

THE PREMISE OF MIXED GOVERNMENT  
IN AFRICAN POLITICAL STUDIES

By

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I am delighted to be here for this conference at the University of Ibadan. My association with this university began 44 years ago, in 1957, during the course of my doctoral research on Nigerian political parties. The late pioneering historian, Dr. Kenneth Onwuka Dike, then director of the Institute of African Studies, received me at his home and made me feel welcome. This institution was then a University College, affiliated with the University of London. Several years later, in 1963, I accepted an invitation to join the academic staff of this university as a lecturer in the newly established Department of Political Science. Previously, political science and sociology were subsections of the Faculty of Economics. In 1963, all three disciplines were incorporated with equal status within a new Faculty of the Social Sciences of a fully independent university with Professor Dike as vice-chancellor.<sup>1</sup>

How do I remember the academic life of this campus between 1963 and 1965? Once a wise teacher warned me to beware the trap of nostalgia for so called good old days. The old days, he said, were rarely, if ever, very good. During the time of my appointment here, political decline in the nation at large, destined to result in civil war, cast a shadow of dissension over the campus community from which collegial relationships were not immune. I would not, for a moment, describe that time as a golden age for this university. As for myself, however, I believe that I learned considerably more about pro-

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<sup>1</sup> With few exceptions, vice-chancellor is the distinctive title for chief executive officers of universities in Britain and throughout the Commonwealth.

professional conduct in those two years than during any comparable period of time in my subsequent academic career.

I owe this institution far more than I can ever repay or even properly acknowledge. Here I learned the importance of civility, because it was highly prized on this campus, to a far greater degree than I have perceived it to be in universities of the Western world. I learned to appreciate the calming value of etiquette in tense meetings, particularly meetings of the Academic Senate, where members checked their camaraderie, or its opposite, at the door, and coated their tongues with unoffending formality. From the academic culture of this university, I learned the value of laughter as a deliberative device in tense proceedings. These lessons have served me well throughout my academic career, everywhere in the world. Personal and professional relationships initiated here, or attributable to my having taught here, have been essential to my identity, including my self-identification, as a scholar. When I left this university in 1965, with the signs of a coming national disaster unmistakably in sight, I understood, regretfully, that I could not be part of Nigeria. But I also sensed at that time, and have known ever since then, that Nigeria would always be a vital part of me. Personal identity is the starting point for my discussion of mixed government.

Many of us have complex political identities. First of all, we are citizens of sovereign states with defined territorial boundaries. Citizenship signifies nothing less than personal participation in the exercise of a country's sovereignty, its highest legal authority. For that reason, a citizen is inclined to feel that loyalty to the sovereign is also, in a sense, loyalty to one's self.<sup>2</sup>

To be sure, however, citizenship is but one among many types of personal political identity. Thus people the world over are fiercely loyal to ethno-linguistic groups, known as nationalities. In several countries, religious identity is an essential component of ethno-linguistic identity, as in the cases of Northern Ireland, Bosnia, and the Sudan. In all parts of the world, certain ethno-linguistic groups are famous for their avowed identities as supranational peoples. The Kurds of the Middle East and the Tuareg of the African Sahel are prime examples of supranational political identity. In our day, however,

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<sup>2</sup> The idea that each citizen is part of the Sovereign was expressed in classic form by Jean-Jacques Rousseau, *The Social Contract* (1762), chapter VI.

supranational identity is emerging more rapidly in Europe and North America than elsewhere in the world. This phenomenon is the result of supranational economic integration and the removal of barriers to migration within those regions.

In Africa today sovereign authority is exercised by 53 national governments. Political fragmentation is a widely lamented legacy of colonial rule, and no one should underestimate the strength of Pan-African aspirations toward continental political unity. The Pan-African appeal was manifest in the proclamation of an African Union by an extraordinary summit (so-called) of the Organization of African Unity earlier this year. Similarly, the recent inauguration of a West African Parliament and the likelihood that West African governments will soon adopt a common currency for the entire region demonstrate the vitality of supranational sentiments on this continent. In the short term, however, the number of sovereign states in Africa is more likely to increase to as many as 60 than decrease to fewer than 53. Political fragmentation and multiple sovereignties create a high potential for severe interstate conflict up to and across the threshold of warfare.

Yet the implications of political fragmentation are not entirely negative. On the positive side, one may conceive of the numerous African countries as veritable workshops of democracy.<sup>3</sup> In each and every one of them, the components, or instruments, of democratic government are being forged in the crucibles of hard experience. Furthermore, the political knowledge gained as a result of this process of trial, error, correction, and retrial is being exchanged within Africa and, increasingly, with the wider world. In this way, Africa contributes to the progress of democracy in the world every bit as much as it benefits from the importation of political ideas.

From time to time, I have attempted to compile an inventory of African contributions to the science of government during the past few decades. Pride of place among such contributions might be assigned to the theory and practice of federalism in Nigeria, including the Nigerian principle of federal character, a constitutional rule that is designed to foster national unity and a sentiment of belonging to the nation. Volumes of assess-

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<sup>3</sup> For the original formulation of this thesis, see Richard L. Sklar, "Democracy in Africa," *The African Studies Review* 26 (September/December 1983): 12.

ment and criticism of this principle have been written by Nigerian scholars; yet it appears to survive as an indispensable condition of national unity.

