 1985 (PNDCL 114), Sections 1-2

<sup>310</sup> The ‘Head of Family (Accountability) Law, 1985 (PNDCL 114), Section 3

The Head of Family Accountability law marked a significant development in attempts by the non-chief political elites to hold traditional authorities accountable in the administration of communal property, particularly land. The Courts were now empowered as an agency of horizontal accountability to enforce informal rules of customary law that required family heads to be accountable to their members. But the arms of this new law could only reach family heads, not the powerful chiefs.

Prior to PNDCL 114, the Courts, following their own 'judicial customary law', provided immunity to family heads and Chiefs from accountability. The classical entrenched 'judicial customary law' developed by the Ghanaian Courts regarding the accountability of Chiefs to their subjects was this: "It is an accepted principle of Native Customary Law that neither a chief nor the head of a family can be sued for account either of state or family funds."<sup>311</sup> The Subjects of an unaccountable Chief who find informal rules of customary law to be ineffective neither found the Courts to be effective agents of horizontal accountability. It is for this reason that the PNDC Law 114 emphasized that the head of family is accountable "Despite a law to the contrary."<sup>312</sup> It appears that politics was in command in defining the rules of accountability that should be enforced by the judiciary. But has the judiciary been willing to let go of their 'judicial customary law' that granted immunity to Chiefs?

From the many World Bank sponsored structural adjustment reforms, the PNDC government had learnt many lessons to shape their conviction that the creation and maintenance of developmental state institutions of accountability occurs through political processes and not through judicial processes. The PNDC government therefore extended its revolutionary cry of 'Probity and Accountability' into the politics of fourth republic constitution making. The 'Directive Principles of State Policy' outlined in the 1992 Constitution included the following:

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<sup>311</sup> Abude v. Onano (1946) 12 W.A.C.A. 102, 104 (quoted from Ollenu 1962). Some of the favourite judicial cases used by lawyers, judges, and legal scholars to support the view that individual members of land owning communities have no *locus standi* to sue the head of family or chief includes the following: Pappoe v. Kweku (1924) F.C. 23-25, 158; Nelson v. Nelson (1932) 1 W.A.C.A. 215; Mahamadu v. Zenua (1934) 2 W.A.C.A. 172, 175; Koran v. Dokyi (1941) 7 W.A.C.A. 78, 80. Many other cases are provided by Ollenu (1962).

<sup>312</sup> The Head of Family (Accountability) Law, 1985 (PNDCL 114), Sections 1-2

The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in that regard.<sup>313</sup>

The commitment to ensure accountability now went beyond family heads to explicitly include Chiefs who manage stool lands on behalf of their subject. The state took a step forward although the internal rules of customary law within organizations of chieftaincy remained uncodified. If the Courts are willing to embrace their role in Ghana's developing democracy, then it appeared that the ruling elite had provided the launch pad for the Courts to become effective agents of horizontal accountability, in matters concerning the administration of land by family heads and Chiefs.

The complex 1992 constitutional settlements both enabled and constrained the accountability of traditional authorities. On one hand, the 1992 constitutional makers appeared to have recognised that the informal institutional environment of chieftaincy constrained the accountability of chiefs to their subjects. On the other hand, the Chiefs appeared to have recognised the creeping steps of government into matters concerning the internal organization of chieftaincy. The Chiefs therefore successfully negotiated constitutional veto points to insulate themselves from the powers of the Presidential-Executive and Parliament. The question that I examine next is whether the external formal rules that compel Chiefs to be accountable have enhanced the powers of the relevant state agencies of horizontal accountability in enforcing the accountability of Chiefs to their subjects in stool land administration.

## **8.5 Chieftaincy and Horizontal Accountability within the State**

I argue that the internal informal rules of customary law within chieftaincy have largely constrained the horizontal accountability of Chiefs to these relevant state agencies, in the context of stool land administration. I examine below the relations of horizontal accountability between organizations of chieftaincy and three state agencies, namely, the OASL, the Courts and the Auditor-General's Department.

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<sup>313</sup> 1992 Constitution, Article 36(8)

### **8.5.1 The OASL as an Agency of Horizontal Accountability**

The OASL is best placed to ensure the accountability of Chiefs in stool land administration. However, the institutional relationship of accountability between the OASL and Chiefs is an interesting one-way traffic. In the previous chapter I discussed fully the origins and functions of the OASL. Here, I emphasize the important fact that the OASL is constitutionally mandated to collect and disburse into the Stool Land Accounts of local communities all relevant rents, dues, royalties, revenues or other payments. Moreover, the OASL is obliged to make available to the relevant stools “all relevant information and data”<sup>314</sup> as well as yearly “statement of revenue and expenditure”<sup>315</sup> concerning its administration of the stool land revenues.

Chiefs therefore have the legal authority to demand accountability from the OASL. Chiefs know that formal institutions of administration are the surest way to promote the accountability of the OASL. However, the OASL has not been given any such authority to hold Chiefs accountable in how the stool land revenues are used in local communities. The OASL only disburses the rents, dues, royalties and other stool revenues that it collects into the stool land account of the appropriate stools. The OASL is therefore accountable to Chiefs but not vice versa. The furthest that OASL can go is to “consult with the stools and other traditional authorities in all matters relating to the administration and development of stool land”.<sup>316</sup> Interestingly, in the next chapter, I discuss how the Chiefs strangely joined forces with the Lands Commission to demand the demise of the OASL. Let us see how the Courts have also fared as agents of horizontal accountability for Chiefs.

### **8.5.2 The Court as an Agency of Horizontal Accountability**

Every state requires an effective judiciary system to ensure that all actors abide by the legal rules of the state – whether the rules are customary laws or common laws. The effective functioning of the Courts in enforcing the accountability of Chiefs is a matter that is rarely discussed by Ghanaian non-legal scholars. Legal scholars in

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<sup>314</sup> Article 267(7) of the 1992 Constitution.

<sup>315</sup> Section 74 of the Chieftaincy Act, 2008 (Act 759),

<sup>316</sup> Article 267(7) of the 1992 Constitution.

Ghana are fully aware that informal rules of customary law do not provide credible restraints on the actions of Chiefs (Asante 1985; Brobbey 2008; Kludze 1987, 1998). However, as I have discussed above, until recently, the Courts provided family heads and Chiefs with judicial immunity from accountability.

Following the military intervention of the PNDC government in the enactment of the Head of Family Accountability Law in 1985, the position of the Courts appears to be changing. In December 1991, some citizens of the Kumawu Traditional Area, “as representatives of the oman or the Kumawu State”,<sup>317</sup> finally succeeded in getting an order of the Supreme Court to compel their Chief (the *Kumawuhene*) to account for money paid to him by Government as compensation for the compulsory acquisition of Kumawu stool lands. More significantly, the Supreme Court emphasized:

The fear of embarrassment to a chief should not be the ground for a chief not to account when a genuine demand for an account is made by his subjects ... It was Mensah Sarbah who enunciated the principle of immunity of the head of family from accountability which was later extended to cover occupants of stools. Now that by the Head of Family (Accountability) Law, 1985 (PNDCL 114), a head of family is made accountable to his family, I would recommend a similar law to be made by the legislature to cover occupants of stools.<sup>318</sup>

Without the intervention of the PNDC government in 1985, it might have been very difficult for the citizens of Kumawu to get the Supreme Court to overturn an earlier decision by the Court of Appeal that the citizens had no *locus standi* to sue their Chief and Kingmakers (Brobbey 2008). One should also not lose sight of the fact that the Supreme Court has also urged Governments to make a law that governs the accountability of Chiefs in matters concerning stool land administration. The implication of that is that developmental institutions of accountability are created through political processes and not judicial processes.

Some legal scholars have pointed out that while the subjects of a Chief might succeed in getting a Court order to compel their Chief to account for stool land revenues, the informal nature of the rules of customary law poses many practical challenges of enforcement (Kludze 1987). The expenditure of Chiefs is not approved

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<sup>317</sup> Owusu and others v. Agyei and others [1991] 2 GLR 493 – 517.

<sup>318</sup> Owusu and others v. Agyei and others [1991] 2 GLR 493 – 517.

by any state agency and therefore the Chief and his elders have unfettered discretion to spend stool land revenues as they wish. Kludze (1987:115), in his analysis of the implications of the Head of Family Accountability Law, outlines the following problems that the Courts might face:

Our courts apply legal principles of accounting which are based upon and are derived from the rules and practices of English courts. There is, therefore, inherent in this a difficulty of reconciling the English practice with the established principles of the Ghanaian customary law. The incompatibility lies in the conflict between the unfettered discretion of the head of family in the handling of family property on the one hand, and on the other hand, the right of the applicant to challenge the state of account. ... The court will have to determine which of the contentious items of expenditure or disbursement of family property should be disallowed. ... Whether it is desirable to substitute the wisdom of the judge for the discretion of the head of family is an issue which may lend itself to debate (ibid).

The above emphasizes the point that without formal-legal rules of accountability that specifies the mandates, rewards, and sanction mechanisms governing positions of public trust, it would be almost impossible to hold public authorities accountable for their actions. Not even the Courts would have the power to restrain “an avaricious chief, with the assent of venial elders, [from] effectively alienating tribal lands for personal gain or some temporary enrichment.”<sup>319</sup> The Courts and the Chiefs know that informal-legal rules constrain the accountability of public agents.

It is not only the OASL and the Courts that find themselves constrained by informal rules of customary law. I briefly show below how the informal rules of customary law similarly constrain the Audit Service Department in the performance of its constitutional mandate of auditing the revenue and expenditure Traditional Councils, Regional Houses of Chiefs and the National House of Chiefs.

### **8.5.3 The Auditor-General as an Agency of Horizontal Accountability**

Here, the crucial point is that it is impossible to effectively audit the revenue and expenditure of chieftaincy within an informal institutional context. The initial institutional relations of accountability between the Audit service and chiefs were laid under the 1944 Native Authority system of local government. When chieftaincy

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<sup>319</sup> Watson Commission Report, 1948, paragraphs 391-2.

became separated from Local Authorities from 1951, the State Councils continued to function as a state agency of administration in local communities. The Audit Service has continued to audit the revenue and expenditure of Traditional Councils but within an informal institutional context where the stool land revenues and expenditure of Traditional Councils are no longer subject to the approval of any state agency. The implications for the effective auditing of the expenditure of Chiefs in an informal institutional environment need not be over-emphasized. I examine below how the Auditor-General has fared with his authority to hold chiefs accountable in the use of public revenue.

The Auditor-General's department has been auditing the accounts of the National House of Chiefs, Regional Houses of Chiefs, and Traditional Councils. So far, the reports of the Auditor-General show that many organizations of chieftaincy are unable to account for the revenue that they receive from Parliament (Auditor-General's Report 2009; Quartey 2003; Sakyi 2003). From the 2009 report of the Auditor-General, I present below a summary of the status of the public accounts of 184 agential-organizations of Chieftaincy (comprising 173 Traditional Councils, 10 Regional Houses of Chiefs, and 1 National House of Chiefs).<sup>320</sup>

**Table 18: Status of horizontal accountability of Traditional Councils (TCs), Regional Houses of Chiefs (RHCs) and the National House of Chiefs (NHC) to the Auditor-General from 2005-2009**

Agency	No Arrears	1-5 yrs	6-10 yrs	11-15 yrs	16 yrs and above	Total
TCs	47	58	41	22	5	173
RHCs	5	1	4	-	-	10
NHC	1	-	-	-	-	1
Total	53	59	45	22	5	184

In Table 18 above, only 53 (28.8%) organizations of chieftaincy had been able to keep their accounts up to date. The above report however conceals a great deal of important information that cannot be fully discussed here. For instance, in the Central Region, three Traditional Councils had not accounted for their expenditure in

<sup>320</sup> Auditor-General's Department, 2009, Report on Traditional Councils, RHCs, and NHC, 2009. At the time of my data collection in December 2010, the Auditor-General's Department had not yet submitted the audited accounts of the 184 chieftaincies to Parliament. The accounts of traditional authorities from 1993 to 2004 had, however, been submitted to parliament.

over twenty years. Moreover, all the organizations of chieftaincy in the Greater Accra, Upper East, and Upper West regions had not prepared their public accounts from periods between 4-12 years. It is only in the Ashanti region where the majority of the Traditional Councils (14 out of 19) have always accounted for their use of revenue. The reason for the failure of many Traditional Councils and Regional Houses of Chiefs to publicly account for their expenditure is not always due to their unwillingness to do so. A major constraint faced by chieftaincy is the failure of the state to provide qualified administrative personnel and technical resources to Chiefs (Quartey 2003; Sakyi 2003). The 2009 report of the Auditor-General stated:

As indicated in previous reports, the default in the preparation and submission of the financial statements for audit are due to a number of factors, including chieftaincy disputes, civil strife, as well as weak administrative and accounting capacities existing at the Houses of Chiefs and Traditional Councils.<sup>321</sup>

It is important to emphasize that all administrative agencies require financial, technical and human resources to effectively perform their responsibilities. Even the Audit Service does not have adequate personnel to provide up to date reports on all the 184 formal organizations of chieftaincy in the country (da Rocha 2001). When it comes to financing organizations of chieftaincy to perform their functions, many scholars and government officials find it hard to appreciate the crucial fact that institutions of chieftaincy are state institutions (Kludze 2000; Ministry of Lands and Forestry (MLF) 2003). Organizations of chieftaincy are usually seen as private institutions and not as public institutions of the state (MLF 2003). Chiefs are therefore commonly asked to self-finance their administrative structures. Traditional Councils that are able to generate enough revenues from stool lands and other sources have been able to maintain effective traditional structure of administration. The typical example of the Kumasi Traditional Council is shown below.

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<sup>321</sup> In an interview with officials of the Audit Service, they confirmed that sometimes the statements of accounts of the Traditional Councils are prepared by the same Auditors who are supposed to audit the accounts because the Chiefs lack qualified staff to prepare the accounts from available receipts (also see Quartey 2003). The Audit Service Act, 2000 (Act 584) requires that the accounts of all public agencies be kept in a standard format approved by the Auditor-General.

**KUMASI TRADITIONAL COUNCIL**  
**REVENUE AND EXPENDITURE ACCOUNTS FOR THE YEAR ENDED 31<sup>ST</sup> DECEMBER 2002<sup>322</sup>**

<b>EXPENDITURE</b>	<b>ESTIMATE</b>	<b>ACTUAL</b>	<b>INCOME</b>	<b>ESTIMATE</b>	<b>ACTUAL</b>
Staff Salaries	360,000,000	394,834,315.69	Otumfuo	300,000,000	306,753,902.18
Allowance to Asantehemaa	12,000,000	11,000,000	Administrator of Stool Lands	750,000,000	680,454,148
Allowance to Nhinkwaa	20,000,000	27,190,891	KMA Grants	120,000,000	140,000,000
Allowance to Security	15,000,000	17,849,000	Fees & Petitions	15,000,000	7,500,000
Travelling & Transportation, Council Staff	10,000,000	2,841,000	Interest	20,000,000	1,340,000
Maintenance of Council Building/Equipment	50,000,000	59,030,000	Kumasi Traditional Council	25,000,000	19,009,208
Medical Expenses	20,000,000	22,563,787.64	Donations	---	127,500
Printing & Stationery	25,000,000	9,506,000			
Entertainment	45,000,000	32,743,457			
Light & Water	15,000,000	3,493,698.71			
Office Expenses	25,000,000	5,033,300			
Purchase of Stool Property	10,000,000	1,256,000			
Miscellaneous Expenses	20,000,000	69,122,120			
Accommodation	50,000,000	30,334,250			
Weekend Expenses	25,000,000	64,158,908			
Customary Expenses	150,000,000	224,125,050			
Akwasidae	20,000,000	35,348,000			
Household Expenses	40,000,000	20,000,000			
Running and Maintenance of Vehicles	85,000,000	83,106,687			
Awukudae	15,000,000	16,868,500			
		<b>1,130,404,964.86</b>			<b>1,155,184,758.18</b>

<sup>322</sup> Source: Auditor General's Department. The audited accounts for 2001, 2003, and 2004 also shows expenditure relating to assistance to needy students, social security deductions, income tax deduction, insurance, allowance to chiefs, and allowance to dependents. The sources of income however remained the same. It is interesting to note that in 2003, the income generated by Otumfuo was 1,265,506,393 and income from the Office of the Administrator of Stool Lands was 924,300,000. As in the colonial period (see discussion in chapter 5), Chiefs continue to raise a major source of their income from the administration of stool lands.

From the revenue and expenditure accounts of the Kumasi Traditional Council for the year 2002, it can be seen that the chiefs derived about 59% of their income from their share of stool land revenues distributed by the Office of the Administrator of Stool Lands (OASL). Only about 1.6% of its income came from money given to the Kumasi Traditional Council. The Kumasi Metropolitan Assembly (KMA) also provided some grants. The crucial point is that traditional authorities in Ghana largely survive on the resources they generate by themselves and not on the financial and material support of government. In 2006, the NPP Government transformed the Chieftaincy Secretariat into the Ministry of Chieftaincy and Culture. It is hoped that the new Ministry would be able to secure enough yearly budgetary allocations to support the development of a more transparent and accountable system of traditional governance in the 196 traditional areas that the Ministry currently supervise.

Due to the limited formal-legal rules that govern chieftaincy-society relations, and the predominance of informal rules of customary law, the Audit Service as a state agency of horizontal accountability faces difficult hurdles in holding traditional authorities responsible for their usage of revenue. Many Traditional Councils have no agreed estimates of expenditure with the Audit Service to compare with the actual figures of expenditure submitted for auditing. For instance, the Apam District Office of the Audit Service wrote the following after auditing the accounts of the Ajumako Traditional Council: “There were no significant findings, however, validation of the Annual Accounts from 2000 to 2009 have been done. There were no estimates to compare with the actual figures.”<sup>323</sup> Interestingly, informal rules of customary law governing the administration of chiefs in their traditional areas have become both substitutive of, and complementary to, the formal-legal rules of accountability.

The rules of customary law complement the constitutional obligation of traditional authorities to be “accountable as fiduciaries”<sup>324</sup> in their administration of communal (stool) land. At the same time, the rules of customary law governing political relations of accountability between traditional authorities and their subjects in the administration of communal land substitute for the formal-legal rules of accountability that used to govern the administration of chiefs in the local

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<sup>323</sup> Audit Service, Apam District Office, Letter to the Auditor-General, 13 December, 2010.

<sup>324</sup> 1992 Constitution, Article 36(8)

government system before 1951. It could be seen that the substitutive informal rules of customary law governing the administration of Chiefs “seek outcomes compatible with formal rules and procedures” (Helmke and Levitsky 2006a:16); and, they “achieve what formal institutions were designed, but failed, to achieve” (ibid). It is important that Ghanaian scholars pay serious attention to the reasons why the Audit Service and other agencies of horizontal accountability within the State have failed to effectively enforce formal-legal rules of accountability in the domain of chieftaincy, rather than usually proclaiming blanket statements that chiefs have not been transparent and accountable in the discharge of their fiduciary mandates.

The creation of formal rules of horizontal accountability is one thing: The power of state agencies to enforce the rules of accountability within organizations of chieftaincy is another matter that has so far been ignored by governments. In 2010, a district office of the Audit Service recommended to the Auditor-General that an embargo be imposed on all government remittances to three Traditional Councils in the district that had refused to prepare their public accounts from January 2005 to December 2009.<sup>325</sup> The Auditors stated:

We require that all remittances from the underlisted institutions should cease forthwith until the annual accounts are submitted for audit: (i) Central Regional House of Chiefs, (ii) Stool Land Administration, and (iii) Municipal Assembly. This will facilitate the Auditor-General fulfilment of its mandate to report to parliament accordingly.<sup>326</sup>

The above recommendation in the letter shows some kind of commitment by some officials of the Audit Service to enforce the rules of horizontal accountability that govern chieftaincy. However, it should be noted that the Auditor-General does not have the power to force the OASL to impose an embargo on the remittance of stool land revenues to Chiefs (Fiadzigbey 2006). The power of the Auditor-General to compel recalcitrant Traditional Councils to publicly accounts for their expenditure would be constrained. Where customary institutions of vertical accountability between local communities and their Chiefs fail, the creation of effective institutions of horizontal accountability is likely to require recursive institutions of restraint

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<sup>325</sup> Audit Service, Agona Swedru District Office, Letter to the Auditor-General, 6 December 2010.

<sup>326</sup> Audit Service, Agona Swedru District Office, 6 December 2010.

between numerous state agencies. The process may involve the OASL, the Auditor-General, the Regional Houses of Chiefs, the National House of Chiefs, and Parliament. Building effective institutions of horizontal accountability is a complex political process (O'Donnell 2010; Przeworski et al. 1999; Schedler et al. 1999).

