

# LEGAL PLURALISM AS A SOURCE OF CONFLICT IN MULTI-ETHNIC SOCIETIES

## THE CASE OF GHANA<sup>1</sup>

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### 1. Introduction

This contribution takes the case of a conflict about land in Ghana to show how opportunities offered by legal pluralism can be used as a political instrument and how this can threaten political stability and the practice of democracy in a multi-ethnic society. It employs a broad concept of culture and an open concept of law. It understands ethnic identity as a cultural phenomenon and law as an element of culture. It argues that in Ghana cultural plurality can be seen as a problem because conflicts between different ethnic groups about competing claims as to the validity of their respective social and legal orders are not sufficiently taken into account. The paper will illustrate how the institution of law fails to fulfil its function to settle conflicts and support social integration and how it becomes the source and catalyst of so-called 'ethnic' conflicts. At the same time there emerge approaches which try to deal with this structural potential for conflict through legal reform and committees of inquiry by using the opportunities offered by legal pluralism in a constructive way.

The central questions of the article are: Is it inevitable that law in multiethnic societies such as Ghana becomes a source of conflict? What role is played by the state? What is the impact of the state's legal policy? And to what extent can not

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## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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only so-called 'modern', but also 'traditional' law be reformed and rearranged if it is understood as an element of culture? The last question emphasises the openness of the concept of law applied here. The background to these questions is the perception that not only the recognition of cultural diversity, but also an open approach in dealing with a plurality of law are constitutive for a democracy which is guided by the idea of legitimacy and justice. In approaching these questions a historical perspective has been chosen. The description of the history of the conflict will take into consideration legal developments and various attempts at reform.

The analysis will show that it is not an extensive legal pluralism in itself which has led to 'ethnic' conflict, but the practice of using law as a political instrument. It will also be suggested that to confront questions on the necessity and appropriateness of legal regulations which are themselves prone to conflict, will promote reforms. Such reform could tend to coordinate and to balance with each other the various effective legal orders and thus reduce the potential for future conflict.

In any discussion on democratic theory and social change it is important to ascertain whether a confrontation such as that discussed here has been forced onto society through violent clashes between the parties or whether it is promoted or even engendered by a legal policy which is open to reform and based on a continuing debate within society. Indeed, the recognition of cultural and legal diversity seems to enable the achievement of democracy only if it is accompanied by an openness to proposals for legal reforms and a continuation of debate. Institutionalising these processes of reform can thus facilitate those adjustments which, despite considerable plurality of culture and law (which, much as they are to be desired, may threaten the viability of a democracy), enable the necessary administrative coordination and social integration.

### *1.1 The conflict of 1991 in Kpandai: basic data of the case<sup>2</sup>*

The 'ethnic' conflict of 1991 in Kpandai, a small town in the Northern Region of Ghana, was in scale comparatively small, but its legal aspects provide a succinct example of the dangers of legal pluralism. Kpandai is situated in the *Traditional*

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<sup>2</sup> I am indebted to Artur Bogner for giving me crucial information and access to relevant documents collected by him on the political conflict and its historical context in Ghana's Northern Region as well as on the civil war of 1994. See also Bogner 1996, 1998.

*Area*<sup>3</sup> of the Gonja, the dominant ethnic group in this region. The town had in 1984 5252 inhabitants (Census 1984), of which only 700 were Gonja. The rest of the inhabitants belong primarily to the Nawuri, who constitute in this, the largest Traditional Area of the Northern Region in terms of land, a small minority (Report 1991: 215). The allodial or ultimate title to land in Kpandai is vested, as is the whole Traditional Area, in the Gonja. For long the Nawuri had claimed title to Kpandai and the surrounding Alfai area within the Traditional Area on the ground of their status as first settlers in the Alfai area<sup>4</sup>. In the violent clashes of 1991 the Nawuri finally expelled the Gonja from the town.