In any such inventory a competitor for pride of place at the highest level would surely be the remarkable Truth and Reconciliation Commission of South Africa, chaired with great integrity and sensitivity by Archbishop Desmond Tutu. The mandate and methods of this commission, including grants of amnesty in return for full disclosure of personal conduct during the course of politically motivated crimes, were quite distinctive compared with other such endeavors elsewhere. Another competitor for highest recognition would be the Sovereign National Conference used in several francophone African countries to launch democratic renewals in the early 1990s. Yet another significant political innovation is the annual public forum that enables citizens of the Republic of Mali to pose questions to Cabinet Ministers, who reply on radio and television for an entire day. Recent scholarship has shown that this contribution to democratic governance has unmistakably enhanced the protection of human rights in Mali.<sup>4</sup>

Any serious inventory of African contributions to the theory and practice of government in our time would necessarily include the modernized indigenous institutions that we have gathered to discuss and assess at this conference. The durability of traditional authority in Africa cannot be explained away as a relic of colonial rule. African 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.

Everywhere in Africa today, the architects of government are building new structures on political foundations that are traditional as well as modern. Often they appear to be constructing a new form of government, one that conserves traditional authority as a political resource without diminishing the authority of the sovereign state. To express this idea, I have borrowed a concept from the history of political thought, namely “mixed government.” In Africa today, it is normal for traditional political jurisdictions to occupy a second dimension of political space – a dimension that lies behind the sovereign state. Like the Roman god Janus, these two faces of government are positioned back-to-back,

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<sup>4</sup> Susanna Denholm Wing, “Constitutional Dialogues: Participation and Citizenship in the Transition towards Democracy in Mali, 1991-1999,” Ph.D. dissertation, UCLA Department of Political Science, 2000, chapter 3.

each one behind the other and facing in opposite directions. The political officials of these “second states” are known as traditional authorities; they hold positions of public trust in accordance with customary rules, although their appointments and functions are normally regulated by statutory law as well.

In the history of political thought, the idea of mixed government appears in the ancient classics of Plato, Aristotle, and Polybius, where it implies a mixture of institutions designed to protect the interests of the rich with other institutions that were created to assist the poor. Mixed government reappeared in early modern Europe when the so-called Estates of society, specifically the nobility, the clergy, and the common people, were represented in the organs of government. The Estates-General in France during the sixteenth and seventeenth centuries and the contemporaneous system of King, Lords, and Commons, known as mixed monarchy, in England define the early modern meaning of mixed government. Subsequently, the principles of mixed government were incorporated into the republican constitution of the United States of America. The American Electoral College, created to ensure that the president would be chosen by a relatively small body of well-informed electors, is a direct descendant of the idea of mixed monarchy.

In European, and American, political thought mixed government never implied dualistic, as opposed to unified, systems of political authority. In medieval Europe, however, dualistic forms of political authority were commonplace. Political theorists adopted the concept “double majesty,” introduced by the eminent German theorist, Otto von Gierke, to represent this reality; it signified the coexistence of two self-subsistent realms of government, called by Latinists *Princeps* and *Populus*, or the King, including his court and military establishment, and the Kingdom, comprising judicial and municipal officials who were independent of the king.<sup>5</sup> European political thinkers did not formulate theories of sovereignty for unified territorial states until the sixteenth century.

Prior to my 1993 essay on mixed government in modern Africa (from which portions of this address are derived),<sup>6</sup> that term does not appear to have been used in connec-

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<sup>5</sup> Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper & Brothers, 1949), pp. 30-40; Otto von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, trans. Ernest Barker (1934; Boston: Beacon Press, 1960), pp. 43-45, 54-55.

<sup>6</sup> Richard L. Sklar, “The African Frontier for Political Science,” in Robert H. Bates, V. Y. Mudimbe, and Jean O’Barr, eds., *Africa and the Disciplines* (Chicago and London: The University of Chicago Press, 1993), pp. 83-110. Portions of this address have also been derived from Sklar, “On Democracy in Africa,”

tion with dualistic forms of political authority.<sup>7</sup> It has always been conceived as a type of representative government in unified states. In our day, sovereign states in Africa are governed by unified central, or national, authorities, usually in the form of a republic with executive, legislative, and judicial branches of government. What I term the second, or traditional, dimension of government almost always consists of several, or many, separate and distinct traditional polities. The two exceptions are the kingdoms of Lesotho and Swaziland, where the two dimensions are virtually symmetrical. Rarely, if ever, do traditional polities aspire to sovereignty in the world of nations.<sup>8</sup> Yet they are sources of immense moral authority in everyday life.<sup>9</sup> Increasingly, that authority is reckoned in Africa to be a political resource of potentially great value. Wisely used, it can help to maintain civic morale and social order during the current era of extremely difficult transitions to modern forms of economy and society. A separate source of authority, embedded in tradition, could be used to reinforce social stability without the abandonment of democratic reforms. Traditional governments would then prove themselves to be superior shock absorbers for the African ships of state during the stormy passages of these turbulent times. Note that I say shock absorbers, not engines or steering wheels.

For conceptual guidance on the durable, symbiotic relationship between traditional authorities and the officials of sovereign governments in Africa, the work of C. S. Whitaker on the Muslim emirates (theocratic kingdoms) of northern Nigeria is fundamen-

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in Michael W. Coy and Leonard Plotnicov, eds., *Africa in World History: Old, New, Then, and Now*, University of Pittsburgh, Ethnology Monographs, No. 16 (1995): 94-114; Sklar, "African Polities: The Next Generation," in Richard Joseph, ed., *State, Conflict and Democracy in Africa* (Boulder and London: Lynne Rienner, 1999): 165-177; Sklar, "The Significance of Mixed Government in Southern African Studies: A Preliminary Assessment," in John Hyslop, ed., *Always Something New: African Democracy in the Era of Globalization* (Johannesburg: Witwatersrand University Press, 1999), pp. 115-121; Sklar, "Ethnicity and Traditionalism in the Quest for New Democracies," *Journal of African Studies* 17, 1 (Fall/Winter 1999-2000): 7-11. This address is a new synthesis and further development of present writer's "mixed government" thesis.