Informal rules of customary law constrain the authority of the Auditor General as an agent of horizontal accountability to hold chiefs responsible for their actions. Although the Audit Service may be willing to enforce its rules of horizontal accountability concerning the expenditure of Chiefs, the internal informal rules of customary law usually substitute formal procedures. It is clear that satisfactory results from Traditional Councils cannot be obtained without the provision of qualified administrative personnel and relevant material resources to the Traditional Councils. These are the practical challenges of ensuring accountability in chieftaincy. However, even if administrative personnel and material resources are provided, it would still be a mirage to expect effective transparent and accountable chieftaincy administration in a system governed by informal-legal rules. In the next chapter I shall examine reform attempts made from 2003-2010 to create transparent and accountable agencies of customary land administration in the domain of chiefs.

## **8.6 Conclusion: Informal Rules of Customary Law Hinder Vertical and Horizontal Accountability in Chieftaincy Administration**

The historical political settlements of state authority concerning chieftaincy have certainly shaped chieftaincy-government relations in the post-independent period. Stool land ownership has been consolidated, the institution of chieftaincy has been integrated into the state, and government has refrained from interfering in the definition of local constitutional rules of chieftaincy-society relations. Democratically-elected governments have demonstrated their commitment to abide by historical political settlements that constrain government from interfering in local constitutional matters of chieftaincy. The failure of Chiefs and their subjects to formalise their informal rules of customary law has constrained the vertical and horizontal accountability of Chiefs in the administration of stool lands. Political settlements do matter in enabling or constraining chieftaincy development.

There is little doubt that the informal state constrains vertical and horizontal accountability of Chiefs in the context of stool land administration. Not all the political actors with interest in the development of chieftaincy have the authority to pursue unhindered reforms. The subjects of Chiefs in local communities do not have the power (or the *locus standi* as lawyers say) to reform the informal rules of customary law. The Presidential-Executive and Parliament also appear to rigidly abide by the terms of the historical political settlements that constrain them from reforming the informal rules of chieftaincy without the cooperation of Chiefs. The reform of informal rules of customary law can be initiated by the relevant formal organizations of chieftaincy (Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs). However, the National House of Chiefs has emphasized that it requires financial and technical resources from government to reform the informal rules of customary law that govern chieftaincy-society relations.

On the one hand, it could be argued that Governments have shown little interest in providing resources for the development of organizations of chieftaincy. On the other hand, one could argue that the historical political settlement of the state absolves Government from any blame because the traditional states and their localities agreed to deal with their own internal problems without any external influence. Whatever the case, it is clear that the agencies of horizontal accountability that are supposed to help enforce the vertical accountability of Chiefs to their subjects have found it extremely difficult to work within informal institutional environment of customary law. The Courts and the Audit Service are unable to define the limits of informal rules of customary law that operate within chieftaincy.

It can be seen that the integration of chieftaincy into the State presents both opportunities and challenges for development. Formal agential-organizations of chieftaincy play significant judicial, political, and administrative roles in the development of the country. However, it is also clear that the informal rules of customary law that organize political relations of rule between Chiefs and their subjects must be reformed to enhance transparent and accountable traditional governance by Chiefs. The legal procedures for the reform of informal rules of customary law are clear. But there are also legal constraints concerning who has the authority to reform the rules of customary law in local communities.

In sum, it should be emphasized that institutions of accountability – whether vertical or horizontal – are created, maintained, and reformed by political actors, particularly the political ruling elite. The political intervention of the PNDC government in the accountability of family heads to their communities occurred outside the democratic conditions of constitutional politics that shaped the historical political settlements concerning chieftaincy. With Ghana’s return to that democratic path of constitutional politics, the only approach to the reform of informal rules of customary law governing stool land administration lies in the politics of cooperation and negotiations between Chiefs and Government. Under the fourth republic constitutional democracy, there are no alternative reform paths. Depending on the reform approach, there is little doubt that the historical political settlements of state authority over communal land ownership and chieftaincy could either enable or constrain the reform of the informal institutions of customary land administration.

## Chapter 9

### **The Politics of Land Administration Reform in the Traditional-Federal Ghanaian State: 1994-2010**

The Project should consider what [i]s doable under the current Constitutional provision since failure in attempt to amend the Constitution would stall the whole Project (*Government's advice to the Land Policy Steering Committee, 2007*).<sup>327</sup>

#### **Introduction**

In this chapter I discuss the politics, challenges and outcomes of the land administration reforms negotiated and implemented from 1994-2010. From 1994-1999, Ghana formulated its first post-colonial National Land Policy document. And from 2000-2004, six international development agencies provided financial support for the Government of Ghana to implement land administration reforms outlined in a National Land Policy produced in 1999. While some of the external actors like the World Bank sought to end Ghana's legacy of communal land tenure system in favour of tradable individual freeholds, other external actors like the DFID provided financial support for strengthening the communal land tenure system. I examine the extent to which external demands or support, internal political support or resistance, and state organization shaped the outcomes of renewed attempts to create transparent and accountable institutions of land administration. I argue that the nature and outcomes of the reforms have been shaped by the political settlements of state organization concerning land administration.

The discussion is divided into four sections. Section 9.1 outlines the nature of the land administration reforms that I analyse throughout this chapter. The nature of the external and internal actors that implemented the Land Administration Project is also discussed. Section 9.2 discusses the outcomes of renewed reforms to create transparent and accountable agencies of communal land administration in the domain of chiefs. Section 9.3 discusses the outcomes of reforms to restructure six public

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<sup>327</sup> Government's advice to the Land Policy Steering Committee (LPSC) that was established to provide policy guidance and supervise the Land Administration Project (LAP), Minutes of the 10<sup>th</sup> meeting of the LPSC, 2 October, 2007. p.8

sector agencies of land administration into a single agency. Section 9.4 concludes the chapter by summarizing how the organization of the State shaped the reforms.

## **9.1 The Nature of the Land Administration Reforms: 1994-2010**

Land administration reforms involve complex activities. I shall focus on two specific objectives that shaped the design and implementation of land administration reforms in Ghana from 1994-2010. The reform objectives are (1) the creation of transparent and accountable agencies of communal land administration, and (2) the restructuring of six public sector agencies of land administration into a single agency. The reforms occurred in three stages namely (i) the setting of reform agenda in the 1999 National Land Policy, (ii) the design of the Land Administration Project (LAP) from 2001-2004, and (iii) the implementation of the first phase of the LAP from 2003-2010 (referred to as LAP-1 but I shall use the abbreviation LAP).

### **9.1.1 Setting the Agenda for Land Administration Reforms: 1994-1999**

The formulators of the National Land Policy set the agenda (referred to as Policy Actions) for the reform of the land administration system. According to the Ministry of Lands and Forestry (MLF), the formulation of the National Land Policy began immediately after the Law Reform Commission submitted its “Final Report” on the ‘Reform of Land Law in Ghana’ to Government in 1994 (MLF 1999). The Law Reform Commission’s draft report was written in 1973 (Woodman 1996).

The making of the 1999 Land Policy involved all the actors that wielded state authority related to the reform of land administration, namely the Presidential-Executive (Cabinet), Parliament, and Chiefs (Kotey et al. 1998; MLF 2003). Kotey et al. (1998) have indicated that the political ruling elites shirked much of the responsibilities to the “senior civil/public officials” who had the technical knowledge. The National Land Policy formulation process is narrated by Kotey et al (1998) and the MLF (2003) in Box 1 below.<sup>328</sup>

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<sup>328</sup> The in-depth narrative given by Kotey et al (1998) unfortunately ends in mid-1997 when the final draft of the policy was completed. How the draft became policy from mid-1997 to June 1999 is narrated by the MLF in its 2003 ‘Country Paper’ titled ‘Ghana – Emerging Land Tenure Issues’.

### **Box 1: The Politics of Formulating the 1999 National Land Policy**

“The Ministry of Lands and Forestry (MLF) established a National Land Policy Committee in January 1994, to undertake this task [of formulating a National Land Policy]. The Committee was made up of representatives (the MLF selected the institutions but not the representatives) of: Lands Commission Secretariat, Department of Town and Country Planning (under Ministry of Local Government), Survey Department, Forestry Department, Department of Wildlife, Environmental Protection Agency (under Ministry of Environment, Science and Technology), Forestry Commission, National Development Planning Commission, Land Valuation Board, National House of Chiefs (two representatives), Water and Sewerage Corporation, Ministry of Environment, Science and Technology, Ministry of Agriculture, Department of Geography and Resource Development (University of Ghana), Faculty of Law (University of Ghana), Land Administration Research Centre (University of Science and Technology), Department of Land Economy (University of Science and Technology), Water Resources Research Institute, and Soil Research Institute.

The full Committee elected its chairman (there was not a single woman on the Committee) and met on four occasions to determine its modus operandi, delineate the parameters of the assignment, assemble relevant data, information, previous studies, etc. The Committee then divided into 5 subcommittees: Ownership and Tenure, Use and Conservation, Administrative and Institutional Arrangements, Inventory and Information, and Legislation. Each subcommittee was tasked with preparing a report on the status quo, causes, problems, possible solutions and possible policy options available to government. Subcommittees had powers to co-opt and consult others and some did. Subcommittees deliberated and worked for about three months. Reports were modified and amended by the full committee. A small group of three was appointed to synthesise these subcommittee reports into a final report. The final report was further summarised into a draft policy document and both were approved by the full committee.

The MLF then appointed a consultant to draft a policy document as the basis of formulating a policy. The Draft was circulated to a wide number of stakeholders including those represented on the National Land Policy Committee and: the Ghana Institute of Surveyors; Ghana Bar Association; Institute of Planners; Institute of Renewable Natural Resources; all Regional Lands Commissions; all Regional Houses of Chiefs; the Parliamentary Sub-Committees on Lands and Forestry, Food and Agriculture, Environment, Science and Technology, Mines and Energy, and Local Government; the Ghana Real Estate Developers Association (GREDA); and the Ghana Cocoa, Coffee and Sheanut Association. Many stakeholders including the National House of Chiefs submitted memoranda on the Draft.

A new draft policy was then prepared by the consultant and Lands Commission staff and discussed at a three-day workshop in April 1997. The workshop was attended by the institutions represented on the National Land Policy Committee and a representative of each regional lands commission; the President or representative of each regional House of Chiefs; NGOs; representatives of migrant farmers' groups; representatives of GREDA; the Managing Director of the Home Finance Company; and some individual experts. At the end of the workshop, the MLF and Lands Commission undertook to finalise a draft national land policy for submission to the President. In mid-1997, the Deputy Minister for Lands and Forestry announced that the draft would be submitted to the President for his approval soon” (Kotey et al. 1998:58-59).

“The final draft policy document was presented to Cabinet in December 1997 for consideration and approval. Cabinet then organised a day's seminar in May 1998 to deliberate on the policy provisions. At this seminar experts on land tenure and land use were invited to provide inputs and comments on the draft policy document. The consensus at the seminar was that the document was a workable one but needed further revision. The revisions were made and the proposals received final government approval in January 1999 and the policy document was launched in June 1999” (MLF 2003:23).

There is very little research work on how the different actors influenced the ideas in the policy (Kasanga 2000b). Kotey et al. (1998:7) however make three important remarks about the policy making process: first, that much of the policy was “actually formulated by senior civil/public officials” rather than by government; second, that “the ideas and attitudes of such senior officials [were] often influenced by data (reports) from below” (ibid); and, third, that the policy was “not intended to be law” (p.59). I move on to outline the reform agenda outlined by the policy makers. The analysis of my thesis shall focus on the ‘Policy Actions’ that concern the two reform objectives that I have stated above. The relevant specific policy actions that were to be undertaken to achieve the broad objectives are in Table 19 below.

**Table 19: National Land Policy Actions towards Transparency and Accountability in Customary Land Administration**

<b>Facilitating Equitable Access to Land</b>	<b>Security of Land Tenure and Protection of Land Rights</b>
<p><b>a.</b> Collaborate with the traditional authorities and other land stakeholders to review, harmonise and streamline customary practices, usages and legislations to govern land holding, land acquisition, land usage and land disposal.</p> <p><b>b.</b> Encourage, through appropriate incentives, stools/skins, clans and land owning families to create land banks for present and future generations.</p> <p><b>c.</b> Collaborate with and support the traditional authorities and other stakeholders to:</p> <ul style="list-style-type: none"> <li>• facilitate development of land management knowledge and skills among stool, skin, clan and family landowners;</li> <li>• institute an administrative mechanism to guide the allocation and disposal of land by traditional authorities and family land owners throughout the country;</li> <li>• develop systems that would facilitate proper record keeping in respect of allocation and disposal of stool/skin, clan and family lands by all traditional authorities and other land stakeholders;</li> <li>• assist the various traditional authorities and other land owning families and clans to establish Land Secretariats to facilitate the work of government departments and agencies involved in land service delivery.</li> </ul>	<p><b>a.</b> With full participation of traditional and customary land owners, undertake tenurial reform process which documents and recognises the registration and classification of titles under (i) the allodial owner; (ii) customary law freeholder; (iii) an estate of freehold vested in possession or an estate or interest less than freehold under common law; (iv) leasehold interest; and (v) interest in land by virtue of any right contractual or share cropping or other customary tenancy arrangement.</p> <p><b>b.</b> Speed up title registration to cover all interests in land throughout Ghana, and phase out deeds registration.</p> <p><b>c.</b> Pursue the following actions to resolve or minimise land tenurial disputes and their associated ethnic conflicts:</p> <ul style="list-style-type: none"> <li>• implementation of a programme for the production of large scale maps of land parcels and buildings in all urban areas and locations;</li> <li>• enactment of legislation to require stool, skin, clan, family and other land owners to survey and demarcate their land boundaries with the approval of the Survey Department;</li> <li>• The Chief Justice shall create a special division of the High Court properly equipped to deal solely with land cases.</li> </ul>

Source: 1999 National Land Policy, Sections 5.2 and 5.3 (pages 15-17)

Within the public sector of land administration, the policy makers recommended that the best way to deal with the “lack of consultation, coordination and cooperation” among the public sector land agencies (MLF 1999:4) is to “restructure” them into a single agency and strengthen their capacity to deal effectively and efficiently with land administration delivery (MLF 1999:18). There appear to have been some general understanding among officials of the public sector land agencies that the autonomous agencies should be re-organized under a single agency (Kasanga 2000).

Within the customary sector of land administration, the policy actions generally focused on “facilitating equitable access to land” and ensuring “security of tenure and protection of land right” (MLF 1999). It could be seen from Table 19 that the policy makers were more concerned with the development of a clear system of customary laws and legislations, transparent administrative structures for communal land administration, and the registration of interests in communal land. However, the conflict among the policy makers over the contentious concept of ‘customary law freehold’ as a registrable interest in communal land could not be resolved. The concept that originated from the Land Reform Commission’s 1973 report pre-dated the creation of the 1992 constitution which prohibited the creation of “a freehold interest howsoever described”. Perhaps, the failure of the policy makers to subject the policy to legal tests (as it was not intended to be law) was its Achilles heel as Chiefs would later contest the constitutional validity of a reform agenda to register ‘customary law freeholds’ as an interest deriving from communal land tenure.

It is important to point out that in the ‘policy guidelines’ “intended to guide policy action and execution” (MLF, 1999:8), the policy makers stated that decision making with respect to the disposal of communal land should take into consideration “accountability to the subjects for whom the land is held in trust, in accordance with the provisions of the Administration of Lands Act, 1962 (Act 123) and the Head of Family Accountability Law, 1985 (PNDC Law 112).” (MLF 1999:9) Later, the implementation of the policy actions through the Land Administration Project (LAP) largely focused on the creation of agencies that could promote the accountability of traditional authorities to the members of their community. I discuss in turn how the 1999 policy actions were designed into the LAP.

### **9.1.2 The Politics of Designing the Land Administration Project: 2001-2004**

In the ‘Budget Statement and Economic Policy’ approved by Parliament in 2000, the MLF was given a three-year budget, from 2000-2002, to begin the implementation of the National Land Policy Actions (Ministry of Finance 2000, 2001). Officials in the Lands Commission began to design a land administration reform project.<sup>329</sup> However, the Government of the National Democratic Congress (NDC) lost the December 2000 presidential elections to the New Patriotic Party (NPP). In January 2001, the NPP formed a new Presidential-Executive and ruled for eight years before losing power back to the NDC. It was during the eight-year Rule of the NPP that the LAP was fully designed and the first phase implemented. It is important to note the power transition because the political commitment and power of the new NPP government to implement the inherited policy actions would become crucial.

In 2001, Ghana, led by the NPP Government, applied to the World Bank and IMF to join the Highly Indebted Poor Countries (HIPC) initiative to seek debt relief and financial aid from international creditors. For Ghana to obtain debt relief the NPP Government was expected reach the ‘Completion Point’ of the HIPC Initiative by establishing a track record in the implementation of reforms approved by the World Bank-IMF (IMF 2004, 2011). The National Land Policy readily offered to the NPP Government a set of defined policy actions that received support from the World Bank and IMF (Ghana, World Bank, and IMF 2003). From 2001 to 2003, the Ministry of Lands and Forestry (MLF) collaborated with officials of the World Bank to refine the 1999 ‘Policy Actions’ into the LAP (World Bank 2003b, 2003c).

The World Bank used the window of opportunity to push for the radical reform of the communal land tenure system into “marketable” or “tradable” freehold titles (Ghana 2003). The World Bank argued that “the 1992 Constitution affects the land titling subcomponent of the project” (World Bank 2003c:33) because “only freehold private ownership obtained prior to the enactment of the 1992 Constitution is legally recognized as Article 267 (5) bars creation of freehold interests in land out of Stool land and by implication Skin land as well” (World Bank 2003c:88).

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<sup>329</sup> Interviews with Dr Odame Larbi (1/12/2010), LAP Project Director (2005-2010) and Professor Kasim Kasanga (25/01/2011), Minister of MLF (2001-2003).

The Minister of Lands and Forestry, Professor Kasim Kasanga, who had for decades championed the strengthening of the customary land tenure system opposed the move to end the legacy of communal land ownership.<sup>330</sup> Mr Sulemana Mahama, an official of the MLF who co-ordinated the design of the LAP lamented that “the relative short period of project preparation (August-November 2001) by Consultants whose knowledge of the customary land tenure regime was limited, did not allow for sufficient consultations throughout the country” (Mahama 2003:4). The hurried manner in which the LAP was prepared appears to have been influenced by Government’s urgency to meet IMF-World Bank deadlines for a decision to be made in February 2002 on the debt reduction packages for Ghana (IMF 2004).

Consequently, the initial design of the components of the LAP reflected both (a) the interest of the World Bank to transform the customary land tenure system into individual freeholds, and (b) the contradictory interest of Ghanaian political elites to strengthen the customary land administration system (World Bank 2003b, 2003c). The World Bank therefore tied political conditions to the disbursement of its loan for the implementation of the project. The World Bank agreed to provide technical and financial support for the implementation of the LAP subject to the condition that Government provides “assurances, satisfactory to the IDA, with respect to the continuing validity of customary freeholds” (World Bank 2003c:33). From 2003 to 2010, the disbursement of World Bank funds for the implementation of the LAP became a contentious issue between the World Bank and officials of the LAP.

Professor Kasim Kasanga, the Minister of the MLF, and other political elites who supported the strengthening of the customary land tenure system negotiated with the UK Department for International Development (DFID) to provide financial support to strengthen the customary land administration system.<sup>331</sup> Four other international development agencies also supported different aspects of the LAP. The four external actors were the German Technical Assistance Cooperation (GTZ), Nordic Development Fund (NDF), Canadian International Development Agency (CIDA),

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<sup>330</sup> Interview with Professor Kasim Kasanga (25/01/2011).

<sup>331</sup> Interview with Professor Kasim Kasanga (25/01/2011). Professor Richard Crook and Mr Julian Quan who worked as Consultants to the DFID in the design and implementation of the CLS project also emphasized the instrumental played by Professor Kasanga to get the CLS project inserted into the LAP. Interviews with Prof Richard Crook (8/03/2010) and Mr Julian Quan (18/02/2010).

and Kreditanstalt für Wiederaufbau (KfW). What is known as the LAP is in fact a project with different components designed by the MLF in collaboration with different external actors who provided financial support. Sulemana Mahama, the LAP Coordinator (2001-2005), pointed out that “Despite the overwhelming evidence of the need for the project, the sense of ownership by stakeholders requires to be dramatically improved upon” (Mahama 2003:4). The reform components negotiated and financed by each external actor is presented in Table 20 below.