This conflict about land has to be seen in the context of a socially stratified society, where the differences in social status become a catalyst to this dispute. Such social hierarchies have a particular importance when resources are scarce and access to them is determined by social status. The power relations between the Gonja and the Nawuri are asymmetrical and favour the Gonja. This

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<sup>3</sup> The term 'traditional area' is only defined in the Chieftaincy Act, 1961 (Act 81) where "the term meant an area within which a paramount chief exercised jurisdiction". The Act of 1961 was replaced by the Chieftaincy Act of 1971. Yet it "seems likely that the same meaning is intended to apply in the 1971 Act." (Woodman 1996: 210)

<sup>4</sup> Historically the first settler status (the basis for the claim to land founded on appropriation of hitherto uninhabited land or land not effectively claimed) constitutes one of the two foundations for a claim to land. The other is conquest (in the sense of appropriation of an area through expulsion or de facto control of the hitherto resident population). While there are legal viewpoints that do not recognise conquest as a foundation for title to land unless the previously resident population has been expelled (e.g. Ollennu and Woodman 1985), statements of the Gonja before the Alhassan committee, that inquired into land tenure in the Northern Region (below) seem to reflect a different notion, at least for the Northern Region: "... [A]ll lands in the Gonja Traditional Area were acquired by conquest. ... The Gonja invaders 'did not interfere with the religion and land organisation of the [indigenous] people'" (Report 1978: 13. The chairman of the committee was R.I. Alhassan; the status of this report is disputable, since, as Artur Bogner notes [Bogner 1998: 266], at least according to the copy available to him and passed on to the present author, it was signed by only five of the twelve members. A committee report from 1991 comments: "... no reliance can be placed on that Report since on the face of it, it was signed by only four (4) out of nineteen (19) members of that Committee (R.I. Alhassan Committee), and it is not known whether the findings in the Report presented to the Ministry of Lands and Mineral Resources were accepted by Government." (Report 1991.)

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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detrimental social status of the Nawuri can be attributed only in part to precolonial power relations. The British had in the context of 'indirect rule' subordinated clan societies such as those of the Nawuri to other hierarchical and centralised societies like the Gonja, or rather to their aristocracy. By doing this, they ignored and overrode for the sake of standardization the differences in particular political arrangements between neighbouring societies. Key words like slavery, tributary relations, migrant status, asymmetrical defensive alliances or simple neighbourhood give an idea of the plurality of possible relations.

[The] Nawuri were simply absorbed by the Gonjas in 1934 and the protests by the Nawuris and Nchumurus began. ...

The Gonja Native Authority as constituted in 1932 recognised the Nawuris and Nchumurus as distinct culture groups. The ordinance establishing the native authority provided that all tribal lands ...

'a) belonging to the Owure of Nchumuru; or

b) belonging to the Nawuri tribe and subject to the Chief of Kpandai'

should form part of the Gonja Native Authority. (Report 1991: 8)<sup>5</sup>

With colonial subordination under dominant groups, communities like the Nawuri in most cases lost legal rights as well as social status.<sup>6</sup> The Gonja however profited from this development and they supported it through their account of

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<sup>5</sup> Other groups like the Mos were only temporarily successful in their refusal to be absorbed into the Gonja Native Authority and in their quest for independence.

<sup>6</sup> While slavery was officially abolished by the British and thus colonial rule in theory opened up social mobility, in practice historical conditions of slavery were often transformed into a status of 'post-slavery' that prolonged status differences. Indicators of this condition of 'post-slavery' include differences in ownership rights. But, while these can be the result of 'post-slavery', they can also be a result of colonial administrative subordination. The latter may lead to a reinterpretation of the status of such subordinated communities which assigns to their lack of rights new meaning and adds a connotation of post-slavery. (See Harneit-Sievers 2000 and the other papers in the panel discussion in VAD 2000 for the term 'post-slavery'.)

local power relations. They still contribute to the continuation of this imbalance by asserting their claim to the allodial title, a residual component of this colonial arrangement.