<sup>7</sup> The concept of mixed government had been used previously in African studies by Maxwell Owusu, "Chieftaincy and Constitutionalism in Ghana: The Case of the Third Republic," *Studies in Third World Societies* 24 (June 1983): 35-36, who argued that political thinkers in Ghana had formulated conceptions of government that resemble Aristotle's concept of mixed government. In Sklar, "The African Frontier," I use the concept differently, without Aristotelian connotations, but in relation to the idea of dual authority. For his approval of that application of the concept, see Owusu, "Different Cultures, Different Democracies? An Anthro-historical Perspective on Political Reforms in Africa," paper presented at the Annual Meeting of the American Anthropological Association, November 1993.

<sup>8</sup> This proposition has been questioned by Pierre Englebert with reference to his study of the Ugandan Kingdom of Buganda. His excellent paper has not yet been released for citation.

<sup>9</sup> Peter P. Ekeh, "Colonialism and the Two Publics in Africa: A Theoretical Statement," *Comparative Studies in Society and History* 17, 1 (January 1975): 91-112.

tal.<sup>10</sup> Professor Whitaker's study shows that, in this part of Nigeria, a unified social elite controls both dimensions of government: that which has evolved from precolonial origins and its sovereign counterpart, originally established by the colonial ruler. He used the expression "stable symbiosis" to characterize the relationship between these dual structures of authority.<sup>11</sup>

Ten years ago, in 1991, I noted a manifestation of this symbiotic process during a brief visit to Nigeria. At the time of my arrival, Alhaji Aliyu Mohammed, then Chief Secretary to the Government of the Federation, was about to be installed by the Emir of Jema'a as *Waziri* (chief official) in the government of that traditional Muslim kingdom. For two weeks before the turbaning ceremony the expectation of this event overshadowed all other news, including gubernatorial primary elections, in the national press. On the appointed day, all roads led to Kafanchan, capital of the relatively small emirate of Jema'a. In an interview with a news reporter, Alhaji Aliyu said, "I have reached my peak traditionally," adding that he could not aspire to become Emir of Jema'a because he was not born into the ruling family of that emirate.<sup>12</sup> His comment reflected the coexistence of two distinct dimensions of government, one based on the democratic premise of equal political rights, the other on the aristocratic premise of restricted, in this case dynastic, entitlement to political office.

During the course of my visit to Nigeria, I presented a few guest lectures at universities. On those occasions, I said that as a political scientist I should be able to suggest an explanation of what was going on in the world of dualistic politics. I then offered my thesis on mixed government as a plausible explanation: that there are two separate and distinct political realms; that they interact in many ways; that each one is rooted in an independent source of authority; that each has its separate jurisdiction and governs in its own way. Invariably, someone would respond to my analysis by saying something like this: "It is all about politics; the incumbent head of state, General Ibrahim Babangida, seems to be grooming Aliyu Mohammed as a potential president should the transition from military to civilian rule be completed." Just so, I would answer; politics is about

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<sup>10</sup> C. S. Whitaker, Jr., *The Politics of Tradition: Continuity and Change in Northern Nigeria, 1946-1966* (Princeton: Princeton University Press, 1970).

<sup>11</sup> *Ibid.*, p. 464.

<sup>12</sup> Quoted in the *New Nigerian*, 2 November 1991.

power and there is only one dimension of power. But there are two dimensions of political authority. The traditional kings are not powers behind the throne; they are thrones behind the power of the sovereign state, which they help to legitimate.<sup>13</sup> The existence of traditional kings, councils, and courts do not greatly affect whether or not the sovereign government is democratic in form. But traditional political identity could prove to be a bedrock of political order for whatever system of government does possess legal sovereignty.

In African political studies, the role of traditional institutions in relation to the modern state commands increasing scholarly attention.<sup>14</sup> The idea of dual authority implies a systemic relationship between two coexistent dimensions of government. I use the term “incorporation” to connote the inclusion of elements of one dimension within structures of the other. Specialists on the institutions of traditional authority would be able to assess the impacts of sovereign national governments on the structures of the second dimension. As I am not a specialist on either chieftaincy or customary law, I do not labor in that vineyard. My discussion of incorporation in this address is limited to the assimilation of traditional institutions by the organs of sovereign governments, and the effects of that process on the nature of the state in Africa.

Throughout western and eastern Africa today, the degree of incorporation varies widely; in general it is higher in countries with French colonial traditions than in the former British colonies. Yet it is not at all uncommon for traditional rulers in Commonwealth Africa to be members of advisory bodies established by the constitution, or to serve as ex-officio members of local government authorities. In Nigeria, for example, previous constitutions (1979 and 1989) have provided for State Councils of Chiefs with

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<sup>13</sup> Although the phrase is mine, I think it was inspired by an issue of the *African Guardian*, April 1, 1991, entitled “Politics from the Throne.” Abdul S. Oroh was the lead writer of an invaluable article, “Between the Stool and the Soap Box,” to which others contributed.