**Table 20: The Politics of LAP Components Ring-fencing**

Donors	Budget US \$m	Percent (%) used as at 31/12/2010	Reform Component Supported	Date of Funding (with extension)
World Bank (IDA)	20.51 Loan	99%	1. Land policy and regulatory framework revised and harmonised with customary land laws (includes legally conclusive confirmation of the continued validity of customary freehold and other customary titles.) 2. Institutional reform and development: 2.1 Restructuring public sector land agencies into a single agency 2.2 Decentralisation of restructured single agency to the regions 3. Improving land titling registration, valuation and information systems 4. Project coordination, monitoring and evaluation	18/08/2003 – 30/06/2011
Department for International Development (DFID)	9.02 Grant	81%	2.3 Strengthening customary land administration through the development of publicly accountable Customary Land Secretariats (CLSs)	08/06/2004 – 31/08/2009
Canadian International Development Agency (CIDA)	1.03 Grant	62%	1.4 Policy studies on gender and analysis 3.4 Improving deed and title registration 3.7 Piloting demarcation and registration of allodial boundaries	30/06/2011
Kreditanstalt für Wiederaufbau (KfW)	6.03 Loan	43%	2.1 Construction of new head office for the unified new land agency 3.2 Cadastral mapping 3.7 Piloting demarcation and registration of allodial boundaries 3.8 Piloting systematic land titling and registration	26/11/2004 – 30/09/2011
German Technical Assistance Corporation (GTZ)	3.98 Grant	19%	1.1 Revision of policies, laws and regulations for effective and efficient land administration (specifically the ascertainment and codification of the rules of customary law in local communities)	11/10/2001 – 31/03/2008
Nordic Development Fund (NDF)	6.92 Loan	92%	3.5 Land use planning and Orthophoto Mapping	20/12/2004 – 30/09/2011
<i>Government of Ghana</i>	7.56	36%	<i>All components as required for counterpart funding</i>	31/12/2011
Total	55.05			

Source: compiled from DFID (2010), World Bank (2003c, 2008), MLF (2006), MASDAR (2011b)

It could be seen that the HIPC Government of Ghana struggled to meet its share of 13% of the budgeted project cost, and therefore became highly susceptible to external controls. The World Bank provided the largest financial support, touching on almost every aspect of the project. The challenge faced by the HIPC Government was the need to meet the World Bank's loan conditions without stirring the hornets' nest at the National House of Chiefs. The NPP usually like to praise the work of its founding fathers that played leading roles in the Aborigines Rights Protection Society (APRS) to resist colonial governments from expropriating communal lands.<sup>332</sup> The NPP government therefore found itself in a delicate political situation.

While the World Bank was the main financier of the public sector organizational restructuring project, many external actors supported different aspect of customary land administration reform. The DFID was the major financier of the project to strengthen customary land administration. However, GTZ also provided funding for the ascertainment and codification of the rules of customary law in local communities (sub-component 1.1); CIDA and KfW provided funding for the demarcation and registration of allodial boundaries (sub-component 3.7); NDF provided funding for land use planning and mapping (sub-component 3.5). Moreover, the external actors who supported the strengthening of the customary land administration system did not usually agree on the best approach to develop a transparent and accountable agency for communal land administration.

From 2003-2010, the turf of land administration reform in Ghana witnessed many uncompromising ideological battles between the six external actors. I shall not delve into the conflicts except to highlight where it affected the implementation of the Project, particularly the objective to development a transparent and accountable agency of communal land administration. Dr Odame Larbi, the LAP Project Director (2005-2010), rued that the ring-fencing of project sub-components by the external actors was "the worst thing that ever happened to the project. It made the project implementation *very very very* difficult and nothing but very difficult."<sup>333</sup> The

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<sup>332</sup> Speech delivered by Nana Akuffo-Addo, the current Presidential candidate of the NPP, "What the NPP means by a Property-Owning Democracy", on 23 May 2011, 'The Statesman', [http://www.thestatesmanonline.com/pages/news\\_detail.php?newsid=10240&section=7](http://www.thestatesmanonline.com/pages/news_detail.php?newsid=10240&section=7), (Accessed 24/01/2012).

<sup>333</sup> Interview with Dr Odame Larbi (1/12/2010).

ineffective coordination of financial aid between the external agencies raises a question about their numerous commitments “to harmonise and align aid delivery” to developing countries (OECD 2005:1). How the LAP was designed and implemented raises serious questions about the capacity of aid dependent African countries like Ghana to be assertive and assume ownership of aid-dependent development processes (Whitfield and Jones 2008). It also raises question about the judicious use of foreign aid poured by different international development ‘partners’ into Ghana for the implementation of different components of the same project. I discuss below the internal agencies that were mandated to implement the LAP.

### **9.1.3 The LAP Implementation Actors: State Authority Matters**

As already discussed, State authority for reforming the public sector land agencies, customary land administration, and the rules of customary law governing chieftaincy-society relations of accountability is shared between the Presidential-Executive (or government), Parliament, and the National House of Chiefs. The reform of constitutionally established agencies and institutions would however require the consent of voters through a national referendum on the proposed constitutional amendments. The question was whether or not the government, parliament, chiefs and citizens were ready to review the constitution.

It should also be noted that the procedure for reforming rules of customary law in local communities is a bottom-up process that begins at the level of the Traditional Council, and moves through the Regional House of Chiefs, the National House of Chiefs, Parliament, and finally receives assent from the Presidential-Executive (Chieftaincy Act, 1971, Act 370; Chieftaincy Act, 2008, Act 759). The decision making structure of the National House of Chiefs concerning the reform of customary laws in a local community is a long democratic process that is shaped at level of the local community by citizens, family heads, clan heads, sub-chiefs and paramount chiefs that comprises a Traditional Council.

The World Bank, government and other internal stakeholders agreed to create three new political agents to facilitate the implementation of the project. The new implementation agents were the Land Administration Project Unit (LAPU), the Land

Policy Steering Committee (LPSC) and the Land Sector Technical Committee (LSTC). I describe below the nature of these three new agents.

**(i) Land Administration Project Unit (LAPU)**

LAPU was created as the project secretariat responsible for collaborating with external actors to design the LAP, coordinating the implementation of the LAP, managing financial support from external donors, and facilitating the work of other project implementing agencies. LAPU was initially created within the office of the Chief Director of the MLF but was separated to function independently. The independent LAPU was manned by a team of six professionals headed by the Project Director.<sup>334</sup> They were supported by administrative personnel provided by the public sector land agencies and the National Service Secretariat. The DFID negotiated the creation of a Unit called the Customary Land Administration Project Unit (CLAU) within LAPU to manage the customary land administration reform sub-component of LAP. The CLAU worked almost independently within LAPU.

LAPU was severely plagued by lack of qualified personnel with specialised knowledge about institutional reform and project management (LAPU 2006; MASDAR 2011a, 2011b). LAPU therefore relied heavily on the recruitment of consultants. A review of the project in 2011 showed that “At just under \$14 million, expenditure for the hire of consultants took up more than one third of all costs for LAP in the period up to 31st December 2010” (MASDAR 2011b:52). It appears the World Bank is right in raising a red flag over Ghana as lacking the bureaucratic capacity for implementing complex reforms such as LAP. However, there is much evidence to suggest that the World Bank and other external development partners have not usually supported the use of their project funds to hire and train local human resources (Kotey et al. 1998; MASDAR 2011b; Whitfield and Jones 2008).

Many external consultants recruited by LAPU had little knowledge about the complex organization of the Ghanaian State and therefore provided ‘expert advice’

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<sup>334</sup> The six professionals comprised (i) The Project Director/Coordinator; (ii) Legal Advisor; (iii) Social Science Specialist; (iv) Public Administration Specialist; (v) Communications Specialist; and (vi) Internationally Recruited Project Management Advisor (World Bank 2003c:14).

that sometimes proved to be legally unworkable. Sulemana Mahama pointed out that the preparation of the project was done by “Consultants whose knowledge of the customary land tenure regime was limited” (Mahama 2003:4). By 2006 it had become clear to LAPU officials that the Customary Land Secretariats they had established had failed to function as publicly accountable agencies. But it appears that LAPU listened to the advice that “it was not possible to stop the establishment of new ones” because “failure to establish new ones could be interpreted to mean non delivery of the project outputs.”<sup>335</sup> The reform outcomes shall be discussed later.

## **(ii) Land Sector Technical Committee (LSTC)**

The majority of members of the LSTC were the heads of public sector land agencies and it was chaired by the Chief Director of the MLF (World Bank 2003c).<sup>336</sup> The LAP Project Director was the Secretary to the LSTC. Due to the depth of technical knowledge about the institutional reform issues possessed by the heads of the public sector land agencies, the LSTC became the think-tank of the project that provided technical advice to both LAPU and the Land Policy Steering Committee (LPSC) on what needed to be done. Unlike the LAPU and the LPSC which were plagued with high turnover of professional expertise and political appointees, the LSTC was a relatively stable coalition. A key problem was that many of the heads of the public sector land agencies on the LSTC resisted the restructuring of their agencies into the proposed single agency. Therefore, the role assigned to the LSTC to supervise the implementation of the public sector organizational reform became problematic as many of its members not only resisted the reforms, but also carried their inter-departmental conflict and squabbling into the LSTC meetings.

During the mid-term review of the LAP in 2006, the reviewers remarked that “The biggest challenge to the LAP is that it is the agencies to be reformed that are being

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<sup>335</sup> Minutes of the 5<sup>th</sup> LPSC Meeting, 1-2 February, 2006, p.5

<sup>336</sup> The LSCT was composed of the following: all the heads of the public sector land agencies; the Technical Directors (Lands), MLFM; Director, Finance and Administration, MLFM; Financial Controller, MLFM; Director, PPMED, MLFM; Representatives of the Ministries of Finance and Information; Representative of land sector NGOs; and The Ghana Bar Association. Project Coordinator (Secretary) The LSTC was chaired by the Chief Director of the MLF. The LAP Project Director was the Secretary (World Bank 2003c:14).

used for implementation” (MLF 2006:66). Considering the powerless of the public sector land agencies to bring about the intended unified agency without the political ruling elites, it is questionable whether their advisory and supervisor roles constituted the biggest challenge to the LAP. The heads of the public sector agencies however appeared to encounter difficulties in combining their official civil service responsibilities in the day-to-day management of their agencies with the ‘unofficial’, less rewarding, and demanding task of supervising the reforms within and outside their agencies (Aryeetey et al. 2007; MASDAR 2011b; MLF 2006). For the above reasons, many of the heads of the agencies were less committed to the reforms.

### **(iii) Land Policy Steering Committee (LPSC)**

The LPSC was created to be the highest supervisory agent for the LAP. It was composed of the Ministers and Deputy Ministers of various Ministries with interest in the reform, a representative of the National House of Chiefs, the Chairman of the Select Committee of Parliament on Lands, and a host of representatives described as “the principal stakeholders and prominent professionals in Ghana’s land policy scene” (World Bank 2003c:14).<sup>337</sup> The LPSC was chaired by the Minister of the MLF and the LAP Project Director was the Secretary to the Committee. Frequent changes of Ministers across the Ministries and the change in government in 2008 made the LPSC a highly unstable coalition of elites. Some of the representatives rarely attended the Committee’s meetings (particularly representatives of the Attorney-General’s Department and the Ministry of Finance and Economic Planning). The meetings of the LPSC were “especially successful because members of the LSTC were available to provide technical and professional insights into the policy considerations.”<sup>338</sup> In fact, the LPSC held its first meeting eight months after members of the LSTC had hit the ground running with five meetings.

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<sup>337</sup> The LPSC comprised the following members: (i) Minister, MLF (Chairperson); Deputy Ministers of Ministry of: (ii) M LF (Lands); (iii) Justice; (iv) Local Government and Rural Development; (v) Information and Presidential Affairs; (vi) Environment and Science; (vii) Food and Agriculture; (viii) Women and Children’s Affairs; (ix) Finance and Economic Planning; (x) Chairman, Select Committee of Parliament on Lands; (xi) Representative, National House of Chiefs; (xii) Renowned land tenure scholar; (xiii) Renowned jurist; (xiv) President, Ghana Bar Association; (xv) representative of land sector NGOs; (xvi) Representative of Academic or Research Institutions; and (xvii) Head of the National Women’s Development Council. The Project Director was the Secretary to the LPSC (World Bank 2003c:14).

<sup>338</sup> Minutes of the 1<sup>st</sup> LPSC Meeting, 29 April - 1May, 2004, p.9.

The LPSC membership instability and late take-off affected its capacity to provide effective direction and guidelines to the LAPU. On rare occasions when the LPSC gave directions to the LAPU, “decisions made by the LPSC were sometimes rejected by the World Bank.”<sup>339</sup> In 2006, the LPSC complained to a DFID project visitation team that “A major problem of the Committee was that it was not certain as to who was the decision maker when it came to Project Implementation. This was because there had been circumstances when LPSC had taken decisions and DPs had objected to the implementation of those decisions.”<sup>340</sup> The LPSC was not able to “discourage donors from operating as “policemen”, using disbursements and authorisations as instruments of control” as it had hoped.<sup>341</sup> Three years into the implementation of the LAP, the Minister for the MLF, complained to members of the LPSC that “it was still not clear as to who was the final decision maker for LAP.” The reality was that the LPSC lacked economic power and state authority to shape the reforms.<sup>342</sup>

In sum, the organization of state authority for the reform of the land administration system depended on political action between the Presidential-Executive, Parliament, and the National House of Chiefs. The new political agents that were created to facilitate the reform (LAPU, LSTC and LPSC) did not have state authority to reform the institutions of land administration by themselves. The LAP Project Director, Dr Odame Larbi, rightly emphasized that “The processes of reforming institutions are political processes. LAP is to make recommendations”.<sup>343</sup> The roles of the new internal actors in facilitating the reform were important but what mattered most was the political support or resistance of the political ruling elites who wielded state authority for reform. The World Bank, notwithstanding its economic power, realised that Ghana’s constitutional settlements on land administration constrained its interest to promote individual land titling. Constitutional rules do matter in enabling or constraining the interest of even powerful economic actors in Ghana. How the external and internal actors interacted within or outside the rules of the traditional-federal State to implement the reform mattered significantly. The nature of interaction between the reform actors is depicted in Diagram 4 below.

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<sup>339</sup> Minutes of the 8<sup>th</sup> LPSC Meeting, 29 August 2006, p.5.

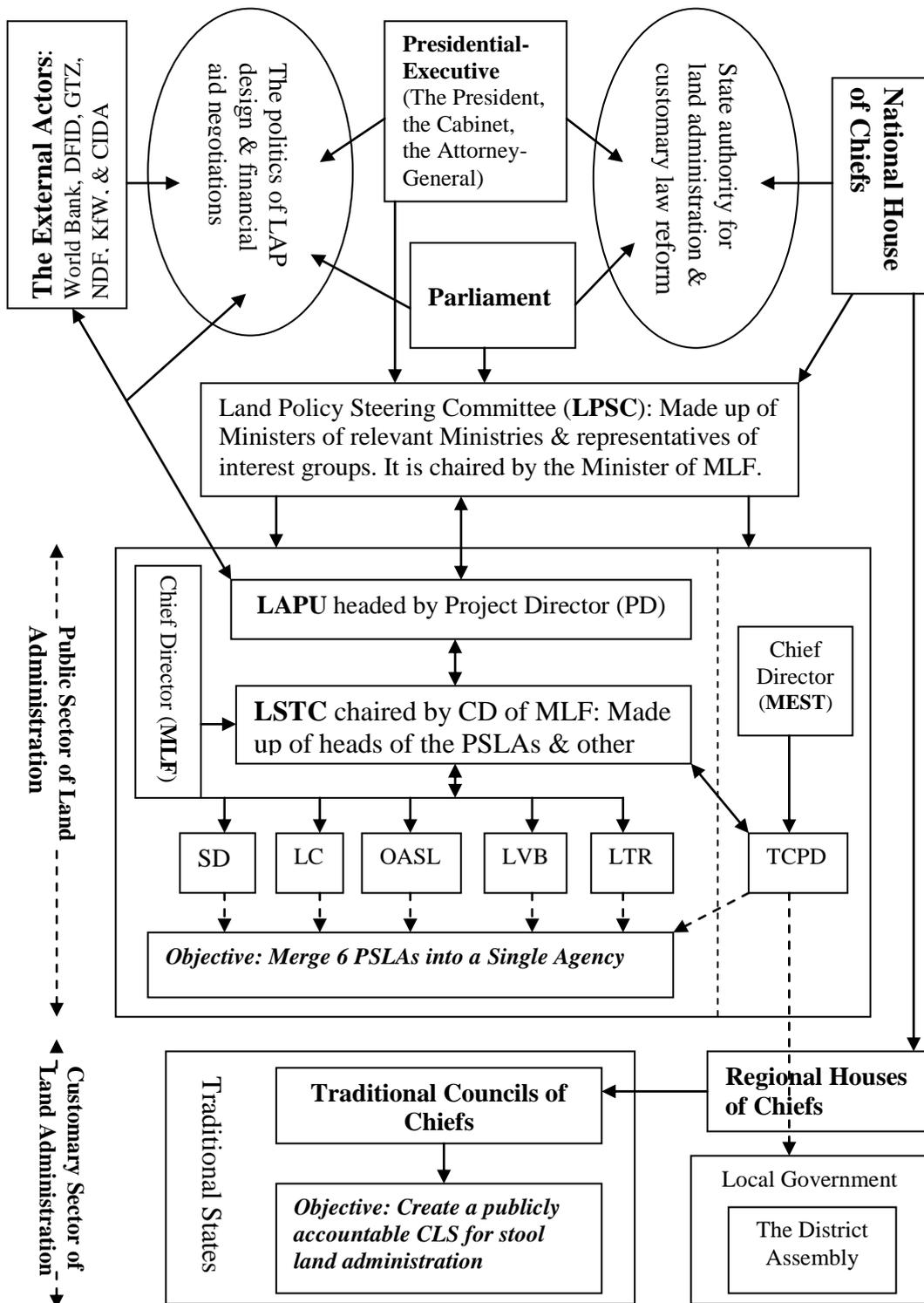
<sup>340</sup> Minutes of the 7<sup>th</sup> LPSC Meeting, 13 June 2006, p.5.

<sup>341</sup> Minutes of the 1<sup>st</sup> LPSC Meeting, 29 April - 1 May, 2004, p.8.

<sup>342</sup> Minutes of the 8<sup>th</sup> LPSC Meeting, 29 August, p.5.

<sup>343</sup> Interview with Dr Odame Larbi, (1/12/2010).

**Diagram 4: External and Internal Actors in the implementation of the LAP**



In Diagram 4 above, the design of the sub-components of the LAP as well as the negotiation of financial aid for the project involved the relevant Ministries (MLF and the Ministry of Environment, Science and Technology - MEST), Parliament, the Presidential-Executive, and the six international development agencies. However,

the organization of state authority for reform is shared between the Presidential-Executive, Parliament, and the National House of Chiefs. Five of the public sector land agencies to be reformed into the single agency were under the MLF. The headquarter of the Town and Country Planning Department (TCPD) is within the MEST although the department is decentralised to the District Assemblies that are supervised by the Ministry of Local Government and Rural Development (MLGRD). Members of the LPSC were appointed by the Presidential-Executive, Parliament, the National House of Chiefs and other stakeholders. As I have discussed, although the LPSC tried to shape the implementation of the LAP, it is questionable whether it has any major influence in shaping the restructuring of the public land agencies into a single agency or the creation of the Customary Land Secretariats. The heads of the six agencies that were supposed to be reformed into a single agency were members of the LSTC that provided technical advice to LAPU. In the domain of traditional states, the cooperation of chiefs was crucial in the creation of the publicly accountable agencies of customary land administration (the CLS). The traditional authorities were seen by LAPU to be key actors in the implementation of that aspect of the project (Toulmin et al. 2004; World Bank 2003c).

I move on to discuss the outcomes of the reform objectives. I shall begin with the customary sector of land administration. The ability of the Government to access the World Bank's loan for the restructuring of the public sector agencies depended on its ability to meet the World Bank's loan conditionality concerning "confirmation of the validity of customary freehold" within the customary sector. It is therefore logical to start the analysis from the complex customary sector because how the matter was settled shaped the reform of the public sector agencies.

## **9.2 The Politics of Customary Land Administration Reform: Creating Transparent and Accountable Customary Land Secretariats (CLSs)**

Customary land administration is embedded in the complex rules of customary law governing organizations of chieftaincy-society relations to land ownership. I have showed that the 'increasing returns' (Pierson 2004) to the demands for transparent and accountable customary land administration by chiefs is shaped by four key political settlements of state organization: (1) the consolidation of stool (communal)

land ownership; (2) the prohibition of the creation of freehold lands from stool lands; (3) the integration of the rules of customary law into the laws of the state; and, (4) the consolidation of the institution of chieftaincy. In chapters 5-8, I discussed the political and administrative challenges of ensuring transparent and accountable customary land administration since colonial rule. Demanding transparent and accountable customary land administration is not a simple matter. I discuss below the reform objective and outcomes.

### **9.2.1 Customary Land Administration Reform Objectives**

The World Bank's project appraisal document outlined the reform objective as follows: "the project would seek to assist traditional authorities to develop local land administration in a transparent and accountable manner and with increased participation of community members on whose behalf they act" (World Bank 2003c:8). However, "a detailed work program [was to] be developed during project implementation with technical and financial support by DFID" (World Bank 2003c:48). I have explained why some political elites felt that the strengthening of customary land administration was more likely to be achieved through collaboration with the DFID than through World Bank support. The World Bank's loan accessibility condition that required government to provide satisfactory confirmation of the validity of so-called customary freehold was seen by some political elites as contradictory to the objective of strengthening customary land administration.