<sup>14</sup> See especially Olufemi Vaughan, *Nigerian Chiefs* (Rochester, N.Y.: The University of Rochester Press, 2000); also Christiaan Keulder, *Traditional Leaders and Local Government in Africa* (Pretoria: Human Sciences Research Council, 1998); and Jeffrey Herbst, *States and Power in Africa* (Princeton: Princeton University Press, 2000), pp. 173-197. Collaborative works include these: Oladimeji Aborisade, ed., *Local Government and the Traditional Rulers in Nigeria* (Ile-Ife: University of Ife Press, 1985); John A. A. Ayoade and Adigun A. B. Agbaje, eds., *African Traditional Political Thought and Institutions* (Lagos: Centre for Black and African Arts and Civilization, 1989); E. Adriaan B. van Rouveroy van Nieuwall and Donald Ray, eds., *Journal of Legal Pluralism and Unofficial Law*, nos. 37-38 (1996); E. Adriaan B. van Rouveroy van Nieuwall and Rijk van Dijk, eds., *African Chieftaincy in a New Socio-Political Landscape* (Hamburg: Lit Verlag, 1999).

representation in the Federal Council of State as well as the creation of traditional councils with purely advisory functions in local government areas. The omission of any mention of traditional rulers and councils in the 1999 Constitution has been widely criticized; indeed the incumbent administration has pledged to restore the constitutional recognition of traditional authorities. A recommendation to that effect is contained in the recent report of the Presidential Committee appointed to review the Constitution, which also reactivates a provision of the 1989 Constitution to the effect that constitutional recognition of traditional councils does not confer on them any executive, legislative, or judicial functions.<sup>15</sup> Whether or not some form of constitutional incorporation is restored in Nigeria, it is obvious that traditional authorities do not require that kind of validation in order to function effectively in their own dimension of political space.

In francophone West Africa, prefects normally appoint the *chef de village* while heads of state appoint *chefs de canton*. As noted by E. Adriaan B. van Rouveroy van Nieuwall, in the Republic of Togo, candidates for appointment are screened by “the local police and gendarmerie” to ensure their loyalty to the autocratic president, Gnassingbé Eyadéma, who has been in power since 1967. This screening procedure, known as the *enquete de moralité*, was originally introduced by the former colonial government.<sup>16</sup> President Eyadéma always makes the final selection of senior chiefs. Professor van Rouveroy van Nieuwall’s vivid description of Eyadéma’s lordly method of selection captures the spirit of full incorporation thus: In a keenly contested case, the president was presented with four candidates who had survived the *enquete de moralité*. At a ceremonial reception for the candidates, the president questioned them at length “on their loyalty to the ideals” of his regime. “To three of them he gave large sums of money to defray the costs of their campaign.” The fourth received nothing, “a sign that he had finally been chosen by the government,” whereupon he departed joyfully to begin a “triumphant journey” from the capital to his home district, where he would be ritually installed.<sup>17</sup>

As in the era of colonial overrule, the officials of independent African states in the postcolonial era appoint and control traditional authorities. Except for countries in tur-

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<sup>15</sup> *Report of the Presidential Committee on the Review of the 1999 Constitution*, Vol. 1 (Abuja: Federal Republic of Nigeria, 2001), pp. 81-83.

<sup>16</sup> E. A. B. van Rouveroy van Nieuwall, “The Togolese Chiefs: Caught between Scylla and Charibdis?” *Journal of Legal Pluralism* 32 (1992): 25.

<sup>17</sup> *Ibid.*, p. 29.

moil, where the reach of the state is restricted by warfare or incapacity, traditional authority is exercised by leave of the sovereign, who may even choose not to recognize it at all, as in the case of Tanzania. But it is important to understand that traditional authorities do not exist by virtue of their recognition and appointment by the governments of sovereign states. On the contrary, they are recognized and appointed to traditional offices, in accordance with customary rules, because those offices are legitimated by the beliefs of the people, who expect them to exist in practice.<sup>18</sup> Furthermore, the legitimacy of a traditional ruler does not derive from the act of appointment. So-called pretenders and dubious kings have often been rejected by the people owing to an unacceptable method of governmental appointment. I shall consider the role of courts in adjudicating disputed appointments to traditional office presently, as a separate topic, apart from the question of incorporation.

In anglophone Southern Africa, the degree of incorporation is generally higher than elsewhere on the continent. In South Africa, for example, the constitution provides for the establishment of Houses of Traditional Leaders at the provincial level of government and a Council of Traditional Leaders at the national level. These bodies advise their respective governments on matters relating to traditional law and custom. The South African interim Constitution of 1994 actually provided for a constitutional monarch in the province of KwaZulu-Natal. This was done to prevent a boycott of the historic nonracial election of 1994 by the powerful Inkatha Freedom Party in that province. Although the permanent Constitution of 1996 does not specifically mention the Zulu king, KwaZulu-Natal continues to function as a virtual constitutional monarchy within a republic – an extraordinary permutation of mixed government in practice.<sup>19</sup>

In the mountain kingdoms of Lesotho and Swaziland, the degree of incorporation is far greater still. Thus, in the constitutional monarchy of Lesotho, paramount chiefs, or their designated representatives, occupy two-thirds of the seats in the Senate, an inferior legislative chamber that is empowered merely to delay the enactment of bills passed by

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<sup>18</sup> Sklar, "African Politics," p. 169.

<sup>19</sup> In a judicious and empirically rich response to my perception of mixed government in South Africa, Leslie Bank and Roger Southall suggest that I "commend" this idea as a relatively stable foundation for the construction of South African democracy. However, my purpose is strictly analytical; although I do not advocate mixed government as a policy option, I do commend the assessment of benefits and costs in their essay. Bank and Southall, "Traditional Leaders in South Africa's New Democracy," *Journal of Legal Pluralism and Unofficial Law* 37-38 (1996): 407-430.

the elected National Assembly. By contrast, Swaziland has been governed in a more absolutist fashion by a traditional monarch ever since the late King Sobhuza II repealed that country's Independence Constitution in 1973. This deviation from the normal pattern of incorporation, whereby traditional rulers are constitutionally recognized but subordinate to high officials of the sovereign state, implies a question of theoretical significance. Does the capture of sovereign authority by a traditional ruler negate the very idea of dual authority? Not at all. Each dimension of the African mixed state exists in its own right; each has an independent foundation in the structure of society. While each may incorporate major aspects of the other's domain, neither can extinguish the other during the current era. Should the heavens fall on a sovereign entity and destroy it, or cause it to be acquired by another sovereign power, traditional authority would still continue to exist in that country's second dimension of political space.<sup>20</sup> Similarly, should a traditional state acquire sovereignty in the world of nations, the customary constitution might be overshadowed by the ascendant, and newly sovereign, dimension, but it would not cease to exist in the minds and daily routines of those who keep the ancestral faith.

In Botswana, as in Namibia, the degree of incorporation is considerably less than it is in South Africa. Botswanan chiefs are incorporated into the government by virtue of both their appointment by the president and the various functions they are required to perform.<sup>21</sup> Botswana is also famous for its use of a traditional institution, known as the *kgotla*, which is a public meeting convened by a traditional ruler in a rural area. *Kgotlas* test and shape public opinion toward policies that are expected to have direct local impacts. Although these assemblies of citizens are extra-constitutional, they are partially incorporated by legislation that requires chiefs to convene *kgotla* meetings, and by regulations that authorize the *kgotla* to elect members of both village development committees and land boards, and to hear land disputes.<sup>22</sup> Elsewhere, I have used the term "shading" for areas of government, such as the Botswanan *kgotla*, that are barely incorporated

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<sup>20</sup> This paragraph and portions of the preceding paragraph are adapted, partially verbatim, from Sklar, "The Significance of Mixed Government in Southern African Studies," pp. 118-120.

<sup>21</sup> Keulder, *Traditional Leaders*, p. 117.

<sup>22</sup> *Ibid.*; William Tordoff, "Local Administration in Botswana," *Public Administration and Development* 8 (1988): 190-194.

into the national constitution. Shading, I believe, demonstrably substantiates the existence of a second dimension of authority.<sup>23</sup>

A prominent example of non-incorporation with perceptible shading is the role of the Kingdom of Buganda in Uganda. As Pierre Englebert has shown, the government of that republic favors a form of incorporation that would weaken the authority of the kingdom, while Buganda aspires to federal status as a means of maximizing the degree of its own sovereignty.<sup>24</sup> In 1996, Muteba II, Kabaka of Buganda, discussed his conception of the role of an African traditional ruler in a constitutional democracy in an address delivered at Princeton University.<sup>25</sup> The Kabaka, who does not exercise power under the constitution, envisages the traditional ruler as being “part of an effective civil society which countervails and enriches the State.” The Kabaka’s use of contemporary academic terminology is impressive, all the more so if it attests to his personal association with scholars. Yet I agree with Professor Englebert’s view that the “nature” of the kingdom “is unquestionably governmental rather than non-governmental as pre-supposed by membership in civil society.” In his Princeton address, the Kabaka made this further statement: “If the traditional leader is largely dependent on the State for his survival, he will find it hard to take a neutral position when the State is prompting him to side with it even when he is convinced that the State is wrong.” To my mind, this passage affirms the principle of dual authority in Uganda without derogating the republic’s exclusive sovereign authority, whatever the Kabaka’s ultimate goal for Buganda may turn out to be.

My concept of incorporation refers to a form of linkage that involves the transfer of political authority from one dimension of government to another. Perhaps the word transfusion is preferable to transfer, since I do not mean to imply that chiefs who function as officials of sovereign governments will suffer a loss of authority. On the contrary, those chiefs are likely to be recompensed in heightened prestige as well as material benefits, both of which tend to magnify the awe in which they are held by their devoted subjects. Systems of mixed government based on dual authority do not operate in accordance with the rules of so called zero-sum games, meaning that one player’s gain is al-

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<sup>23</sup> Sklar, “The African Frontier,” p. 97.

<sup>24</sup> Pierre Englebert, Draft paper, not for citation.

<sup>25</sup> Excerpts from this address were published under the title, “Traditional Leaders and Democracy,” in *West Africa*, April 15-21, 1996, pp. 557-558; and Sklar, *African Politics*, p. 169.

ways another's loss. Rather does it appear that the governments of both dimensions are regularly bolstered by new infusions of authority from one another.<sup>26</sup>

Before proceeding to discuss other types of linkage, I might remark that the forms of incorporation are many and varied, as shown by the examples that I have already mentioned, including constitutional recognition of traditional rulers and the reservation of places for them or their representatives in administrative bodies and legislative assemblies. The use of assessors by statutory courts to assist in the adjudication of cases involving customary or religious law is yet another example. Furthermore, the mobilization of chiefs by politicians for partisan political purposes in the vast majority of African countries often involves the incorporation of chiefs by political parties as well as governmental institutions.<sup>27</sup> I wish to emphasize, however, that incorporation is not the only form of linkage that binds and strengthens the dualistic system of mixed government. Indeed, other linkages may prove to be more durable if, as I suspect, the pattern of political development involves the long-term, relentless erosion of traditional authority in the sovereign dimension and its concurrent robust persistence in the second dimension. That type of evolutionary process would be consistent with the persistence of dual, or multiple, political identities in modernizing societies. Alternatively, Professor Englebort believes that sovereign states will need to increase the level of incorporation in order to obtain political legitimacy from traditional institutions.<sup>28</sup> Whatever may be the future of incorporation, whether it becomes more or less significant as a strategy of African statecraft, its bearing on the nature and effectiveness of governance in Africa merits close attention.