The Project Memorandum developed by DFID consultants in collaboration with LAPU stated that "The purpose of this project is to support the development of Customary Land Secretariats [CLS] in Ghana as effective, publicly accountable local structures for administration of land" (Toulmin et al. 2004:1). Concerning the issue of accountability of traditional authorities, the CLS project emphasized that "Article 36(8) of the 1992 Constitution makes clear that customary land managers are accountable as fiduciaries to the nation and the stool, skin and family land members that they represent" (Toulmin et al. 2004:31). The specific reform outputs sought by the CLS project are shown in Table 21 below.

**Table 21: CLS Project Objectives and Verifiable Indicators**

Objectives/Outputs		Verifiable Indicators
1	<p><b>Institutions:</b></p> <p>CLSs established and/or strengthened in pilot areas, in partnership with government land sector agencies.</p>	<p>1.1. Relative responsibilities of CLSs and Land Sector Agencies (LSAs) clarified, and validated by both parties.</p> <p>1.2. A range of pilots identified and strengthened (up to 50 in number), representing the broad range of allodial authority types.</p> <p>1.3. Procedures, processes and information systems at CLS-level established and tested in up to 50 pilot areas.</p> <p>1.4. Evidence that pilot CLSs are operating effective and sustainable administrative systems.</p> <p>1.5. Greater adherence to legal procedures for allocation and recording of land holding and land use planning.</p> <p>1.6. Mechanisms for lesson learning from the pilots established, and lessons disseminated.</p>
2	<p><b>Information:</b></p> <p>Improved quality of records and accessibility of information at CLS level on land use and holdings, land transactions and availability, and associated financial and cadastral records.</p>	<p>2.1. Customary secretariats land records are updated and made publicly available in appropriate formats.</p> <p>2.2. Evidence that CLS records functioning in ways which allow for rationalisation with the records of the LSAs and District Assemblies (DAs).</p> <p>2.3. Customary secretariats publish exhaustive regular accounts of revenues received, and make these widely available in appropriate formats.</p> <p>2.4. Customary secretariats publish exhaustive regular accounts of CLS expenditure, and make these widely available in appropriate formats.</p>
3	<p><b>Accountability:</b></p> <p>CLS accountability improved, in line with the Constitutional provisions, in a way that protects the rights of all land holders, recognises the public interest in land management and provides an effective interface with democratic local and national governments.</p>	<p>3.1. Evidence of cooperation between customary and elected local government authorities in development spending and land use planning.</p> <p>3.2. Dispute resolution procedures put in place which operates effectively to balance interests of primary and derived-rights holders and give impartial judgements on the actions of CLS land managers.</p> <p>3.3. Greater legitimacy of customary authorities as evidenced by reduction in chieftaincy disputes and destoolments.</p>

Source: DFID (2010) Project Completion Report

DFID project consultants who designed the project emphasized, “The DFID component is centrally concerned with accountability, and indicators relating to the size and deployment of revenues will be crucial to developing the required transparency” (Toulmin et al. 2004:54). In other words, CLS accountability, “as far as the mind frame of those who prepared the project document is concerned is to see that revenues accruing into stools or families, and for that matter to the occupant of the stool or head of family, are well accounted for.”<sup>344</sup> Developmental states with transparent, accountable, and enforceable institutions are purposely created by political ruling elites and not wished into existence. The political support of the NPP Government and chiefs were crucial for the success of the project to create a transparent and accountable CLS. The important question therefore is whether there was strong internal political support for the CLS project.

### **9.2.2 Political Support or Resistance to the CLS Project**

DFID consultants and CLS project consultants who designed or implemented the project have pointed out that the NPP government did not strongly support the effort to ensure the creation of an accountable agency of communal land administration managed by chiefs and representatives of community members. Quan et al. (2008) have argued that “the [NPP] government’s clear political choice at the inception of LAP was that CLSs should fall under the aegis of traditional authorities, rather than seeking to develop more community based approaches to the management of customary land” (Quan et al. 2008:188). Richard Crook also argued that “The chiefs were and are defended by the parties of the Danquah-Busia tradition, of which the New Patriotic Party (NPP) is the latest manifestation” (Crook 2005:3).

President J.A. Kufour is a direct descendant of the *Oyoko* royal family from which the Asantehene is chosen (Agyeman-Duah 2003). His father was the head of the royal family (ibid). In a biography of J.A. Kufour, according to Agyeman-Duah (2003) narrated that J.A. Kufour in his young days “would accompany his father to the Manhyia Palace where the Asantehene would sit in court on Mondays and Thursdays to adjudicate cases – civic and land litigation.” Growing up in the royal

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<sup>344</sup> The explanation was given by Mr Mark Kakraba-Ampeh, CLS National Facilitator, 2007-2009 (Interview, 7/12/2010).

house at the heart of the Asante Kingdom, became “a strong believer in traditional values” (Agyeman-Duah 2003:10). Perhaps this could explain why the Presidential-Executive preferred the CLS to be developed under the authority of the chiefs rather than rather than supporting the development of an agency similar to Botswana’s Land Boards. It should be noted that President J.A. Kufour had faced the dilemma of a ‘royal-citizen’ similar to the challenge faced by Seretse Khama of Botswana. However, President Seretse Khama used his dual status as a royal-citizen to effectively reform the existing informal institutions of chieftaincy that governed communal land administration into the transparent, publicly accountable, and renowned Lands Boards. The path chosen by the NPP Government therefore stood in sharp contrast to the path chosen by Seretse Khama in Botswana.

At this juncture it is important to link the discussion to how the government responded to the World Bank’s demand for the provision of “assurances, satisfactory to the IDA, with respect to the continuing validity of customary freeholds” (World Bank 2003c:33). In 2004, the NPP Government, through the office of the Attorney-General, provided assurance to the World Bank that customary freeholds are valid. It appears that the World Bank was initially satisfied with the Attorney-General’s interpretation that customary freeholds are backed by the rules of customary law and should not fall under the constitutional prohibition of the creation of freeholds from stool lands. The National House of Chiefs, and particularly chiefs in the Ashanti region, vehemently opposed the Attorney-General’s interpretation of the constitutional position on customary freehold (LAPU 2004, NHC 2005). Later, World Bank legal experts noted that the Attorney-General’s persuasive interpretation which would allow recognition and registration of new customary freeholds “is not binding” (Bruce 2006b:7). In 2010, the LAP legal team also appears to have accepted the forceful argument of the Stool and Skin Lands Committee of the National House of Chiefs that the 1992 constitution clearly prohibits the creation of any freehold whatsoever from stool lands. The LAP legal team and the NHC agreed that the term “customary tenancy” should rather be used.<sup>345</sup> Clearly, constitutional settlements over the organization of state authority matters.

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<sup>345</sup> Lands Bill, Draft 2. During a workshop at the National House of Chiefs (NHC), in December 2010, members of the National House of Chiefs and the LAP Legal Team were both satisfied that “that horrible terminology called customary law freehold” (expression used by Paramount chief of

Chiefs supported the creation of the CLS to help ensure transparency and good records keeping in communal land transactions (NHC 2005, 2009; Quan et al. 2008). However, many chiefs have not been willing to subject their use of stool land revenues to public scrutiny (Quan et al. 2008). For instance, the Paramount Chief of Mampong (*Mamponghene*), a legal expert, told the LAP team at the National House of Chiefs that “if any of my citizens should be bold enough to ask me to account for how I use the stool land revenues, I will tell him to start from the District Assembly where the bulk of the money meant for infrastructural development is sent.”<sup>346</sup> Technically, the *Mamponghene* was justified in referring to the constitutional settlement underpinning the sharing of the stool land revenues. Many chiefs maintain the position that the share of stool land revenues given to the chiefs “remains the perquisites of the traditional authority for the maintenances of the positions of the chiefs.”<sup>347</sup> In the previous chapter I showed how the Kumasi Traditional Council uses its share of the stool land revenue to maintain the stool.

The irony is that the designers of the CLS project did not even notice the institutions of horizontal accountability that exist between the Auditor-General’s Department (or the Audit Service) and Traditional Councils of chiefs. The reason could be that those institutions of horizontal accountability were innovated by chiefs and non-chief political ruling elites during the colonial era. Although the institutions have been consolidated in the post-colonial state, policy makers, customary land administration project designers and scholars have not paid serious attention to them. Certainly, the design of the CLS project was done without “serious analysis of where the country is, [or] where it is coming from” (Booth et al. 2005:2). Particularly, discussions by scholars and legal experts on the issue of accountability of chiefs in the use of stool land revenues fail to examine the origins of the current constitutional rules governing the sharing of stool land revenues between chiefs and local government agencies.

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Mampong) had finally been removed by the LAP legal team from the new draft of the Bill based on an agreement reached with the Stool and Skin Lands Committee of the NHC. In satisfaction, and partly with anger, the *Mamponghene* stated, “It took us so many hours to agree on this!”

<sup>346</sup> Mamponghene, Workshop organized by LAPU for members of the National House of Chiefs (NHC) to discuss progress made on the drafting of the Lands Bill, December 2010.

<sup>347</sup> Report of the Coussey Committee, 1949, paragraph 207. Particular attention should be paid to the Coussey Committee constitutional settlements and the events preceding those settlements.

One might ask whether there were strong demands from citizens for the accountability of their chiefs in stool land administration. I argued that such a technical matter should be examined from among Ghanaian officials who implemented the LAP or from officials of the public sector land agencies who are better informed about the issue. Is there any ordinary non-chief citizen who is “bold enough” to ask his chief to account for the use of stool land revenues? Mr Jimmy Aidoo, LAP Monitoring and Evaluation officer offered the following advice when I asked him whether chiefs are accountable to the CLSs that have been created:

You don't ask 'Are the Chiefs accountable?', even if you are trying to use those words, the word you should use is 'cooperation'. You have to ask, 'Do the traditional authorities cooperate with the CLS?' ...So the word is cooperation, not accountability. ...The word accountable, you are looking at democratic process. Some people are even saying they are not transparent. You don't choose or use those words when you go to the Chiefs. I took the World Bank to the Asantehene and I coached them the words to use. ...So if you say accountable and all that, you are threading in a very dangerous territory, they won't mind you, they will say pack your things and go.<sup>348</sup>

Dr. Odame Larbi, LAP Project Director, agrees with Mr Jimmy Aidoo as follows:

It is the way the traditional system is organized. You know when you go to the chiefs in their palace, in our culture when the chief sits in public and he is adjudicating any case or performing any function, he is the last person to speak, and once he speaks no one else speaks again. When the chief speaks nobody challenges him, in public; when the chief speaks nobody can tell him that he is lying, in public. ...Their own subjects cannot call them to account because of the way the traditional institutions are organized. If you go and demand in public that the Chief should account, I am sure that before you leave that durbar grounds to your house, if you are in a village they would have burnt your house or whatever they do they would intimidate you to leave so those structures do not allow the people to demand accountability.<sup>349</sup>

The answer to the question on the presence of bottom-up demand for accountability from chiefs is clear. Officials of LAPU could demand accountability within the public sphere of government but not within the palaces of chiefs where the rules of customary law reign. The attempt to create vertical institutions of accountability between citizens and chiefs therefore appears to have been misplaced. Jimmy Aidoo explained what Ghanaians demand: “Those buzz words ‘transparency’ and

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<sup>348</sup> Interview with Mr Jimmy Aidoo (1/12/2010).

<sup>349</sup> Interview with Dr Odame Larbi.

‘accountability’ came from the project Memorandum of Understanding between DFID and the Project. So that is why it found itself into the project. In effect we want simple and efficient land transaction at the local level.”<sup>350</sup> This view supports the point made by Sulemana Mahama, LAP Project Coordinator, that “Despite the overwhelming evidence of the need for the project, the sense of ownership by stakeholders requires to be dramatically improved upon” (Mahama 2003:4).

The CLS project did not only lack strong local ownership but its focus on accountability of chiefs in stool land administration lacked strong support from among those who were supposed to implement it. Dr. Adarkwah Antwi, CLS National Facilitator from 2005-2006, questioned the basis for demanding the accountability of chiefs in stool land ownership by arguing as follows:

We got the accountability issue wrong to some extent, because in the forest areas a significant proportion of farm land transactions are organized without reference to the Stool. ... As I understand our traditional land holding system, ...the chiefs are custodians or trustees; they don’t hold direct beneficiary ownership of the land. In villages where the customary land system is still being practised, chiefs do not have the power to sell land or to dispose of it. It is individual families and extended families that are doing that. ... Payments for land acquisition are not made to the Stool but made directly to the family or individual that transacts the land. Now if the Stool doesn’t receive payments for transactions, where lies the question of accountability that we are fixated on?<sup>351</sup>

Dr. Adarkwah Antwi was therefore less interested in pursuing the objective of the CLS to create publicly accountable agencies of stool land administration. Mr. Mark Kakraba-Ampem, who took over from Dr. Adarkwah Antwi as CLS National Facilitator from 2007-2009, also argued that the focus of the CLS project should be on the creation of transparent agencies rather than the demand for accountability.<sup>352</sup> He explained his position as follows:

You don’t need to demand accountability. The system must lend itself to accountability. You don’t need to prescribe the form that it should take. The system must itself make it possible. Throw more light on the dealings at the local level. Let people see what is happening. That would be 90% of accountability.<sup>353</sup>

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<sup>350</sup> Interview with Mr Jimmy Aidoo (1/12/2010).

<sup>351</sup> Interview with Dr Adarkwah Antwi (1/11/2010). He was the CLS National Facilitator from March 2005 to November 2006. Mr Mark Kakraba-Ampem replaced him after he resigned.

<sup>352</sup> Interview with Mr Mark Kakraba-Ampem (07/12/2010).

<sup>353</sup> Interview with Mr Mark Kakraba-Ampem.

It could be seen that the implementation of the CLS project “without proper diagnostics and consultations with stakeholders” (Aryeetey et al. 2007:61) made each CLS Facilitator to work based on how he understood the problems of, and solutions to, customary land administration. While Dr Adarkwah Antwi questioned the claims of chiefs to the beneficiary ownership of stool lands, Mr Mark Kakraba-Ampeh also questioned the basis for demanding accountability from chiefs. The general lack of strong interest in the accountability of chiefs was not only shaped by cultural constraints but also inadequate understanding about the institutional character of chieftaincy. At the time the CLS project was designed, there was confusion among legal experts and officials of the MLF about the character of chieftaincy institutions. The MLF had classified the institutional arrangements for land administration into public institutions’ and ‘private institutions (MLF 2003:15-16). The two institutional categories were explained by the MLF as follows:

By public is meant the Government land agencies which collaborate to manage all state acquired and vested lands and enforces regulations regarding the administration of customary lands. The institutional arrangements for land administration are shared among six (6) public agencies under the Ministries of Land and Forestry, and Environment and Science. ...The private institutions comprise the customary landowners (Chiefs and Family Heads) and individuals who may possess land...and Non-Governmental Organizations (NGOs).

The MLF stated the implication for the development of Customary Land Secretariat as follows: “Since these institutions [CLSs] are mainly private, the level of assistance expected to be received by them, has been the subject of debate” (MLF 2003:26). Many officials of LAPU adopted the position that Customary Land Secretariats are private institutions and not public institutions. Professor Kasim Kasanga who pushed for the CLS project to be inserted into the LAP and implemented pointed out that “there was little or no support” among officials in the MLF for the CLS project.<sup>354</sup> The MLF had undermined the political basis on which to negotiate with chiefs for the development of publicly accountable agencies of customary land administration as intended by the CLS project. I turn next to discuss the outcomes of the CLS project. The outcomes of the CLS project reported by DFID are shown in Table 22 below.

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<sup>354</sup> Interview with Professor Kasim Kasanga (25/01/2011).

**Table 22: CLS Project Outcomes** (Source: DFID 2010)<sup>355</sup>

Objectives/Outputs	Objectively Verifiable Indicators	Outcomes
<p>1 <b>Institutions:</b> CLSs established and/or strengthened in pilot areas, in partnership with government land sector agencies.</p>	<p>1.1. Relative responsibilities of CLSs and LSAs clarified, and validated by both parties.</p> <p>1.2. A range of pilots identified and strengthened (up to 50 in number), representing the broad range of allodial authority types.</p> <p>1.3. Procedures, processes and information systems at CLS-level established and tested in up to 50 pilot areas.</p> <p>1.4. Evidence that pilot CLSs are operating effective and sustainable administrative systems.</p> <p>1.5. Greater adherence to legal procedures for allocation and recording of land holding and land use planning.</p> <p>1.6. Mechanisms for lesson learning from the pilots established, and lessons disseminated.</p>	<p>1.1. Although operating guidelines and training were delivered, comprehensive guidance for use by MLNR and customary institutions on the governance of CLS was not in place by the time of project closure. Although chieftaincy institutions see the CLS as an integral part of the traditional authority, some secondary legislation regulating aspects of CLS functions may be required. Delays in development of planned new substantive land legislation, and the associated policy dialogue, have meant that the discussion of these issues continues.</p> <p>1.2. 37 Pilots have been established, across all 10 regions of Ghana. Most have been in stool land areas, but the pilots include sites in family lands, and in northern Ghana where differing customary land management systems prevail.</p> <p>1.3. A range of procedures, processes and information systems have been piloted. Database formats have been piloted and tested for land registration, as well as mechanisms. A range of home-grown CLS innovations include use of mobile phone cameras to capture images of land users / tenants.</p> <p>1.4. Several pilot CLS appear to be running effective and sustainable systems, but a fuller field assessment would be needed.</p> <p>1.5. Mixed story. Legal procedures generally being improved, but the risk remains that customary usufruct rights may be downgraded to leasehold rights, as a result of existing legislation and legal instruments for land registration.</p> <p>1.6. Initial lesson-learning undertaken in August 2009, with support of Technical Consultants, but the depth of evaluation and lesson learning was curtailed due to project closure. Lesson-learning mechanisms not yet institutionalised.</p>

<sup>355</sup> The DFID CLS Project Completion Report (2010) is a more refined version of the CLA-LAPU Project Completion Report (2009). But there is no significant difference between the content of the two reports with regards to the outcomes of the CLS project.

**Table 22 continuation: CLS Project Outcomes**

	<b>Objectives/Outputs</b>	<b>Objectively Verifiable Indicators</b>	<b>Outcomes</b>
2	<p><b>Information:</b></p> <p>Improved quality of records and accessibility of information at CLS level on land use and holdings, land transactions and availability, and associated financial and cadastral records.</p>	<p>2.1. Customary secretariats land records are updated and made publicly available in appropriate formats.</p> <p>2.2 Evidence that CLS records functioning in ways which allow for rationalisation with the records of the LSAs and DAs.</p> <p>2.3. Customary secretariats publish exhaustive regular accounts of revenues received, and make these widely available in appropriate formats.</p> <p>2.4. Customary secretariats publish exhaustive regular accounts of CLS expenditure, and make these widely available in appropriate formats.</p>	<p>2.1. Records are updated, but public availability and access varies between CLS. Several thousand potential CLS users have been informed of the role of the CLS in strengthening customary land record-keeping through direct meetings (in district halls, churches, mosques, open air venues) as well as through community radio phone-in and TV.</p> <p>2.2. Over 140,000 land records held at CLS level. CLS establishment is creating a demand for rationalisation of records and access at decentralised level to records previously only held at the centre. At least 5 CLS have exchanged data and information with DAs on planning layouts.</p> <p>2.3 / 2.4. Some CLS (e.g. Gbawe) publish accounts including land revenues, but CLS revenue / expenditure accounts are not widely published or disseminated.</p>
3	<p><b>Accountability:</b></p> <p>CLS accountability improved, in line with the Constitutional provisions, in a way that protects the rights of all land holders, recognises the public interest in land management and provides an effective interface with democratic local and national governments.</p>	<p>3.1. Evidence of cooperation between customary and elected local government authorities in development spending and land use planning.</p> <p>3.2. Dispute resolution procedures put in place which operates effectively to balance interests of primary and derived-rights holders and give impartial judgements on the actions of CLS land managers.</p> <p>3.3. Greater legitimacy of customary authorities as evidenced by reduction in chieftaincy disputes and destoolments.</p>	<p>3.1 In some CLS (such as Bole, Paga, Bongo, Damango, and Wassa Amenfi) District Assemblies have provided accommodation for the CLS. There is some evidence of cooperation in land use planning, but discussions with DAs on development spending have been limited.</p> <p>3.2. Dispute procedures have helped to resolve multiple sales of land. ADR baseline studies and training given for Chiefs' Land Management Committees and CLS staff. MLNR reports that over 770 land disputes have been resolved through ADR at CLS. The contribution of CLS to dispute resolution was confirmed in an August 2009 survey (Bugri 2009) which reported that all of the 17 CLS that were visited reported resolution of land disputes.</p> <p>3.3. Some pilot CLS have broadened the membership of existing chieftaincy Land Management Committees to include outsiders. One CLS (Bekwai) has allocated 10% of all land revenues to CLS funding, so providing de facto information on the otherwise hidden value of "drinks money".</p>

Three important points about the reform outcomes should be added. First, according to the DFID Project Completion Report, “Legally, CLS have been established under the authority of the chiefs, and are not public (state) entities.” The reality of the CLS as an agency of customary land administration is that there are no new formal-legal rules that makes it obligatory for a CLS to provide information or accountability to members of the local community. At the time of writing this study, the LAP legal team and the National House of Chiefs were still negotiating over the nature of the formal-legal rules that should govern the mandate-responsiveness of the CLS.<sup>356</sup> External and internal actors with interest in the CLS project are waiting for the National House of Chiefs and the LAPU legal team to finish the negotiations. The mandates and authority of the CLSs are being defined in an omnibus Lands Bill. Interestingly, the constitutional provisions concerning the consolidation of stool, skin, and family land ownership and the accountability obligations of traditional authorities to their communities have all been reproduced.