Another, and to my mind ultimately more important, form of inter-dimensional linkage is the system of justice, including courts and the law. Courts, both statutory and customary, function to maintain the integrity and vitality of political life in both dimen-

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<sup>26</sup> Cf. Donald I. Ray and E. Adriaan B. van Rouveroy van Nieuwall, "The New Relevance of Traditional Authorities in Africa," *Journal of Legal Pluralism and Unofficial Law* 37-38 (1996): 27-29. While these authors stress the "mutual dependence" of chiefs and states, as well as the competition between them, they still conclude, "The chief finds himself in a sort of zero-sum relationship together with the state and its institutions" (p. 29).

<sup>27</sup> For this writer's early work on the political recruitment of traditional authorities by political parties, see Richard L. Sklar, *Nigerian Political Parties: Power in an Emergent African Nation* (Princeton, NJ: Princeton University Press, 1963), chapters 6-8, 10. Recent studies of this subject that are specifically focused on chieftaincy include Vaughan, *Nigerian Chiefs*, and Piet Konings, "The 'Anglophone Problem' and Chieftaincy in Anglophone Cameroon," in Rouveroy van Nieuwall and Dijk, *African Chieftaincy*, pp. 181-206.

<sup>28</sup> Pierre Englebort, *State Legitimacy and Development in Africa* (Boulder and London: Lynne Rienner, 2000), pp. 190-91.

sions of government. Judicial establishments reconcile conflicts of law as a matter of course. Anthropological and legal studies of this subject demonstrate robust duality; but, for the most part, they cling to the premise of an adversarial relationship. By contrast, the premise of mixed government is one of systemic complementarity. Since judiciaries link the two dimensions of government and regulate their relations, judicial independence is crucial to the vitality of mixed government. The logical corollary to this proposition is that chiefs and their followers in the second dimension will be strongly inclined to favor constitutional forms of government in preference to executive despotisms.

The idea of constitutional government is properly identified with the rule of law, which may be defined, at a minimum, to mean that no political authority is higher than the law itself, while the rights of citizens are protected by independent courts. To preserve and protect the rule of law, judges must be free to exercise independent judgment. Judicial freedom in Africa has been battered and bruised by military and other kinds of dictatorship for several decades. Yet the judicial cultures of Africa continue to weather political storms with remarkable resilience. Judicial independence is strengthened by the need for judges to harmonize concurrent systems of statutory, religious and customary law. Moreover, judges frequently adjudicate disputes that involve interpretations of customary law, including the rules of succession to a stool, or throne. For this purpose, the credibility of independent judges is an asset that politically motivated executive officials rarely possess.

Nothing is more familiar to students of chieftaincy in Africa than judicial rulings that link the two dimensions of government, although such cases are not normally perceived by scholars with the premise of non-adversarial dual authority in mind. If this judicial relationship is perceived through a one-dimensional lens as a form of incorporation into the sovereign state, the significance of judicial independence is likely to be obscured by the sense of oppression that people feel when they identify with beleaguered traditional institutions whose very survival may appear to be at risk. If, however, the judicial function is perceived to be a non-hostile linkage mechanism, citizens who identify politically with the traditional order are more likely to have genuine appreciation for both the value of judicial independence and the practical importance of constitutional government. Traditional sentiment may then be enlisted to support the cause of constitutional liberty.

For example, in September 2000, a judge of the High Court of Niger State disallowed a ruling by that State's governor which had nullified the choice of an emir by traditional kingmakers in the Emirate of Borgu. Finding that the kingmakers had made their selection in accordance with the "laws, custom and tradition" of Borgu, the judge rebuked the governor for exceeding his power, declaring that "the stool of Borgu, a traditional institution rooted in Borgu people's customs cannot be awarded to any Prince of Borgu as a political patronage by any chief executive of the state."<sup>29</sup> My thanks to the Internet for this example, which I have chosen to cite from among several instances of judicial participation in the resolution of Nigerian chieftaincy disputes that I have retrieved from that bountiful source of information. Even if this ruling did (or does) not survive appeals by the state government, its impact on the constitutional culture of Borgu Emirate should not be underestimated.

Viewed from the analytical standpoint of complementarity, rather than conflict, of laws, the constitutional implications of Gierke's concept of double majesty, revived and reiterated as dual authority in modern Africa, are stunning. In dual polities, the principle of judicial independence must be maintained for the purpose of effective mediation between customary and statutory systems of law. If the judiciary is perceived to be a tool of the executive, it cannot function as a credible arbiter of inter-dimensional disputes. By contrast, the decisions of independent judges are likely to be accepted by citizens who identify with the traditional order even when those decisions are highly controversial. Moreover, judges who are esteemed for both their fairness and their independence may be able to build constituencies for the support of constitutional government among traditionalists, who might otherwise become reclusive and cynical with regard to constitutional values. A reciprocal observation would be appropriate with reference to judicial officers of the second dimension, including Islamic judges, who manage to find common ground with their counterparts in the sovereign dimension.

Yet another aspect of judicial linkage between the two dimensions of political authority is the opportunity it provides for reconciliation of the claims of historic African nations that were divided by colonial rule with the prerogatives of post-colonial states that have perpetuated those divisions. I shall illustrate this implication of double majesty

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<sup>29</sup> Justice Umaru Bima, quoted in *The Guardian Online* (Lagos), September 12, 2000.

by adducing a decision of the South African Supreme Court that validates the principle of transnational political authority.<sup>30</sup>

The story begins in 1869, when the President of the Transvaal government flogged the traditional ruler of the Bakgatla for having resisted taxation. The aggrieved chieftain and a section of his people left the Boer republic and moved to the British Protectorate of Bechuanaland, now the Republic of Botswana. However, Bakgatla who remained in the Transvaal have continued to recognize the authority of their traditional ruler until the present era. But in 1993, the aged and ill chief of the Transvaal, or Moruleng, section of the Bakgatla attempted to appoint his own son as his successor, in defiance of the wishes of the traditional ruler in Botswana. The following year, the Moruleng chief appealed to the newly elected President of South Africa, Nelson Mandela, to prevent foreign interference in the affairs of the Transvaal section of the Bakgatla. After hearing both sides of the argument from the rival chiefs, Mandela decided in favor of the traditional ruler in Botswana, a decision that was in accord with the expressed wishes of an overwhelming majority of the Moruleng people. The Moruleng chief then appealed to the Supreme Court, but in vain. The judge ruled in favor of the Botswana-based paramount chief, in accordance with the unmistakable wishes of a majority of the people and “the laws and customs of the tribe.”<sup>31</sup>

The obvious relevance of this decision lies in its acceptance of the extra-territorial authority of a traditional government. Its cross-border aspect may also suggest that the premise of mixed government based on dual authority could be used by judges to ameliorate the effects of friction between sovereign governments that arise from the persisting divisive consequences of colonial rule.

No other form of inter-dimensional linkage is as richly documented and readily accessible to inquiry as the judicial-legal linkage. Its binding effect on the mixed system of government in Africa is beyond compare. Yet the importance of other, especially non-governmental, agents of inter-dimensional linkage should not be minimized. The role of the clergy in this regard is particularly significant, although it is rarely noted in scholarly

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<sup>30</sup> This account is derived from Richard L. Sklar, “On the Study of Constitutional Government in Africa,” Proceedings of an International Workshop on Constitutionalism and Society in Africa, Ohio University, Athens, Ohio, November 6-8, 2000, to be published under the editorship of Okon E. Akiba.

<sup>31</sup> In the matter between Chief Tidimane Ramono Pilane and Chief Linchwe, Supreme Court, Bophuthatswana Provincial Division, 1994 (Hendler, J.).

works.<sup>32</sup> In African countries today, the Lords Spiritual normally enjoy greater degrees of autonomy than either the Lords Judicial or the Lords Traditional. In general, the clergy is inclined to be wary of the sovereign's tendency to aggrandize its power at the expense of traditional institutions. From the standpoint of Lords Spiritual in African societies, Gierke's conception of double majesty is a more suitable form of compound authority than mixed government in its classical, consolidated form. And from this vantage point too, non-incorporative forms of linkage between the dual dimensions of government are preferable to a consolidated system of political authority.

There is, however, one system of government, namely theocracy, in which the principal theologians acquire sovereign authority. In theocracies, the lords of religion have totalitarian objectives to this extent: that within the community of believers, no activities are exempt from clerical control. If the form of theocratic government is also partially constitutional, as for example in the Islamic Republic of Iran, the means whereby clerical rulers exercise control would be regulated by law. However, political boundaries and limitations on the extent of clerical authority over the community of believers would still be insignificant.

At present, in Nigeria, the federal form of national unity is being tested by a theocratic challenge in the northern states. During the past two years, eleven states in the emirate sector of northern Nigeria have adopted the legal system of Islam, known as *Shari'a*, as the official legal system in each of those states. These actions have nullified the historic compromise of 1960, which limited the application of Muslim law to personal status, family law, and civil cases. The introduction of *Shari'a* has, in effect, created two categories of citizens based on religion in the states concerned, each with its own set of rights and criminal penalties. Critics contend that some of the punishments and restraints to which Muslim citizens are liable are incompatible with "fundamental rights" protected by the constitution, and that the adoption of *Shari'a* as an official legal system violates section 10 the constitution, which prohibits the adoption of a state religion by either the federation or any of its constitutive states.

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<sup>32</sup> For a notation of this kind, based on Olusegun Obasanjo's account of his reception by the traditional ruler and the Anglican Bishop of Abeokuta after the transfer of his military government to a civilian president in 1979, see Sklar, "The African Frontier," p. 88. For a similar instance, see Donald I. Ray and E. Adriaan B. van Rouveroy van Nieuwaal, "The New Relevance of Traditional Authorities in Africa," *Journal of Legal Pluralism and Unofficial Law* 37-38 (1996): 5.