Second, during the discussions on the Lands Bill at the National House of Chiefs, the chiefs vehemently opposed a section of the Bill that seeks to criminalise the failure to discharge the fiduciary obligation of accountability. The *Mamponghe*, vociferously demanded, “That clause should completely be deleted. Delete it and leave it for the people to determine.”<sup>357</sup> *Kunbun Na*, Chairman of the Stool and Skin Lands Committee, advised that “If a chief is imprisoned it is tantamount to destool the Chief. But in customary law, if you are not a kingmaker you have no right to destool the chief. The law should comply with the customary law existing within the particular area.”<sup>358</sup> Kwame Gyan, Head of the LAP Legal team agreed to remove the clause. He further explained to the chiefs, “I deliberately put it there to provoke discussion. It is not my intention to put *Nananom* in prison.” In the face of “lack of bottom-up demand” (Development Institute 2009)<sup>359</sup> from citizens for the accountability of their chiefs, one wonders whether anything new would emerge.

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<sup>356</sup> On 29 July, 2010, at a workshop at the National House of Chiefs, members of the National House of Chiefs and the LAP Legal Team discussed the content of the first and second draft of the Lands Bill (Draft 1&2) and agreed on further amendments.

<sup>357</sup> *Mamponghe*’s contribution at the workshop organized by the LAP for the National House of Chiefs to discuss progress made in the drafting of the Lands Bill.

<sup>358</sup> *Kunbun Na*’s contribution at the workshop organized by the LAP for the National House of Chiefs.

<sup>359</sup> Development Institute (DI) is one of ten NGOs recruited by the LAPU to sensitize the public about the LAP, particularly the CLS project.

Third, the DFID has not seen the outcome of the CLS project as a successful enterprise that warrants its further technical and financial support; and, consequently, after August 2009, the DFID pulled out of the project.<sup>360</sup> Interestingly, according to the LAP Project Director, “some of the Customary Land Secretariats have died.”<sup>361</sup> It is easy for a public service delivery agency that lacks legal foundations to die because no one is obliged to provide the resources for its survival. The LAP Project Director, Dr Odame Larbi, however rightly emphasized,

Making chiefs accountable means understanding the way the traditional institutions are organized and changing that organizational structure, those arrangements, and then to make their deeds more transparent and more accountable. So it is something that has to do with institutional reform. If you are going to deal with reforming an institution like chieftaincy then you don’t need five years because you need to really work on the softer parts and then bring them up to a point where they themselves would recognise that there is the need for them to be more accountable.<sup>362</sup>

Notwithstanding what appears to be a gloomy picture for the CLS following the withdrawal of DFID financial and technical support, the LAP legal team and the National House of Chiefs have continued to negotiate about the nature of the legal rules that should govern the nature and responsibilities of the CLS. I shall use three CLS projects at the heart of the Asante Kingdom to highlight other challenges encountered by the CLS project.

### **9.2.3 The CLS Project in the Golden Asante Kingdom**

The Kumasi traditional area is traditionally ruled by the Kumasi Traditional Council headed by the Asantehene. The KTC plays a central role in the political administration of the Asante Kingdom. The prominent role played by the Asante Kingdom in the politics of traditional-federal state organization during the colonial period has already been discussed. The bitter politics of land administration between the Asante Kingdom and governments have well been documented by scholars. The LAP established three CLSs in the Kumasi Traditional Area, namely, the Asantehene CLS, Nkawie CLS and Toase CLS. The Asantehene CLS project began in 2003

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<sup>360</sup> Interviews with Dr Adarkwah Antwi, Dr Odame Larbi, and Mr Mark Kakraba-Ampeh.

<sup>361</sup> Interview with Dr Odame Larbi.

<sup>362</sup> Interview with Dr Odame Larbi.

under a reform approach which the LAPU refer to as the ‘supply-led approach’. The Nkawie CLS and Toase CLS projects were implemented in 2008 under a new reform strategy which the LAPU refer to as the ‘demand-led approach’. I shall explain these strategies under the relevant CLS created with the strategy.

**(i) The Asantehene CLS Project: The Supply-led reform approach**

The Asantehene Lands Secretariat which was created in 1943 administers all the stool lands vested in the Asantehene, King of the Asantes. The Secretariat has employed its own Land Economist/Valuer, a Surveyor/Quantity Surveyor, a Planning Officer, Recording Officers, and Clerical staff from the labour market. Under the supply-led reform approach, the Customary Land Administration Unit (CLAU) of LAPU attempted to reform the existing Asantehene Lands Secretariat into a more efficient and publicly accountable agency (Toulmin et al. 2004). The CLAU supplied the Asantehene Lands Secretariat with computers, printers, office furniture, photocopiers and other items.

The Asantehene and his traditional council however refused to give audience to the CLS implementation team.<sup>363</sup> Nana Asomadu,<sup>364</sup> Head of Administration of the Secretariat, provided some explanations as to why the CLS team was not given audience with the Asantehene. He explained that the CLS project had sought to change the name of the Asantehene Lands Secretariat to Customary Land Secretariat. Changing the name of the Secretariat was not something that the Asantehene and his council of chiefs were going to tolerate. Nana Asomadu explained as follows:

They [CLS Team] call this place Asantehene Customary Land Secretariat but we do not consider here as Customary Land Secretariat. It is Asantehene Lands Office. ... This office cannot be dismantled. The Lands Commission and others can be dismantled and a new organization created but this Office cannot be dismantled. We have our own autonomy. ...This office has existed since 1943.<sup>365</sup>

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<sup>363</sup> Interview with Dr Adarkwah Antwi, CLS National Facilitator, 2005-2007 (1/11/2010).

<sup>364</sup> Interview with Nana Asomadu, Administrative Head, Asantehene Lands Secretariat (25/01/2011). In 2006, during the writing of my MPhil thesis (Appiah 2007), I also conducted an interview with Nana Asomadu on similar matters concerning the establishment of the CLS (Interview, 27/07/2006).

<sup>365</sup> Interview with Nana Asomadu, Administrative Head, Asantehene Lands Secretariat (25/01/2011).

Nana Asomadu further explained that the CLS project had ignored the customary rules of accountability that governed stool land administration in the Kumasi traditional area. He explained the unwritten customary rules as follows:

Within the Kumasi Traditional area, there is a formula for sharing the money from the sale of land. One-third of the money goes to Asantehene. The remaining two-thirds is divided into five and shared among the following: (1) the *Obrempon* (divisional chief), (2) the stool, (3) the family with usufructuary rights, (4) *Nkonyasefo* (stool elders including the *Adikrofo* in that area), and (5) community development. ... This formula is not on paper. We pass it on from generation to generation. We have sat down to develop our own customary rules.<sup>366</sup>

Moreover, Nana Asomadu explained that the CLS project team brought to the negotiation table things that the Secretariat could easily purchase from the market and not things that the Secretariat had requested. He explained as follows:

We were here when they came here under the LAP to give us support. They brought us 2 or 3 computers, chairs, office cabinets, and tables. These are not things that we need at all. We need the whole expansion of this block, if they can do that for us to enable us employ more personnel. And they should pay them to help us do our work, this will help us. So if they can come and build an additional building block and staff it with personnel paid by them that will be good. Before computers were discovered we were doing everything manually.<sup>367</sup>

It should be noted that officials of the MLF and LAPU argued that chieftaincy institutions are “private institutions” and so the chiefs should find their own resources (MLF 2003). Consequently, the staff of the Asantehene Lands Secretariat in Kumasi rebuffed attempts made by the LAP to reform the Asantehene Lands Secretariat into a publicly accountable agency by arguing, “This is a private institution. It is not under Government. So why would anyone want to come here and ask us what we use our money for?”<sup>368</sup> The Asantehene Lands Secretariat therefore did not see the need to negotiate with the CLS Team on grounds of accountability.

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<sup>366</sup> The nature of stool land administration in the Kumasi Traditional area was further clarified in interviews with Nana Nsuase Poku Agyeman III (Chief Linguist or *Akyeamehene* of the Asantehene and head of the Ashanti Regional OASL) (17/01/2011).

<sup>367</sup> Interview with Nana Asomadu (25/01/2011). The ‘real needs’ of the Asantehene Lands Secretariat (ALS) emphasized by Nana Asomadu were also supported by Nana Atta-Karikari (Head of the District Office of the Land Title Registration Division in Kumasi) in an interview (06/01/2011). Nana Atta-Karikari plays some role in the administration of the ALS. At the time of the interview he had drafted some proposals for building the administrative capacity of the ALS.

<sup>368</sup> Interview with Nana Tufour, Chief Clerk of the Asantehene Lands Office (25/01/2011).

Finally, members of the Asante Regional House of Chiefs had become angry and deeply suspicious about the CLS project when they were informed at a workshop that the government, through the office of the Attorney-General had provided confirmation to the World Bank concerning the validity of customary freeholds.<sup>369</sup> The issue “generated a heated argument”<sup>370</sup> at the workshop because “Majority of the Nananom [chiefs] supported the proposition that in Ashanti subjects have only rights of use and no more. Thus subjects do not have proprietary interests in the land they occupy.”<sup>371</sup> The National House of Chiefs was yet to resolve the subject with the government when the CLS Team went to the Asantehene’s palace in 2005 to talk about transparency and accountability in stool land administration.

The combination of the above factors led to the refusal of the Kumasi Traditional Council to grant audience to the CLS establishment team. The supply-led reform approach only managed to supply materials to the Asantehene Lands Secretariat. On many occasions, officials of the Asantehene Lands Secretariat rejected offers from the LAP to train the staff of the Secretariat. LAPU struggled to establish cordial relations with the Secretariat. Ironically, the Asantehene Lands Secretariat had been used as a model to design the CLS project (Toulmin et al. 2004).

In 2007, the CLS National Facilitator resigned and a representative of the NGOs on LSTC, Mr Mark Kakraba-Ampeh, was recruited as the new CLS National Facilitator. According to Kakraba-Ampeh, “By June 2007, it was abundantly clear that the top-down approach (what is now known as the supply-led approach) was not working towards project expectations and the rate of progress was too slow.” Some members of the LPSC argued that LAPU should focus on findings ways to strengthen the 10 CLSs that had been created under the supply-led approach rather than creating new ones. Other members argued that “it was not possible to stop the establishment of new ones” because “failure to establish new ones could be interpreted to mean non delivery of the project outputs.”<sup>372</sup> The CLAU changed its strategy and returned to the Asantehene’s Kingdom where the new CLS National

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<sup>369</sup> Report on the Sensitisation and Awareness creation workshop for the Ashanti Regional House of Chiefs (ARHC) on the Land Administration Project (LAP), held at the Regional House of Chiefs, Kumasi, 8<sup>th</sup> October, 2004 (LAPU 2004).

<sup>370</sup> Report on the Sensitisation and Awareness creation workshop for the ARHC.

<sup>371</sup> Report on the Sensitisation and Awareness creation workshop for the ARHC.

<sup>372</sup> Minutes of the 5<sup>th</sup> LPSC Meeting, 1-2 February, 2006, p.5.

Facilitator had established personal relations with many of the chiefs in the course of his work as a real estate developer which involved numerous land transactions.<sup>373</sup>

**(ii) Nkawie CLS and Toase CLS: The demand-led reform approach**

Under the demand-led approach, the CLAU would supply the same items to only those traditional authorities who demanded that CLS should be established in their jurisdiction of traditional rule. In return, the chiefs were to meet the following responsibilities: Provide suitable office accommodation for the CLS; meet the recurrent expenditure of the Secretariat; provide details of all land transactions to the Secretariat; constitute Land Management Committee/Board; and, allow changes where necessary to existing land management structures.

The CLS Team, led by a new National Facilitator returned once more to the Asantehene's Kumasi traditional area to establish two CLSs at Nkawie and Toase. Nkawie and Toase are two divisional traditional areas under the Kumasi traditional area ruled by the Asantehene. The two divisional areas share land boundaries and are ruled by Divisional chiefs, with the title of *Abrempon* within the structure of chieftaincy in the Asante Kingdom, who owe allegiance to the Asantehene and the Kumasi Traditional Council. Moreover, the Asantehene possesses the allodial title to the land managed by the Nkawie and Toase divisional chiefs.<sup>374</sup> Thus, the Nkawie CLS and the Toase CLS can only function with the permission of the Kumasi Traditional Council presided by the Asantehene.

The Nkawie and Toase divisional chiefs applied to LAPU for the establishment of CLSs in their divisional areas. In 2008, the CLAU established the Nkawie CLS and the Toase CLS. However, the divisional chiefs had not obtained the permission of the Asantehene. The Asantehene therefore became angry and placed injunctions over the operations of the CLSs. Unfortunately for the Nkawie CLS, before the matter could be resolved by the Kumasi Traditional Council, the Nkawie Divisional Chief died and the Kingmakers have since become embroiled in conflict over should be his

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<sup>373</sup> Interview with Mr Mark Kakraba-Ampeh.

<sup>374</sup> Interview with Nana Asomadu, Head of the Asantehene Lands Secretariat; and Focused Group Discussion with Nkawie Divisional chiefs and CLS Staff (14/01/2011).

successor. The chieftaincy conflict has also crippled the work of the Nkawie CLS as the chiefs constituting the Land Management Committee have been divided into two factions supporting different candidates. The success of stool land administration by chiefs depends upon the success of chieftaincy as a whole. When the work of the Nkawie CLS was reviewed in 2010 by a private consultant hired by LAPU, the consultant reported, “It is obvious that the Nkawie CLS has not been successful. Currently it is virtually moribund” (MASDAR 2011a:89). Concerning the Toase CLS, the Toase divisional chiefs have amicably resolved their differences with the Asantehene and the Kumasi Traditional Council. Since they do not owe the allodial title over their lands they have agreed to send all stool land transactions to the Asantehene Lands Office to be completed (MASDAR 2011a, 2011b).

The works of the Nkawie CLS, Toase CLS and Asantehene Lands Secretariat could enhance transparent and accountable customary land administration. The Asantehene CLS, Nkawie CLS and Toase CLS are inclusive of the 37 CLSs that have been reported to have been established under the aegis of willing and unwilling chiefs. There is some general agreement that all the CLSs that have been established are not publicly accountable agencies of customary land administration (Bugri 2009). John Bugri (2009:22), in his survey of the operations of 17 CLSs, reported that “No CLS was able to provide convincing evidence that revenues generated and expenditures made were subject to public scrutiny or auditing for purposes of transparency and accountability.” Ironically, the horizontal rules of accountability between the Kumasi Traditional Council and the Auditor-General department have not died. The practical human resource challenges face by Traditional Councils in their attempts to ensure transparency and accountability in the administration of their income and expenditure remains almost the same.

#### **9.2.4 Summary: Increasing Returns to Communal Land Ownership, Informal Institutions of Chieftaincy, and Accountability of Chiefs**

The organization of state authority for the reform of institutions concerning chieftaincy certainly matters. The CLS project rested on the premise that the state not only vests stool land ownership to traditional authorities of land-owning communities, but also the state obliges traditional authorities to be accountable to

their subjects for whom communal lands are held in trust. What the project failed to seriously examine is whether the accountability of chiefs to their subjects through existing rules of customary law as well as through annual audited reports submitted by Traditional Councils to the Auditor General falls short of the constitutional obligations of chiefs to their subjects.

So long as the constitutional rules of the state ensures increasing returns to the survival of chieftaincy, communal land ownership, and rules of customary law there shall also be increasing returns questions over the public accountability of chiefs to their subjects. The administrative capacity of chiefs to enable them perform their agential functions in the administration of communal land should be developed. But it should be understood that institutions of chieftaincy are not private institutions. Institutions of chieftaincy have been part of the Ghanaian State since colonial rule. The nature of the informal state embedded in chieftaincy should be seriously researched and developed to support Ghana's economic development.

Chiefs share the functions of land administration with numerous public sector land agencies. I shall therefore move on to discuss the politics and outcomes of the organizational restructuring of six public sector land agencies into a single agency.

### **9.3 The Politics of Public Sector Organizational Restructuring: Restructuring Six Public Sector Land Agencies into a Single Agency**

The focus of the reform was to restructure six public sector land agencies into a single agency and to strengthen the administrative capacity of the new agency to improve land administration. The six agencies were the Office of the Administrator of Stool Lands (OASL), the Lands Commission, the Land Valuation Board, the Land Title Registry, the Town and Country Planning Department (TCPD), and the Survey Department (World Bank 2003). This reform component (sub-component 2.1) was funded by the World Bank. The reform objective did not encounter strong ideological conflicts among the six external actors as the CLS project encountered. The background to the World Bank's support for this aspect of the project was discussed in chapter 7. I discuss below the nature of the reform, the political and institutional reform challenges encountered, and then the reform outcomes.

The World Bank's appraisal of the project remarked that,

Establishing a single land sector agency combining all the current six agencies and providing a one-stop-shop service (OSS) to customers may be difficult at the beginning, given the entrenched identities and interests of the public land sector agencies. However, this should be the preferred model to be considered. General agreement was obtained, during project preparation, that a model combining all land sector agencies...would be feasible. (World Bank 2003c:46)

The political support or resistance of the civil servants working within the OASL and the Lands Commission did matter but the political ruling elites would not be legally constrained by any resistance from civil servants. Interestingly, the proposal for the restructuring of the public sector land agencies into a single agency was developed by officials of the Lands Commission.<sup>375</sup> The Lands Commission therefore strongly support the reform. But the staff of the OASL strongly opposed the reform. Mrs. Christina Boboobe, Administrator of the OASL, argued that "The mandate of the Lands Commission and the mandate of the OASL are parallel. They are both creations of the 1992 Constitution...Nobody has the right to amend the constitution except the good people of Ghana."<sup>376</sup> The question was whether the political ruling elites had the will and resources to pursue constitutional reforms. Officials of the OASL were not the only ones who opposed the reform. Even before the LAP was designed, advocates of the reforms had recognised that "constitutional amendments and legal reforms are required" in order to restructure the agencies into a single agency (Kasanga 2000a:ii). The institutional and political challenges to the reform are examined in turn.

### **9.3.1 Political and Institutional Constraints to Public Sector Reform**

The historical institutional analytical framework emphasize that institutions are created by political actors; and, the process of institutional change is in turn enabled

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<sup>375</sup> According to Professor Kasim Kasanga, the Lands Commission had already started developing the land administration reform project when he became the Minister (Interview with Professor Kasim Kasanga, 25/01/2011). Professor Kasanga pushed the design of the project from the Lands Commission to the Ministerial level where he exercised much influence over its design. The point is that the agenda for the reforms was set and pushed by interests within the Ministry of Lands and Forestry rather than the government. This confirms the position of Kotey et al (1998:7) that "much policy is actually formulated by senior civil/public officials" rather than by government.

<sup>376</sup> Interview with Mrs. Christina Boboobe, Administrator of OASL (21/12/2010).

or constrained by the institutions that have been created. At the onset of the LAP, a comprehensive review of the legal rules governing the public sector agencies was undertaken with some recommendations about which rules needed to be changed (Kotey et al. 2004). However, the review was silent on the institutional reform processes and political challenges that faced the reformers in their attempt to restructure the six agencies into a single agency. State authority for the reform of institutions of land administration, I have argued, is shared by the Presidential-Executive, Parliament and the National House of Chiefs. However, the reform of statutory created agencies and constitutionally created agencies of land administration entailed different reform processes and political challenges.

Unlike the procedure for reforming the constitutional rules that guaranteed the institutions of chieftaincy, the constitutional provisions establishing the Lands Commission and the OASL were not entrenched provisions that required a referendum to be held throughout Ghana before they could be restructured.<sup>377</sup> That notwithstanding, the constitutional procedure (Article 291) for the amendment of the constitutional provisions establishing these two agencies were not very easy to overcome. The constitutional procedure is as follows:

- (1) A bill to amend a provision of this Constitution which is not an entrenched provision shall not be introduced into Parliament unless:
  - (a) it has been published twice in the Gazette with the second publication being made at least three months after the first; and
  - (b) at least ten days have passed after the second publication
- (2) The Speaker shall, after the first reading of the bill in Parliament, refer it to the Council of State for consideration and advice and the Council of State shall render advice on the bill within thirty days after receiving it.
- (3) Where Parliament approves the bill, it may only be presented to the President for this assent if it was approved at the second and third readings of it in Parliament by the votes of at least two thirds of all the members of Parliament.
- (4) Where the bill has been passed in accordance with this article, the President shall assent to it.

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<sup>377</sup> 1992 Constitution, Articles 289-292, Amendment of the Constitution.

Therefore, government did not only have to secure the support of at least two thirds of all members of parliament but also the support of the National House of Chiefs whose interest was at stake. The acrimonious politics that shaped the separation of chieftaincy from the local government system in the colonial era the consequent establishment of the OASL to manage the sharing of stool land revenues between chiefs and local government structures (District Assemblies) have already been discussed. The question now is whether or not the chiefs were going to support the restructuring of the OASL into a new single agency.

The National House of Chiefs argued that the role and functions of the OASL should no longer be maintained but should be dismantled and “the ten percent share of the stool land revenue currently paid to the Office of the Administrator of Stool lands be given to the Customary Lands Secretariats to enable them to manage their organization efficiently” (NHC 2005:8). The chiefs argued that the CLSs would be able to meet its expenses if the 10% is given to them. The implication of the proposal made by the chiefs is that they wanted to manage their own stool lands; particularly, the collection of their stool land revenue. The crucial question that arises is what would happen to the share of stool land revenue disbursed to the District Assemblies? The National House of Chiefs agreed to a proposal by LAPU that the collection and management of stool lands revenue should be undertaken by the Customary Land Secretariats.

The National House of Chiefs (NHC) further suggested that “there should be a partnership between the traditional authorities and the District Assemblies in the management and control of the District Assemblies’ share of stool lands revenue” (NHC 2005:23). Among the reasons assigned by the chiefs was that “the 55% share of stool lands revenue paid to the District Assemblies is not being used for development projects. The result of this is that pressure being put on Nananom to use their share of the stool land revenue to undertake infrastructural development in their areas” (NHC 2005:22-23). The chiefs further proposed that “Article 267 (6) of the 1992 Constitution which contains the formula for sharing stool lands revenue be amended” with this new formula: “District Assembly Forty percent (40%); Traditional Authority Twenty Five percent (25%); Stool Twenty five percent (25%); and Customary Land Secretariats Ten percent (10%)” (NHC 2005:23, original in

bold and italics). Could the chiefs be trusted by the non-chief elites to administer stool land revenues in a transparent and accountable manner? If the above new political settlement offered by the chiefs were accepted by the Presidential-Executive, then, all that was needed was at least two-thirds of the members of parliament to also support the reform of the OASL.

Reforming the statutory created agencies of land administration into a single agency would require the support of civil servants within the agencies. The statutory created agencies that largely supported the reform were the Land Valuation Board, the Land Title Registry.<sup>378</sup> Bureaucratic elites of the Land Title Registry largely supported the reform because the registration of land titles also depended on technical clearances from the Lands Commission, the Survey Department and the Land Valuation Board (refer to discussion in chapter 7). Interestingly, the Land Valuation Board which existed without a legislative act of parliament saw its integration into a single agency as an opportunity to finally acquire a solid legal status and therefore its bureaucratic elites supported it (Kasanga 2000a). Thus, officials of the Land Valuation Board wholeheartedly supported the organizational reform. Crucially, Kasim Kasanga, Chairman of the Land Valuation Board who had argued that “the Land Valuation Board and the Compulsory Land Title Registry all of which deliver property services should come under one roof” (Kasanga 2000a:15) was made the Minister of the MLF during the period of designing of the LAP.

Not every agency supported its restructuring into the proposed single agency. Staff of the Survey Department embarked on demonstrations and strike actions to strongly protest their restructuring into the single agency. In a memorandum to the Parliamentary Committee on Lands and Forestry in 2008, the Survey Department, supported by the Ghana Institute of Surveyors (GhIS) and the License Surveyors Association of Ghana (LISAG), argued that,

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<sup>378</sup> LAPU organized workshops for bureaucratic elites of the public sector land agencies across all the 10 regions of Ghana. The analysis of support for and resistance to the reform is also based on the written comments on the proposed single agency submitted by the agencies in all ten regions (see bibliography for the workshop reports used). I also used the Report of the Parliamentary Committee on Lands and Forestry on the Lands Commission Bill, 9<sup>th</sup> October 2008, was also used in the analysis.

Historically, the Survey Department operated as a single autonomous body unlike the other land sector agencies that have been fragmented. This autonomous status stems from the specialised nature of surveying. According to them, apart from cadastral surveys that have direct relationship with land administration, there are other aspects of surveying currently undertaken by the Survey Department that do not integrate with land administration. ...According to this school of thought, the importance of these other aspects of surveying is likely to be down-played if they are integrated into a single unit.<sup>379</sup>

The resistance of the Survey Department was not simply based on technical matters. The history being recalled in the above was the history of state organization in the colonial period when the Survey Department was created in 1909 and the Survey General was even made a member of the Executive Council of the ruling government in 1926. I have discussed how the Lands Division within the then Survey Department gradually became autonomous under the new name Lands Commission and acquired constitutional authority at the expense of the Survey Department. Officials of the Survey Department now argued that if they should agree to the reform at all then the Lands Commission and the other fragmented agencies should rather be the agencies to be restructured under the Survey Department which gave birth to all the agencies.

The restructuring of the TCPD faced strong resistance from several fronts. First, the headquarters of the TCPD was located under the Ministry of Environment, Science and Technology (MEST) and the MEST resisted the restructuring of the TCPD to the proposed single agency that would be created under the Ministry of Lands and Forestry. Second, bureaucratic elites at the headquarters of the TCPD also argued that the TCPD should rather be transformed into an autonomous authority to effectively perform its functions of town planning. Third, to complicate matters, the regional and district level offices of the TCPD were decentralised under the District Assemblies managed by the Ministry of Local Government and Rural Development (MLGRD). Ironically, the regional and district level staff of the TCPD favoured the restructuring of the TCPD into a revamped Lands Commission under the MLF because they argued that conditions of service under the existing Lands Commission

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<sup>379</sup> Parliament of Ghana, Report of the Parliamentary Committee on Lands and Forestry on the Lands Commission Bill, 9<sup>th</sup> October, 2008.

were far better than under the local government service.<sup>380</sup> Members of the LPSC were in disagreement over what to do with the TCPD: “While some argued that it should be brought under the Ministry of Lands and Forestry, others argued for the Department to be moved from its current location in the Ministry of Environment to the Ministry of Local Government and Rural Development.”<sup>381</sup> Everybody agreed that the TCPD should be reformed but there was no agreement over how to do it.

The organization of state agencies of land administration reflects Kwame Nkrumah’s observation of the nature of state development: “Unfortunately, our planning hitherto has been largely piecemeal and unpurposeful. It has not been linked in an organized manner. ...Too often the relation of these bodies and departments with each other and with the different sectors of the national economy has been unco-ordinated.” (Nkrumah 1961:3) Nkrumah’s observation remained valid after four decades of state development. The restructuring of the TCPD, the Survey Department, the Lands Commission, the Land Title Registry, the Land Valuation Board, and the OASL not only generated institutional and political challenges for the political ruling elites, but, crucially, it tested the ability of the political ruling elites to create a more developmental system of land administration that is well co-ordinated to the relevant sector of the economy. Perhaps, how to link the public sector agencies of land administration to the largely undeveloped customary institutions of communal land administration posed the greatest challenge to the political ruling elites. The outcome of the reform is discussed in turn.

### **9.3.2 Public Sector Reform Outcomes: Constitutional Settlements Matter**

In December 2008, four of the six agencies were restructured into a revamped Lands Commission. The restructured agencies are the Survey Department, the Land Title Registry, the Land Valuation Board, and the old Lands Commission. The OASL and the TCPD were not included. Why was the OASL not restructured in spite of the support of the National House of Chiefs? More curiously, how was it possible for the constitutionally created old Lands Commission to be restructured without the

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<sup>380</sup> Reports from the 10 regional workshops held for the public sector land agencies (see Land Administration Project documents under bibliography, LAPU 2007a-j).

<sup>381</sup> Minutes of the 2<sup>nd</sup> LPSC Meeting, 20 August 2004, p.9.

OASL? Surely the outcome raises many interesting questions. I explain the outcomes by first looking at the response of the Presidential-Executive.

In a new Lands Commission Bill submitted by the Minister of the MLF to the Presidential-Executive (specifically Cabinet) for approval, the Bill sought to make the Survey Department, Land Valuation Board, Lands Commission Secretariat, the OASL and the Land Title Registry “Divisions of the new Lands Commission”.<sup>382</sup> The Presidential-Executive however did not agree to pursue constitutional amendments to reform the OASL. For unknown reasons, the Presidential-Executive informed the LPSC that “The Project should consider what was doable under the current Constitutional provision since failure in attempt to amend the Constitution would stall the whole Project.”<sup>383</sup> It is fair to say that the NPP Government had been re-elected in the 2004 elections but the NPP had won only 128 out of the 230 seats in parliament. Therefore, the Presidential-Executive did not have the “two-thirds members of all the members of parliament” required to guarantee a successful constitutional amendment. The main opposition party, National Democratic Congress (NDC), controlled 94 of the parliamentary seats and therefore the government needed the support of the NDC to successfully amend the constitution. However, prior to the election of the NPP in 2000, it was the NDC Government that initiated the land administration reforms in the 1999 National Land Policy. Therefore it was likely that the NDC could have been persuaded to support a reform that they had initiated. The NPP Government decided not to test such political grounds.

There are strong grounds to argue that the NPP Government was not committed to amend the constitution. According to Deputy LAP Co-ordinator, Mr Jimmy Aidoo, on two occasions the LAP legal team tried to integrate the OASL into the new Lands Commission following the insistence of the World Bank but “when we went to Parliament the Parliamentary Select Committee shot us down.”<sup>384</sup> Faced with the prospect of failing to reform both the Lands Commission and the OASL, the LAP legal team decided that it was better to integrate the statutorily created agencies into the existing Lands Commission under a new Lands Commission Act (Act 767). The

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<sup>382</sup> Memorandum submitted to Cabinet by the Minister for Lands, Forestry and Mines on Lands Commission Bill, 26 June, 2007 (Submitted by Prof. Dominic Fobih, Minister of MLF).

<sup>383</sup> Minutes of the 10<sup>th</sup> meeting of the LPSC, 2 October, 2007, p.8.

<sup>384</sup> Interview with Mr Jimmy Aidoo.

functions and governing structures of the old Lands Commission outlined in the constitution could not be changed in the new Act. The Land Title Registry, Land Valuation Board, and Survey Department were restructured to become divisions of the new Lands Commission. The nature of the new Lands Commission is explained by the Deputy LAP Coordinator, Mr Jimmy Aidoo, as follows:

It is important to note that the Lands Commission as it exists in the Constitution has not been changed. What we did was that the Secretariat of the Lands Commission was dismantled. We could not change the Lands Commission because it was created by the Constitution, what we changed was the Secretariat, that is, the Chief Executive's office and the Administration. That is why we still call the newly created organization Lands Commission. We even wanted to change the name Lands Commission completely because we thought it has a bad name in the public; it is tainted with lack of accountability and corruption here and there. So we wanted a new name to reflect a period of new thinking and new born baby. But we realise that for the new baby we cannot change the name because of the Constitution.<sup>385</sup>

Many officials of LAPU and the heads of the four divisions of new Lands Commission point out that the institutional reform could not override the constitutional provisions. But I argue that LAPU failed to fundamentally reform the OASL and the Lands Commission because of the failure of the Presidential-Executive to politically negotiate with the NDC due to reasons that are best known to the NPP Government. Developmental states are created by political actors through processes of cooperation and negotiation. The failure of the Presidential-Executive to pursue developmental politics is what led to the failure to reform the OASL. Whether or not the old governing structures that still live within the new Lands Commission will enable the new agency to function effectively remains to be seen. Whatever is the case, it should be noted that the 1992 constitutional settlements of state organization mattered in shaping the public sector reform outcomes.

We are left to explain why the TCPD was not restructured into the new Lands Commission as originally intended. Bureaucratic elites at the TCPD's headquarters claim that their arguments against reform prevailed.<sup>386</sup> Thus, Mrs Rebecca Sittie, the Director of the Land Title Registration Division of the Lands Commission, argues

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<sup>385</sup> Interview with Mr Jimmy Aidoo (1/12/2010).

<sup>386</sup> Interviews with Mr Lawrence Dakurah, TCPD LAP Task Team Leader (22/12/2010) and Mr Asiedu Poku, Acting Director, TCPD (22/12/2010).

that the restructuring of the TCPD failed because bureaucratic elites at the MEST resisted the reform.<sup>387</sup> Dr Odame Larbi, LAP Project Director offered the following explanation as to why the LAP did not restructure the TCPD into the single agency:

We think that it is better if the TCPD stays outside the Lands Commission because Town and Country Planning is as of now supposed to be a decentralised agency and therefore they are part of the District Assemblies being part of the Ministry of Local Government and Rural Development. When we were discussing the institutional reform processes one of the cogent pieces of advice that we got which I thought was very phenomenal was an advice that we should be very careful not to create a monstrous organization that would be too unwieldy and too difficult to manage. And we think that bringing Town and Country Planning would create that unwieldy organization because they also have a very huge organization out there going out to the district level; and if we are to bring all that under the Lands Commission it will be too unwieldy and too big to manage; and so I think they should be there on their own.<sup>388</sup>

In essence, it is more plausible to argue that LAPU lost interest in the initial proposal to integrate the TCPD into the single agency. The Lands Commission Bill that was submitted by the Minister of the MLF to the Presidential-Executive (specifically Cabinet) for scrutiny and approval did not include the TCPD as one of the divisions of the new Lands Commission that was to be created.<sup>389</sup> Bureaucratic elites of the Survey Department who tried to resist the reforms were told by the political elites that “if you want to be a law abiding citizen then you have to agree; if you disagree then of course you want to walk out of the merger or out of the Commission.”<sup>390</sup>

#### **9.4 Conclusion: The Legacies of the Traditional-Federal State Matter**

I examined the extent to which the organization of state authority for land administration reform, the demands or support of powerful international development agencies, and the demands or support of national actors shaped the politics and outcomes of the land administration reforms. It is clear that the agreement of actors with state authority is paramount in driving change. The limited reform successes achieved in the restructuring of the four agencies into a single

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<sup>387</sup> Interview with Mrs Rebecca Sittie, Director, Land Title Registration Division (22/12/2010).

<sup>388</sup> Interview with Dr Odame Larbi.

<sup>389</sup> Memorandum submitted to Cabinet by the Minister for Lands, Forestry and Mines on Lands Commission Bill, 26 June, 2007.

<sup>390</sup> Interview with Mr Jonathan Abossey, Former Head of the Survey Department (22/12/2010).

agency were the result of increasing returns to the collective authority of the Presidential-Executive, Parliament, and the National House of Chiefs to reform both statutory created and constitution created agencies of land administration.

The constitutional choices made by political elites to consolidate chieftaincy and stool land ownership, prohibit the creation of freehold lands from stool lands, integrate the rules of customary law into the laws of Ghana, and divide state authority for land administration reform between Chiefs, the Executive, and the Legislature have mattered in shaping reform processes and outcomes in diverse ways. The 1999 National Land Policy that set the reform agenda was “a product of its time, of prevailing conditions and of the results of past action” (Kotey et al. 1998:7). Although the land policy was not intended to be law, the actors, ideas, and interests that shaped the policy were the result of historical choices of state organization made by political elites from 1821 to 1992.

It is clear from the analysis that the collective action of Chiefs, Government, and Parliament is required to effectively reform the land administration system. Chiefs have demonstrated their willingness to negotiate with government and other stakeholders about how to strengthen customary land administration. Government officials have not shown the same level of preparedness to support chiefs with the appropriate resources required by all public agencies to function effectively. There is no guarantee that if the non-chief political elites reverse the constitutional settlement that vests communal land ownership in traditional authorities, it is going to produce transparent and accountable public sector agencies of land administration. The nature of state organization of authority does not make the reversal of the current paths of land administration easy for any democratically elected government.

The analysis also shows that within the public sector of land administration reform, the unwillingness of the Presidential-Executive and Parliament to pursue reforms supported by the National House of Chiefs led to the failure of LAP to fundamentally reform the Lands Commission and the OASL. Conversely, the willingness of the Presidential-Executive to pursue reform supported by Parliament and the National House of Chiefs led to the successful reform of the Land Title Registry, the Land Valuation Board, and the Survey Department as intended. The

resistance or protests of the public sector land agencies did not have significantly effect on the reform outcomes. The politics and outcomes of the LAP has shown that the political will of chiefs, government, and members of parliament to cooperate in the pursuit of desired reforms matter most in shaping the outcomes of land administration reforms in Ghana's constitutional democracy.

Furthermore, the analysis shows that well-resourced Customary Land Secretariats could help local communities to ensure transparency and accountability in communal land administration only if the rules of customary law that govern chieftaincy-society relationships are ascertained, reformed where necessary, and codified into formal-legal rules. The lessons from chieftaincy administration reforms during the colonial era support the long-standing demand of Chiefs for the codification of the rules of customary law to enhance transparency and accountability in traditional governance. Many reports from the courts and the Audit Service also show that failure to do so only leads to a situation where informal rules of customary law substitute for the formal-legal rules defined in the constitution and statutes (such as the Head of Family Accountability Law). It would be naïve to think that horizontal agencies of accountability can function effectively when the vertical rules of accountability between chiefs and their subjects remain informally defined.

Finally, within the customary sector of land administration, the constitutional settlement that obliges chiefs to be accountable to their local communities was only an affirmation of the increasing political returns to fiduciary role of chiefs arising from state consolidation of communal land ownership. The failure of government to support chiefs to reform the informal rules of customary law that govern chieftaincy-society relations of accountability unavoidably yields demands for transparency in stool land administration. If chiefs are to meet such demands, then, Government, citizens, and scholars should understand that chiefs also require the appropriate administrative resources and formal-legal institutions to administer communal lands “for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned.”<sup>391</sup> Of course transparency and accountability do not usually occur within systems of informal rules of customary law. However, even if the rules are

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<sup>391</sup> 1992 Constitution, Article 36(8).

ascertained and codified, chiefs cannot deliver transparent and accountable governance without the key role of professional human agency and material resources. It is therefore important that government, chiefs, parliament and actors with interests in land administration (both external and internal) understand how the organization of the traditional-federal state authority shapes the politics of reform.

## Chapter 10

### Conclusion: The Legacies of the Traditional-Federal State Matter

The people of this country cherish chieftaincy as an institution of such significance that it is inconceivable to think of a situation where the subjects of a chief may contemplate the abolition of the status of their chief or chieftaincy, at least not for now. ...The 1992 Constitution consolidates this view [by entrenching chieftaincy]. ...The entrenchment obviously implies that the only way by which chieftaincy may be abolished is by a referendum, the cost of which is so prohibitive that no government may easily find the resources to conduct one, specifically for the purpose of abolishing that institution. Furthermore, attempting to abolish chieftaincy will amount to committing political suicide as almost every indigenous Ghanaian is subject to one chief or the other. The chief has pervading influence over the people who are his subjects.<sup>392</sup>

### Introduction

This study has investigated the provenance and causal effects of the bifurcation of state authority in Ghana between chiefs and government concerning land administration. The provenance of the current traditional-federal state with bifurcated authority between government and chiefs is located in the politics of war-making, negotiations and political settlements that defined the critical juncture of state formation in the colonial era, from 1821-1831. The critical juncture and causal effects of the traditional-federal state were not destined. They have been shaped by diverse forms of politics between chiefs and non-chief political elites. Crucially, this study argues that the traditional-federal state has constrained the development of transparent, accountable and efficient institutional framework of land administration due to the failure of chiefs and government to comprehensively settle the formal-legal complementarity, unification, or substitution of their bifurcated public institutions. The study reinforces the historical institutional argument that the critical juncture of institutional development matters in shaping the politics and outcomes of subsequent development. The implications of the research findings for conceptual, theoretical and practical development are highlighted below.

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<sup>392</sup> S.A. Brobbey (2008:4-5), Justice of the Supreme Court of Ghana, in his influential book 'The Law of Chieftaincy in Ghana'. See articles 11(1-3), 270 and 290(1) (c) (p) of the 1992 Constitution for the relevant entrenched clauses concerning chieftaincy institutions.