This crisis for federal government in Nigeria is unlikely to be resolved by judicial means in the near future. Earlier this year, the High Court of the State of Zamfara ruled that Christians who object to the enforcement of *Shari'a* do not have standing to sue, since they are not subject to its provisions. I am not aware of any pending appeal of a *Shari'a* judgment by a Muslim grievant. For the time being, the Zamfara holding has barred a judicial resolution of what may be the greatest constitutional question in the history of the country. Eventually, jurists who grapple with this problem may discover legal precepts that create common ground for two legal systems that are, in some ways, incompatible.<sup>33</sup> Meanwhile, Nigeria's system of mixed government based on dual authority may serve to mitigate the effects of such seemingly intractable conflicts. Traditional rulers routinely interact with the clergy of all religions on a basis that is independent of sovereign authority. The "royal fathers" (this familiar term of reference for traditional rulers is regularly used in the Nigerian media and public discourse) are naturally inclined, and well positioned, to abate religious strife and foster toleration.

One conspicuous example of a royal initiative in support of interfaith amity is the non-governmental consultative group known as the "Advisory Forum of Traditional Rulers and Eminent Persons on Peace and Unity in Nigeria." This forum supports conferences and workshops for religious leaders to discuss issues that threaten to disrupt national unity.<sup>34</sup> By no means should conciliatory resolutions adopted by influential groups, such as this one, be mistaken for solutions to national problems. Yet it is evident that no other part of the polity is as well suited as the countrywide institution of traditional authority to function as a shock absorber along the rocky road of cultural and legal pluralism in a constitutional democracy.

In this connection, I should mention the recent initiative by a Committee of Concerned Traditional Rulers to convene a meeting of delegates from the six unofficial geopolitical zones in Nigeria for the purpose of considering proposals for a national constitutional dialogue.<sup>35</sup> Without regard to the merits, politics, or conclusions of this controver-

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<sup>33</sup> Sklar, "On the Study of Constitutional Government in Africa."

<sup>34</sup> *The Guardian Online* (Lagos), July 27, 2000.

<sup>35</sup> B. O. Nwabueze, "The Imperative of a National Dialogue," *The Guardian Online* (Lagos), June 28, 2001.

sial initiative, it is surely illustrative of the shock absorbing and potentially stabilizing function of the second dimension of government.

To conclude, the concept of mixed government is deeply rooted in its Aristotelian and early modern theoretical origins. Its use in connection with dual authority is not merely unorthodox but may also be hard to grasp, especially if one views the relationship between legally sovereign governments and chiefs as being essentially competitive with reciprocal gains and losses of authority at stake. For clarification, I wish to suggest a triangular image of this idea. (Figure 1) The baseline connects two corners, which represent the sovereign and traditional dimensions of government. The apex represents society. One side of the triangle represents sovereign state-society relationships; the opposite side represents the relationship between chiefs and society. The baseline represents the relationship between the sovereign government and the chiefs. It signifies a unified system of power, one that unites two legitimate governmental authorities. Each of these authorities is a form of power, specifically legitimate power, based on the shared values of office holders and citizens, or the members of society.<sup>36</sup> Each of the ascending sides corresponds to a form of political identity and loyalty. On the one side, citizens identify with their sovereign government; on the other, with their ancestral governments.

This triangular image of mixed government suggests a complex conception of authority relations rather than the simpler linear conception that implies a tendency toward sovereign encroachment into the second dimension and minimization of its authority, regardless of public opinion at the apex and along the sides of the triangle. Furthermore, stability of the power system requires mediation between the two forms of governmental authority. That service is provided by the Lords Judicial and Spiritual, on condition of their ability to perform their duties freely and in accordance with their respective vocational principles and oaths of office. Judicial independence is a pillar of constitutional government; spiritual freedom has often been the harbinger of political liberty. Judges, men and women of the cloth, and other such guardians of limited government will help to preserve the system of dual authority so long as it is supported by the will of the people.

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<sup>36</sup> For authority “described as legitimate power,” see Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (Stanford: Stanford University Press, 1959), p. 166, who attributes this view to Max Weber. Also George E. Gordon Catlin, *Systematic Politics* (University of Toronto Press, 1962), p. 118.

Students of government in Africa have often posed this provocative question: To what extent can, or should, the constitutions of sovereign states be shaped by principles derived from indigenous African political traditions? Affirmative replies to this question have rarely been specific. Sovereign states are built on legal foundations derived from principles of government that are relevant to all countries, everywhere. They include citizenship, electoral representation, the rule of law, limited government, and federalism, among others. These ideas are as vital to political development in Africa as they are anywhere in the world. Yet there is a second dimension of political identity and authority that is ordered by African traditions primarily. The two dimensions are likely to coexist for many years to come.

Mixed marriages were rare in South Africa before 1949, averaging fewer than 100 per year between 1943 and 1946, but the National Party explicitly legislated to keep non-whites from "infiltrating" the dominant white group by intermarriage. Both the Prohibition of Mixed Marriages Act and the Immorality Act of 1957 were based on then-active United States segregation laws. It also showed that the National Party was going to fulfill its promises to protect the white race, unlike its political rival, the United Party, which many thought had been too lax on that issue. Anything taboo, however, can become attractive, just by virtue of being forbidden. Furlong, Patrick Joseph. "The Mixed Marriages Act: a historical and theological study." Cape Town: University of Cape Town, 1983. 1340 Comparative Political Studies. the nature of political power in many African States, together with the real and perceived consequences of capturing and maintaining power, is a key source of conflict across the continent. It is frequently the case that political victory assumes a "winner-takes-all" form with respect to wealth and resources, patronage, and the prestige and prerogatives of office. Although policy makers, journalists, and scholars readily employ the concept of patronage in explaining political outcomes in Africa, relatively little is known about the extent to which the distribution of patronage systematically affects political stability.