The chapter is divided into six sections. Section 10.1 deals with the conceptualization of the bifurcation of state authority between chiefs and government. Section 10.2 summarizes the causal effects of the critical juncture of traditional-federal state-making on subsequent chieftaincy-government relations within the state, particularly in the context of land administration. Section 10.3 highlights the implications of the interactions between formal-legal rules and informal rules of customary law within the current traditional-federal state for transparent and accountable land administration. Section 10.4 links the research findings to the mandate of the Constitutional Review Commission (CRC) established by government in 2010 to review, among other matters, ‘the public character of chieftaincy institutions’. Section 10.5 discusses the theoretical contributions of the study to historical institutional explanations of institutional formation, maintenance and change. Section 10.6 concludes the study.

### **10.1 The Traditional-Federal State: Conceptualizing the Bifurcation of State Authority between Traditional Authorities and Government**

Chiefs and government in Ghana uneasily share power and state authority over ‘two public’ organizational structures simultaneously created by ‘citizens’ of the modern state who are also the ‘subjects’ of traditional state authorities (Ekeh 1975; Ray 1996). It is generally acknowledged that the bifurcation of state authority between chiefs and government is a legacy of colonialism (Dia 1996; Ekeh 1975; Englebert 2000; Mamdani 1996; Ray 1996; Ray and Rouveroy van Nieuwaal 1996; Rouveroy van Nieuwaal 1987). The study demonstrably concurs with the view of Richard Sklar (2003:6) that “The durability of traditional authority in Africa cannot be explained away as a relic of colonial rule. Africa agency in the construction of colonial institutions was largely responsible for the adaptation of traditional authorities to modern systems of government and the legitimacy they continue to enjoy among ordinary people.” However, the study of the nature and resilience of traditional institutions, as well as the bifurcation of state authority between traditional authorities and government in Africa, “has suffered from the lack of analytical perspectives willing to engage deep explanations that utilize critical interdisciplinary perspectives and local discourses” (Vaughan 2003:xvi). It is my view that it is important to appropriately conceptualize the bifurcation of state

authority between traditional authorities and government to facilitate research about its causal effects. The concept that I have proposed in this study is the traditional-federal state. I argue that at the ‘formative moment’ of colonial states across African countries, the traditional-federal state was the dominant form of state organization due to economic, political and administrative factors. The critical juncture and path dependence (CJ-PD) theoretical framework of comparative historical analysis can be used by researchers to examine the legacies of the politics of traditional-federal state formation on post-colonial state development in African countries.

In the context of land administration in Africa, it is known that the ‘de facto dominant type’ of land tenure in about 80% of African countries is customary tenure administered through organizations of traditional authorities (Bruce 1998a).<sup>393</sup> Interestingly, there has been limited success in reforming the informal organizations of customary land administration across African countries. It is important that scholars and development practitioners understand why customary land administration remains the dominant feature of land administration in Africa. The concept of traditional-federal state can help us to examine not only the provenance of African states but also the causal effects of the colonial politics of traditional-federal state-making on the current dominance of customary land administration.

It is erroneous to assume that informal organizations of chieftaincy cannot embrace transparent and accountable governance. The case of colonial state making in Ghana clearly shows that if traditional authorities are appropriately integrated into the state, they have the political capacity to help government in the effective mobilization of internal revenue and citizens for development. In Botswana, chiefs played a key role in the gradual development of transparent and accountable Land Boards from informal organizations of chieftaincy for customary land administration (Nkwae 2008; Subudubudu and Molutsi 2009). We need comparative historical analyses of why many African countries with dominant structures of customary land administration have failed to create similar transparent and accountable agencies of customary land administration. From the initial ‘choice point’ of traditional-federal

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<sup>393</sup> Out of 43 African countries surveyed by Bruce (1998b), only 8 did not have customary tenure as their de facto dominant type. The World Bank (2003a) suggests that only 2-10% of land in Africa is governed by formal-legal institutions, while Toulmin (2008) notes that only about 2-3% of land in West Africa is governed by formal-legal institutions.

state formation across colonial Africa, a comparative historical analysis can be undertaken across African countries to understand how subsequent processes of state development account for different and similar developmental outcomes. The research findings concerning the case of Ghana are summarized below.

## **10.2 Legacies of Traditional-Federal State Formation on State Development and Land Administration in Ghana**

The initial condition of land administration prior to the creation of the colonial state is a contested subject among Ghanaian scholars. But it is generally accepted that “in the highly centralized traditional states...the stool was at once overlord of the state and owner of the land within its territorial boundaries. The scheme of interests in land was anchored on the fundamental premise that absolute ownership of the land was exclusively vested in the stool, with the subjects merely enjoying rights of beneficial user or usufruct” (Asante 1965:850). On this foundation of initial conditions, the study hypothesized that the creation of the initial traditional-federal colonial state between British officials and the existing traditional states, in 1821-1831, is the critical juncture that subsequently shaped the bifurcation of state authority between chiefs and government over land administration.

The study however shows that the division of state authority between chiefs and government over land administration in Ghana has been a politically contested matter that spans across three stages of state development. The three stages have been divided as follows: the first stage was the initial development and consolidation of the traditional-federal state, from 1821-1901; the second stage was the transformation of the traditional-federal state into the traditional-unitary state, from 1902-1953; and the third stage was the return of the traditional-unitary state to the path of the traditional-federal state, from 1954 to the present. The causal effects of the initial traditional-federal state on subsequent chieftaincy-government relations over land administration under these three stages are summarized below.

Under the first stage of state development, the study showed that the dominant ruling coalition of British officials tried unsuccessfully to claim ultimate ownership of all lands for the colonial state. The attempts were met with fierce political resistance not

only from chiefs but also from non-chief indigenous educated elites. Chiefs and non-chief indigenous elites united to form the Aborigines Rights Protection Society (ARPS) to successfully defeat the infamous Land Bills of 1894 and 1897 (Adu-Boahen 2000; Aryeetey et al. 2007). These bills had sought to claim ultimate ownership of all unoccupied lands for the colonial state. The failure of British governments to appropriate the stool lands from the traditional states led to the consolidation of stool land ownership and administration in the subsequent phases of state development. The first stage of state development laid the foundations for the emergence of the dual organizational framework of land administration in Ghana – namely, (a) the customary sector of land administration managed by traditional states through their informal rules of customary law, and (b) the public sector of land administration managed by public sector agencies controlled by government. Ghanaian scholars have not failed to point out that “It is difficult to reconcile the notion of stools, families and individuals owning land and managing it from day to day, whilst the government and its officials control important decisions affecting the land, including the collection and disbursement of the income accruing from their land” (Kotey et al. 2004:39). However, many scholars have failed to investigate the underlying logic of state organization that sustains this legacy.

Under the second stage of state development, from 1902-1953, British governors gradually integrated chiefs into the Executive and the Legislature. The new dominant ruling coalition collaborated to transform organizations of chieftaincy into local government agencies. Local government in Ghana was gradually developed on the foundations of chieftaincy – particularly the Traditional and Divisional Councils of chiefs. The traditional-federal state was therefore transformed into a de facto traditional-unitary state in which the Executive and Legislative powers of chiefs and British officials became unified (Hailey 1956). The creation a new dominant ruling coalition of chiefs, British officials, and, later, non-chief indigenous elites largely removed the gap of distrust between chiefs and British government officials. The transformation of chieftaincy into local government agencies impacted on the administration of stool lands. Stool lands came to be administered by chiefs within the local government system. The dominant ruling coalition cooperated to create horizontal and vertical formal-legal institutions to govern the revenue and expenditure of chiefs within the local government system. Horizontally, the Audit

Service held chiefs responsible for the administration of communal revenues. Vertically, subjects of chiefs also tried to hold their traditional leaders accountable for how they managed communal revenues, including stool land revenues. These events shaped new processes of democratization in chieftaincy governance within local communities. Very little research has been done by Ghanaian scholars on these political and institutional reforms that occurred under the traditional-unitary state.

Under the current third stage of state development, from 1954 to the present, the traditional-unitary state was ended and the state was returned to the path of traditional-federalism. The political struggles between chiefs and non-chief indigenous elites that led to the demise of the traditional-unitary state actually began before 1954. The legacy of the traditional-unitary state was gradually ended from 1949. In 1954 the chiefs in the Executive and Legislature were replaced by the new class of nationalist non-chief indigenous political elites (commonly referred to as the intelligentsia). The clock of state development was turned backwards towards traditional-federalism. Final state authority over the reform of matters concerning chieftaincy institutions became constitutionally divided between chiefs and central government. During the last decade of the transition to post-colonial independence, from 1947-1957, the growing distrust between chiefs and non-chief indigenous political elites finally led to the creation of constitutional rules that insulated organizations of chieftaincy from government political interferences. However, between 1958 and 1966, Kwame Nkrumah's dictatorial government and one party state promulgated various laws that sought to reverse the negotiated settlements that insulated chiefs from government control (Austin 1964; Rathbone 2000a). After the military overthrow of the CPP government in 1966, the chiefs renegotiated constitutional rules (in the 1969, 1979 and 1992 constitutions) that guaranteed the existence of chieftaincy and limited the authority of government and parliament to reform matters concerning chieftaincy. The causal effects of the return to the path of traditional-federalism on land administration are summarized below.

### **10.2.1 Effects on Public Sector Land Administration**

Within the public sector of land administration, chiefs and governments have negotiated the establishment of agencies that would manage their conflicting

interests in land. The immediate consequence of the separation of chieftaincy from the local government system was the creation of an agency that would manage the collection and sharing of stool land revenues between chiefs and the new local government agencies. Currently, the Office of the Administrator of Stool Lands (OASL) is the constitutionally created agency that collects and shares stool land revenues between chiefs and local government agencies. The Lands Commission has also been constitutionally created to manage the process of government compulsory acquisition of stool lands with compensation. Other agencies including the Land Valuation Board, Survey Department, and Land Title Registry have been created to help the Lands Commission in granting concurrence to stool land transactions.

The constitutional rules of land administration matter for reform. The 1992 constitutional rules that created the OASL and the Lands Commission subsequently constrained the 2001-2010 Land Administration Project (LAP) from reforming these two agencies into a single agency. The study showed that the inability of the LAP to restructure these two agencies into a single agency was not because of lack of financial resources to implement the reforms. Financial resources required to implement the reforms were readily provided by many international development agencies. However the constitutional rules that established the OASL and the Lands Commission as independent agencies proved formidable for government to overcome in the short term. The constitutional rules of state organization of land administration also matter in shaping reform directions and processes. The formulation of the 1999 National Land Policy provided ample evidence to support the point that successful land administration reform will depend largely on negotiations and effective collaboration between chiefs and government. The legacies of constitutional settlements between chiefs and non-chief political elites matter as much as the politics of cooperation between these two ruling classes. Politics within the constitutional rules is important for reform outcomes.

### **10.2.2 Effects on Customary Sector Land Administration**

The causal effects of the critical juncture of traditional-federal state-making on subsequent chieftaincy-government relations in land administration appear to be more significant in the customary sector of land administration than in the public

sector of land administration. These effects have shaped the consolidation of stool (or customary) land ownership and administration, the integration of the informal rules of customary law into the laws of Ghana, and the constitutional limitations on the authority of government and parliament to reform the customary land administration system without the consent of chiefs.

Stool land ownership has not only been constitutionally consolidated but, more crucially, the state also prohibits the creation of freehold land from stool lands. This is intended to preserve communal lands for future generations. It is not surprising that advocates of individual property rights such as the World Bank have sometimes sought to use unconstitutional windows of opportunity opened by military governments to try to end the legacy of communal land ownership. The political choice faced by democratically elected governments who want to reform stool land administration was clearly recognized by the formulators of the 1999 National Land Policy. Governments have to collaborate and negotiate with chiefs about the kind of land administration reforms that could promote economic development as well as enhance the political legitimacy of each ruling class. Political negotiations between chiefs and government over land administration reform have rarely occurred outside the turbulent politics of constitution making that follow periods of military rule.

The separation of organizations of chieftaincy from the local government system has deprived the chiefs of the civil service administrative staff required to perform the complex and costly tasks of communal land administration. What remains in the 196 Traditional Councils is a largely incompetent skeletal administrative staff incapable of meeting the challenges (Ninsin 2010; Quartey 2003; Sakyi 2003). Subjects of chiefs and horizontal state agencies of accountability (such as the Audit Service) have also been deprived of the formal-legal rules that governed how stool land revenues could be used by chiefs. Consequently, it has become difficult for all stakeholders in stool land administration to ensure transparency and accountability.

The 2001-2010 multi-donor supported Land Administration Project (LAP) sought to, among other things, create transparent and accountable agencies for stool land administration in local communities. The implementers of the LAP ignored the fact that government cannot supply customary land administration reforms that are not

demanded or supported by the chiefs. The lack of consultation and negotiations with chiefs led to the lack of cooperation from many chiefs and lack of local ownership of the reform packages supplied to chiefs (CIKOD 2009; Development Institute 2009; MASDAR 2011b). When the ‘supply-led’ reform approach failed to produce the intended results, the LAP officials pursued an alternative approach of supplying only reform packages that are demanded by chiefs (Kakraba-Ampeh 2008). Booth et al. (2005:2) assessed the ‘drivers of change in Ghana’ and correctly noted:

Donors are accustomed to explaining away the failure of development policies and pro-poor reforms by referring to a ‘lack of political will’ in the country. However, the underlying reasons for the apparent unwillingness of country stakeholders to confront the need for fundamental change are rarely examined. Programmes continue to be based on where donors think the country *ought* to be, not on serious analysis of where the country is, where it is coming from or where it is heading. National stakeholders who interact with donors are sometimes complicit in this evasion.

From the colonial history of chieftaincy organizational reform under the traditional-unitary state, 1902-1953, we know that chiefs are unlikely to demand formal-legal institutions of accountability that would hold them responsible for their actions in traditional governance unless such institutions can simultaneously produce economic and political benefits that enhance their traditional authority. There is therefore the need for ‘high-level’ political negotiations between chiefs and government over the kind of political and economic incentives and sanctions mechanisms that are required for the creation of an effective, transparent and accountable system of stool land administration. It should be recognized that both political and economic forces of demand and supply are at stake in communal land administration reform.

### **10.3 Traditional-Federalism and the Interactions Between Informal Rules of Customary Law and Formal Rules of Common Law in Land Administration: Competitive, Substitutive, and Complementary**

The public and customary sectors of land administration are both governed by formal-legal constitutional rules and statutory enactments. However, the customary sector of land administration is simultaneously governed by informal rules of customary law that are constitutionally recognized as part of the laws of Ghana.

There is therefore a complex interaction between formal-legal rules and informal rules of customary law in customary land administration. Legal practitioners know that informal rules of customary law have the capacity to substitute for unfavourable formal-legal rules (Brobbey 2008; Kludze 1987, 1998, 2000; Kunbour 2002). The effect of the complex interactions between formal-legal rules (constitutional rules and statutory enactments) and informal-legal rules of customary law on transparent and accountable customary land administration needs to be comprehensively examined by Ghanaian scholars.

There is less certainty among Ghanaian legal scholars and practitioners about the statutory character of the informal rules of customary law that organizes chieftaincy in local communities. In a case that was brought before the Supreme Court to determine the jurisdiction of the High Court to adjudicate cases concerning Traditional Councils of chiefs, the majority view of the Supreme Court was that “The question of the existence, nature and composition of a Traditional Council has consistently been judicially regarded as a statutory or administrative matter which is not a cause or matter affecting chieftaincy.”<sup>394</sup> The minority who disagreed with the view that matters affecting Traditional Councils are not matters affecting chieftaincy argued that it is impossible to separate “the body of chiefs comprising the...Traditional Council” from the Traditional Council as a statutory agency.<sup>395</sup> Supporting the view of the minority, Justice Jones Dotse argued, “There was no way the High Court was going to determine” the legality or illegality of the establishment of specific Traditional Councils “without considering those constitutional relations under customary law” between the interested chiefs.<sup>396</sup> Interestingly, Section 76 of the Chieftaincy Act, 2008, Act 759, defines a cause or matter affecting chieftaincy to include “the Constitutional relations under customary law between chiefs.”<sup>397</sup> Notwithstanding this definition, the nature of the interactions between formal-legal

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<sup>394</sup> The Republic vs. High Court, Koforidua, Ex-parte Nana Otutu Kono III, No.J5/9/2008. The majority view (3-2) expressed by Justice W.A. Atuguba, Justice R.C. Owusu and Justice Baffoe Bonnie was that matters affecting Traditional Councils of chiefs are not matters affecting chieftaincy. Justice Baffoe Bonnie arrived at his decision based on the strange argument that “there is no need to go into the merits of the application” because the applicant had only sought the jurisdiction of the Supreme Court after the applicant had lost the initial case at the level of the High Court.

<sup>395</sup> The minority comprised Chief Justice G.T. Woode and Justice Jones Dotse. The quotation is from the submission made by Justice Jones Dotse.

<sup>396</sup> Justice Jones Dotse, The Republic vs. High Court, Koforidua, No.J5/9/2008.

<sup>397</sup> This law was used by Chief Justice G.T. Woode and Justice Jones Dotse to support their case.

rules governing chieftaincy and the informal rules of customary law that organizes chieftaincy in local communities remains uncertain for many legal practitioners.

It is important for scholars, government, legal practitioners and development actors to critically examine the nature of the informal rules of customary law that underpin organizations of chieftaincy and how those rules interact with the formal-legal statutory rules governing chieftaincy. Unless this is done, the informal state would continue to undermine the quest for a transparent, accountable and effective developmental chieftaincy. Given the acceptance by legal practitioners that Traditional Councils are a creature of statute (or state agencies), it is important that government provides the 196 Traditional Councils that exist throughout the country competent administrative staff and appropriate resources for the chiefs to effectively manage communally owned stool lands within their geographical jurisdictions of authority. The National House of Chiefs has consistently advocated that the informal rules of customary law that governs relations between chiefs, as well as relations between chiefs and their subjects, should be codified. It may be recalled that the demand from chiefs for the codification of informal rules of customary law goes as far back as 1927 when Nana Ofori Atta introduced the Native Jurisdiction Bill in the Legislative Council. Unfortunately, governments have rarely responded to the demand from chiefs for the codification of informal rules of customary law. It is crucial that the informal rules of customary law are codified to ensure transparency and certainty in the traditional governance of communal lands.

During the implementation of the LAP, the Ministry of Lands and Forestry (MLF) argued that organizations of chieftaincy are private institutions and therefore cannot be supported by the state with administrative staff and offices demanded by chiefs to enable them perform their functions of stool land administration (MLF 2003). The unanimous position of the Supreme Court that Traditional Councils of chiefs are state agencies makes it untenable for the MLF to argue that the 196 Traditional Councils of chiefs scattered throughout the country are not public institutions of the state but are private institutions outside the state. Such erroneous positions stem from the general lack of understanding about the character of the Ghanaian state.

The study has shown that informal rules of customary law that govern organizations of chieftaincy compete with, and undermine, the formal-legal constitutional rules and statutory enactments affecting the roles of chiefs. But chiefs cannot be singled out for blame since they are not the ones who advocated for their organizations to be separated from the formal-legal rules of the local government system. The Courts and officials of the Audit Service have usually considered the informal rules of customary law as complementary to the general constitutional rules that require chiefs to be accountable as fiduciaries of stool lands to their local communities. In the Ghanaian courts of law, informal rules of customary law that specify relations of accountability could as well be considered as substitutive of the formal-legal constitutional rules of accountability (Brobbeey 2008; Kludze 1987).

In an environment of informal-formal legal pluralism, it is difficult to see how informal rules of customary law could be “seen to enhance the efficiency and effectiveness of formal institutions” as argued by Helmke and Levitsky (2006:13). Informal-legal rules of customary law that complement formal-legal constitutional rules do not violate the latter. However, the complementarity of informal rules of customary law to formal-legal constitutional and statutory rules does not imply the institutional efficiency and effectiveness of the Ghanaian state as Helmke and Levitsky (2004, 2006) suggest. Formal-informal legal pluralism implies equal probability of enforcement or substitutability and not equal probability of effectiveness. O’Donnell (1996, 1998, 1999, 2010) pointed out that informal institutions do not enhance the effectiveness of formal state institutions of accountability; particularly, informal-legal institutions undermine the political and administrative accountability of public office holders within any political system of representative governance because they are difficult to pin down (Harrington 2008; Galligan 2007; Oliver and Drewry 1996). Demands from chiefs for the codification of their informal rules of customary law should be acted upon by interest groups.

#### **10.4 The Constitutional Review Commission and the Task of Clarifying “the Public Character or Otherwise of the Chieftaincy Institution”**

In 2010, the government of Ghana established a Constitutional Review Commission (CRC) to review and clarify, among many other issues, “the public character or

otherwise of the chieftaincy institution and whether or not a chief may hold public office”.<sup>398</sup> There is little doubt that this matter requires urgent attention. During the regional level consultations of the CRC in the Ashanti, Greater Accra, Eastern, and Western Regions, I attended the thematic group discussions on ‘Chieftaincy and Traditional Authorities’. However, the issue of the public character of chieftaincy was never raised by any CRC official or member of the public. Usually, only chiefs joined the thematic group to discuss matters affecting chieftaincy. The chiefs themselves detested attempts by ordinary citizens to take part in the deliberations. The issue that was usually raised by the CRC discussion facilitators was the controversial matter of whether or not a chief should play an active part in multi-party politics. How the public character or otherwise of the chieftaincy institution has been defined by the CRC remains to be known.<sup>399</sup>

Kunbun Naa Yiri II,<sup>400</sup> a member of the CRC and chairman of the Stool/Skin Lands Committee of the National House of Chiefs, pointed out that the public character of chieftaincy has two dimensions, namely “public character by legality” and “public character by tradition.” He explained that the public character of chieftaincy by legality is the process of creating chieftaincy institutions through formal-legal statutory rules as is the case with the statutory creation of Traditional Councils, Regional Houses of Chiefs, and the National House of Chiefs. The public character of chieftaincy by tradition refers to the installation of chiefs by their subjects as public office holders within the traditional sphere of governance. Kunbun Naa Yiri II then asked the question, “In which of these two public dimensions, legality and tradition, should the CRC review the public character of chieftaincy institutions?”<sup>401</sup> The issue of ‘the two publics’ raised by Kunbun Naa Yiri II was at the core of the disagreements among the Supreme Court Justices concerning whether or not legal cases concerning ‘statutorily created’ Traditional Councils should be considered as

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<sup>398</sup> The CRC is made up of two paramount chiefs and seven non-chiefs. The paramount chiefs are Osabarimba Kwesi Atta II, and Kumbun-Naa Yiri II (Naa Alhaji Iddirisu Abu). The non-chiefs are Prof. Albert K. Fiadjoe (Chairman), Mr. Akenten Appiah-Menka, Mrs. Sabina Ofori-Boateng, Reverend Prof. Samuel K. Adjepong, Dr. Nicholas Amponsah, Mr. Gabriel Pwamang, and Mrs. Jean Mensa. The Executive Secretary of the CRC is Dr. Raymond Atuguba. The work of the CRC could be found at <http://www.crc.gov.gh/> (last accessed 25/03/2012).

<sup>399</sup> The final report of the CRC is yet to be made available to the public.

<sup>400</sup> Interview with Kunbun Naa Yiri II during the break period of the CRC regional consultation at Koforidua (Eastern region), 2/09/2010.

<sup>401</sup> Interview with Kunbun Naa Yiri II.

matters affecting chieftaincy. The question posed by Kunbun Naa Yiri II captures the less understood duality of state authority within the traditional-federal state.

Clearly, there is much confusion about the implications of (i) the integration of “the rules of customary law which by customary are applicable to particular communities” into the laws of Ghana,<sup>402</sup> and (ii) the constitutional consolidation of “The institution of chieftaincy, together with its traditional councils as established by customary law and usage.”<sup>403</sup> The interaction between informal rules of customary law and formal-legal statutes confuses legal practitioners today in the same manner it confused colonial government officials. The institutional legacies of chieftaincy within the traditional-federal state remain to be taken seriously.

From the historical institutional perspective of political science and public law (Loughlin 2010; Smith 2008), the state is the foundation of public law in countries. Public law is defined by the constitutional rules of the state. I therefore argue that it would be more fruitful for constitutional designers to delineate the statutory character of chieftaincy institutions, rather than to pursue the less promising objective of clarifying ‘the public character of chieftaincy institutions’. This is because all state institutions – statutory enactments and informal rules of customary law – are public institutions. Clarifying the statutory character of chieftaincy would help to determine the public character of chieftaincy institutions.

Informal rules of customary law concerning chieftaincy in local communities remain an integral part of the laws of Ghana. Informal rules of customary law constitute the informal state. It is untenable to argue that institutions of chieftaincy established according to the appropriate customary rules or usages are not state institutions. I emphasize that chieftaincy is not a single institution. It is an organization of complex rules of customary law that defines political relationships between chiefs, customary procedures of traditional governance, and political relationships between chiefs and their subjects. It is not possible to separate the position of the chief as a public office holder from the rules of customary law that created the public office of the chief. It is however possible to determine whether or not chieftaincy institutions constitute a

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<sup>402</sup> Article 11(3) of 1992 Constitution.

<sup>403</sup> Article 270(1) of 1992 Constitution.

part of the Ghanaian state. If the rules of customary law that structures chieftaincy are part of the laws of Ghana, then it is important for constitutional makers to clarify the responsibilities of chiefs, government, and citizens in the renewed attempt to create effective, transparent and accountable agencies of chieftaincy. Reforming the informal sector of chieftaincy and clarifying its relations in the state matters.

### **10.5 Historical Institutionalism – Critical Juncture Matters**

Mahoney and Thelen (2010:7) emphasize that historical institutionalists “view institutions first and foremost as the political legacies of concrete historical struggles.” However, they argue that all leading approaches to institutional analysis face problems in explaining institutional change in a manner that comprehends both exogenous and endogenous sources of change. Interestingly, they claim that “We have good theories of why various kinds of basic institutional configurations – constitutions, welfare systems, and property rights arrangements – come into being in certain cases and at certain times” (Mahoney and Thelen 2010:2). Hall (2010) points out that in order to understand institutional change, we must be able to explain the origins and stability of institutions. Therefore, the claim that we have good theories to explain the sources of institutions but lack good theories to explain the sources of institutional change is quite puzzling. Notwithstanding this puzzle, Mahoney and Thelen (2010:3) suggest that “If theorizing is going to reach its potential, however, institutional analysts must go beyond classification to develop causal propositions that locate the sources of institutional change – sources that are not simply exogenous shocks or environmental shifts.” I suggest that the critical juncture-path dependence analytical framework can help us comprehend both ‘endogenous’ and ‘exogenous’ sources of institutional change.

It is however important to point out some potential analytical misunderstandings among historical institutionalists surrounding explanations of institutional change that call attention to “critical junctures”. First, there is some conceptual inconsistency regarding what is meant by a ‘critical juncture’ (Capoccia and

Kelemen 2007; Collier and Collier 1991; Mahoney 2000; Rokkan 1968).<sup>404</sup> I emphasize that if ‘history matters’ then historical institutionalists need to explain the origins of their ‘critical juncture’ blocks to ensure consistent intellectual development. Second, there is conceptual ambiguity regarding what constitute ‘endogenous sources of change’ and ‘exogenous sources of change’. Mahoney and Thelen (2010:32) advise that “rather than promote abstract debate about metatheory or definitions”, contributions to theoretical development should aid substantive analysis of institutional change. But it is important that theoretical development should be grounded on unambiguous definitions of key concepts.

The concept of critical juncture used in this study builds on the conceptual and analytical blocks laid down by Rokkan and Lipset (1967), Rokkan (1968), and Collier and Collier (1991). In their conceptions, actual change in existing conditions (called antecedent conditions) is a necessary element for hypothesizing the causal effect of that critical juncture of change on a subsequent outcome. The concept is therefore used only with reference to actual “political legacies of concrete historical struggles” (Mahoney and Thelen 2010). The theoretical claim is that those choice points “proved most significant” (Rokkan 1968:199) in shaping actual subsequent outcomes or processes. The subsequent processes and outcomes are what Pierson refers to as path dependent. For that matter, he argues, “Claims about path dependence typically suggest that beginnings are very important” (Pierson 2004:11). The theoretical thrust of the CJ-PD model is to explain the historical development of “a limited range of institutions within a limited range of politics” (Rokkan 1968:175). Some scholars who have sought to provide alternative definitions of what is meant by a critical juncture (Capoccia and Kelemen 2007; Chingaipe 2011) have

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<sup>404</sup>For instance, Capoccia and Kelemen (2007:348) define critical junctures “in the context of the study of path-dependent phenomena...as *relatively* short periods of time during which there is a *substantially* heightened probability that agents’ choices will affect the outcome of interest.” The definition does not only seek to introduce limitations on the duration of a critical juncture, it also departs from existing definitions of Rokkan (1968) and Collier and Collier (1991) based on the actual effect (not heightened probability) of a process on an outcome. The duration of a critical juncture should not be specified independent of the actual processes of institutional development because the period could be long or short. Mahoney (2000:513) also introduces rational choice notions of preference ordering in his definition by arguing that “Critical junctures are characterized by the adoption of a particular institutional arrangement from among two or more alternatives. These junctures are “critical” because once a particular option is selected it becomes progressively more difficult to return to the initial point when multiple alternatives were still available.” Who defines the “multiple alternatives” from which a particular choice is made?

not provided clear justifications for their alternative conceptions. For instance, Chingaipe (2010:ii) suggests that “the concept of critical junctures should be defined based on people’s expectations for, rather than effects of, institutional change.” Such a definition clearly misses the thrust of the CJ-PD model of historical analysis which deals with actual political outcomes within a limited range of time.

Following Lipset and Rokkan (1967) and Collier and Collier (1991), I argue that by holding constant the critical juncture of institutional development, one is able to explain the subsequent changes in institutional development by examining variables such as (i) changes in the ideas of the actors, (ii) the entry of new actors with new ideas, power or resources to aid or displace old actors, (iii) changes in the economic conditions within which the institutions were initially developed, (iv) changes in the political conditions within which the institutions were initially developed, and (v) changes in the environment within which the institutions were initially developed. It is important to emphasize that changes in the last three conditions would not automatically lead to changes in institutions unless the political actors who are affected by such changes decide to change the institutions to suit the new conditions. What is crucial for historical institutional explanations of institutional change is that institutional legacies are created and changed through human agency.

The distinction between endogenous and exogenous sources of institutional change has not been clearly defined by historical institutionalists. Particularly, it is uncertain as to whether ‘ideational change’ should be treated as an endogenous or exogenous sources of change (Blyth 2002a, 2002b, 2007; Lieberman 2001; Rittberger 2003; Rueschemeyer 2006). For instance, the widespread acceptance of new ideas of ‘republican democracy’ by educated Ghanaians led to the displacement of chieftaincy from the local government system in the famous 1949 Coussey Committee political settlements. This “new interpretive frame” of political governance may be considered by Mahoney and Thelen (2010:5) as an “exogenous entity or force...imported or imposed from the outside” (Mahoney and Thelen 2010:5). How does one separate the internal indigenous actors from the imported interpretive frames of politics? Again, the recommendations made by the all-British Watson Commission in 1948 may have had some influence on the decisions of the 1949 Coussey Committee. It is not always easy to analytically distinguish

endogenous or exogenous sources of ideas in the process of institutional change. Usually, it is practically impossible to separate internal political actors from the ideas that they use to shape the process of institutional change.

My study focused on discovering the critical juncture for the bifurcation of state authority between chiefs and government and how that juncture shaped land administration reforms. I argued that the critical juncture was the initial formation of the colonial state from 1821-1831. Subsequent changes in the economic environment led to the current attempts to reform the informal institutions of customary land administration that were integrated into the critical juncture of state formation. Furthermore, I showed that the integration of traditional states into the initial colonial state explains the current division of state authority between chiefs and government concerning the reform of matters affecting chieftaincy, particularly land administration. The CJ-PD framework is therefore able to account for the sources of institutional formation, stability (or maintenance) and change. Fundamentally, the Ghanaian state remains constitutive of organizations of chieftaincy and 'public sector' agencies of modern government. There lies the stability of the bifurcated state established at the critical juncture. However, many of the rules of governance between chiefs, government, and citizens have changed due to changes in some of the variables that existed at the critical juncture of state formation. Such variables include the rise of non-chief educated elites, the replacement within government of British officials with non-chief indigenous elites, the increasing commercialization of land, and changes in the economic conditions of citizens.

Mahoney and Thelen (2010:8-9) rightly argue that "There is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements. Rather, a dynamic component is built in; where institutions represent compromises or relatively durable though still contested settlements based on specific coalitional dynamics, they are always vulnerable to shifts. On this view, change and stability are in fact inextricably linked." The dynamic components of institutions are the human actors who have dynamic interpretive frames, diverse power relations and resources. It is for this reason that Levi (2006:10) remarked that "Institutions are empty boxes without leaders and staff who have the capacity to produce the public goods, the public demands, and the facility to evoke popular confidence even among those who

disagree with particular policies.” The nature and role of human agency in the political process of institutional development should be taken seriously.

Notwithstanding the central claim of historical institutionalists that institutions are political legacies (Hay and Wincott 1998; Mahoney and Thelen 2010; Steinmo et al. 1992), many scholars have noted that the nature and role of human agency in the process of institutional formation, maintenance and change is yet to be taken seriously (Leftwich 2007, 2008, 2009; Moe 2006; Rogers 1992). In critical juncture explanations of institutional stability and change, what matters is whether the social, economic, political, institutional and ecological conditions that prevailed at the critical juncture of institutional development have been sustained, modified, or ended by political actors. The analytical concept of critical juncture is useful for explaining the sources of institutional change by pointing to the nature of the ideas, power and resources of actors that have either remained constant or have subsequently been produced by the variables that existed at the critical juncture.

## **10.6 Conclusion: Towards A Traditional-Unitary State?**

The Committee of Experts that designed the current 1992 Constitution was asked to take into account “the abrogated Constitutions of Ghana of 1957, 1960, 1969 and 1979 and any other Constitutions.”<sup>405</sup> The 1992 Constitution consolidated past constitutional settlements that divided state authority between chiefs and government over land ownership, land administration, and chieftaincy. Under the 1992 constitutional rules of state authority, elected governments and parliaments do not have the authority to reform all matters affecting the rules and actors of chieftaincy without the authority of the chiefs. Invariably, governments are constrained from reforming the institutions of land administration that manage the stool lands of chiefs without the consent of the chiefs. Organizations of chieftaincy are acknowledged to manage about 80% of the country’s land. Governments are therefore obliged to negotiate with chiefs over appropriate land administration reforms within the dual ‘public’ and ‘customary’ organizational frameworks of land administration.

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<sup>405</sup> Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana Presented to the PNDC, July 31, 1991, p.1.

The study sought to find out the provenance of the bifurcation of state authority between Chiefs and Government over land administration in Ghana, and, how this institutional configuration of state authority shaped the politics and outcomes of land administration reforms. Using a historical institutional framework of analysis, I have argued that the critical juncture for the bifurcation of state authority between chiefs and government took place in the Gold Coast between 1821 and 1831. The impact of this critical juncture on the organization of the current traditional-federal state was not, however, predetermined. The transition has been characterized by political negotiations and conflicts between chiefs and non-chief political ruling elites.

The study provides strong grounds to argue that the constitutional bifurcation of state authority between chiefs and government over land administration has largely been shaped by growing distrust between the two ruling classes ever since the chiefs and their organizations were separated from the Executive, Legislature and the local government system. Within the public sector of land administration, the key institutional legacies of distrust between chiefs and government have been the Office of the Administrator of Stool Lands and the Lands Commission created to manage the conflict of interests. Prior to the separation of chieftaincy from these three arms of the state, chiefs managed stool lands through the local government system. The separation of chieftaincy from the local government system left the chiefs and their subjects with inadequate formal-legal rules of stool land administration.

Beneath the fabric of land administration in Ghana are complex institutional legacies shaped by war-making and distrust between chiefs and non-chief political ruling elites. Formal-legal institutions and informal institutions of customary law largely compete for control, authority and power. But in the absence of formal-legal rules to govern how chiefs should manage their stool lands, the informal rules of customary law have imperfectly held the fort. Chiefs have managed communal lands mainly through informal rules of customary law governing chieftaincy. Traditional Councils of chiefs have been deprived of the administrative capacity required for effective communal land administration. It has also become difficult for state agencies of horizontal accountability (the Courts and the Audit Service) to hold chiefs responsible for their actions as fiduciaries of communal lands.

Ghana's dual public and customary land administration systems are the outcome of the bifurcation of state authority between chiefs and government within the traditional-federal state. Regardless of the wishes of institutional reformers, the bifurcation of state authority between government and chiefs regarding land administration has been the major variable that enables and constrains the attainment of reform objectives. It is therefore important for constitutional makers to clearly clarify the statutory character of chieftaincy institutions. This is likely to help chiefs, government, and other interested parties to negotiate appropriate institutional reforms that could promote transparent and accountable land administration.

There is an on-going land administration reform programme intended to create transparent and accountable agencies of land administration across the public and customary sectors of the state. Unfortunately, the reform programme has largely been "based on where donors think the country *ought* to be, not on serious analysis of where the country is, where it is coming from or where it is heading" (Booth et al. 2005:2). Moreover, the reform programme proceeded on the erroneous assumption that organizations of chieftaincy are private institutions and not state institutions. The reformers have not considered it obligatory for the state to provide the administrative and material resources required by chiefs to perform their functions effectively. As a result there has been limited progress in customary land administration reform.

The critical juncture and path dependence theoretical framework of analysis help to understand how and why specific features of the colonial traditional-federal state have been consolidated or ended in the post-colonial state. The study suggests that there is a causal relationship between the colonial critical juncture of traditional-federal state formation and the current constitutional bifurcation of state authority between chiefs and government over the reform of land administration. Subjects of chiefs supported their traditional leaders in military wars against British colonial state-makers. Subjects of chiefs have also supported the entrenchment of chieftaincy in the constitutional rules of Ghana, and are now demanding for an increase in the authority of chiefs in political governance (Logan 2008, 2011). The resurgence of traditional governance in an era of democratization may lead to the Ghanaian state's reform as a traditional-unitary state in which chiefs are incorporated into the local government system, the Legislature and the Executive.

Each African country has its own distinctive experience of state formation. Nonetheless, the Ghanaian experience of colonial state formation shares common features with other African states. The literature on state development in Africa suggests that the choice point of colonial state-making in many countries was the traditional-federal state with bifurcated authority between traditional authorities and colonial governments. Historical institutionalism offers appropriate analytical tools to enable scholars to examine how critical junctures of traditional-federal state formation across Africa explain the current dominance of customary land administration, the complex interactions between formal-legal statutes and informal rules of customary law, and the resurgence of chieftaincy in an era of democratization. History matters.

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## g. Interviews

No	Name	Position	Date	Place
1	Abossey, Jonathan (Mr.)	Former Head of the Survey Department	22/12/2010	Accra
2	Aidoo, Jimmy (Mr.)	LAP Monitoring and Evaluation Officer/Deputy Project Director	1/12/2010	Accra
3	Antwi, Adarkwah (Dr.)	CLS National Facilitator	1/11/2010	Adentan

4	Boboobe, Christina (Mrs.)	Administrator, Office of the Administrator of Stool Lands	21/12/2010	Accra
5	Crook, Richard (Prof.)	Consultant to DFID for CLS Project	8/03/2010	Sussex (IDS)
6	Dakurah, Lawrence (Mr.)	Town and Country Planning Dept. (TCPD), LAP Task Team Leader	22/12/2010	Accra
7	Diaby-Pentzlin, Friederike (Prof.)	GTZ and NHC Ascertainment of Customary Law Project	6/08/2010	Accra
8	Gbawe Kwatei Family Council of Elders	Managers of Gbawe family lands and CLS	4/12/2010	Gbawe Palace
9	Gbawe Kwatei Family Land Management Committee	Managers of Gbawe family lands and CLS	4/12/2010	Gbawe Palace
10	Kakraba-Ampeh, Mark (Mr.)	CLS National Facilitator	7/12/2010	Kumasi
11	Kasanga, Kasim R. (Prof.)	Former Minister of Ministry of Lands and Forestry	25/01/2011	Kumasi
12	Kunbun Naa Yiri II	Member of CRC and Chairman of Stool/Skin Lands Committee at NHC	2/09/2010	Koforidua
13	Larbi, Odame W. (Dr.)	LAP Project Director / Executive Secretary of Lands Commission	1/12/2010	Accra
14	Nana Asomadu	Head of Administration, Asantehene Lands Office	25/01/2011	Kumasi
15	Nana Atta-Karikari	Head, District Office, Land Title Registration Division of Ashanti Regional Lands Commission	6/01/2011	Kumasi
16	Nana Nsuase Poku Agyeman III,	Head, Ashanti Regional Office of OASL/ Chief Linguist ( <i>Akyeamehene</i> ) of Asantehene.	17/01/ 2011	Kumasi
17	Nana Tufour	Chief Clerk of the Asantehene Lands Office	25/01/2011	Kumasi
18	Nkawie Divisional chiefs and CLS Staff	Managers of Nkawie CLS	14/01/2011	Nkawie
19	Poku, Asiedu (Mr.)	Acting Director, TCPD	22/12/2010	Accra
20	Quan, Julian (Mr.)	Consultant to DFID for CLS Project	18/02/2010	Telephone (UK)
21	Sittie, Rebecca (Mrs.)	Director, Land Title Registration Division of New Lands Commission	22/12/2010	Accra

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