Thus at the heart of the dispute is, technically speaking, the legal-administrative subordination of the Nawuri under Gonja dominance which was established only in the 1930s under colonial rule. But it was legally entrenched by the assignment of the 'allodial title' to the Gonja. This territorialisation of traditional authority<sup>7</sup> with its undifferentiated extension to the land of the Nawuri had, as will be shown, socially, economically and politically deleterious consequences for the Nawuri. Even though from at the latest 1950 onwards, the Nawuri have tried through petitions to have this rectified, crucial aspects of it remain in force. This is so even today despite the fact that various committees of inquiry have dealt with the matter, and even though the committee of 1991, which followed the clashes, supported the position of the Nawuri. These recommendations have still not been implemented.

### *1.2. The wide political relevance of the case: a potential precedent*

The conflict of 1991 was just a small part of a conflict which extends more widely not only in time but also in space. In 1994 it escalated into a civil war throughout the Northern Region, with thousands of casualties and tens of thousands of refugees (Bogner 1996, 1998). This escalation must be considered in the context of a series of smaller and larger clashes throughout the Region since 1981, i.e., in 1985, 1986, 1989, 1991 and 1992. Then in 1994 the Nawuri and Gonja found themselves fighting each as an ally of one of the two main opponents in this civil war: the Nawuri with the Konkomba, another 'minority group', on the one hand,

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<sup>7</sup> On territorialisation of traditional authority compare below and see von Oppen's discussion of Zambia (1995 and 1998).

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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and the Gonja with the Dagomba, another of the four 'majority tribes', on the other.<sup>8</sup>

The title to land in all of the four Traditional Areas of the Northern Region is assigned to the majority tribes. And the cause of conflict in all of them is claims of the minority groups to land or to have Chiefs or a 'traditional' jurisdiction which is independent of the majority tribes. The issue of 'traditional' authority and jurisdiction is intricately linked to any land question since Chiefs are prime actors in the administration of land and their jurisdiction is – as will be shown – linked to land. These disputes have been smoldering for decades and the clashes in Kpandai in 1991 must be seen in this broader context. Any decision or solution taken here will be seen as a precedent for the rest of the region or even beyond and thus could initiate a major shift of power.

### *1.3. The legal relevance of the case: law as a source of conflict in multi-ethnic societies*

Disputes about land and about Chiefs and their jurisdiction have to be seen in the context of the territorialisation of 'traditional' rule under colonial administration. The rule and jurisdiction of a Chief, which had previously been delimited in terms of people, was now explicitly assigned to a specific territory.<sup>9</sup> The two types of rule, over people and over territory, were now interrelated in a profound and complex manner which entrenches the status quo. This interrelation is the result of

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<sup>8</sup> The terms 'minority group' and 'majority tribe' are especially misleading in the case of the Konkomba and Dagomba, since the Konkomba are in the majority in relation to the Dagomba. This is not just the result of the demographic development of the last decades. Being an immigrant and partly conquering group, the Dagomba of today include many assimilated Konkomba (especially Konkomba women). Although in the Traditional Area of the Gonja there is no comparably numerous ethnic group like the Konkomba, the immigrant Gonja are confronted with at least a plurality of minorities, thus being themselves only a group with a relative 'majority' (and again the question of assimilated indigenous population arises).

<sup>9</sup> Yet in principle it must be considered that the relationship to land did change also before the advent of the colonial intervention whenever there were pressures on good arable land due to competition over this valuable resource caused i.e. by migration.

interdependencies with other legal spheres in the modern economic and national administrative context<sup>10</sup>.

The majority tribes as well as the minority groups justify their competing claims by reference to 'traditional' law. Yet up to today the position of the majority tribes alone is officially recognised by the law of the state and thus 'legally valid'. This means in concrete terms that the present law of the state, according to regulations made in colonial times, assigns the allodial title in the Traditional Areas of the Northern Region to the Paramount Chiefs of the majority tribes. By this decision the colonial state intervened in the balance of power between different groups and invented a 'tradition'<sup>11</sup>.

For the Nawuris in Kpandai, a numerically small minority in the Traditional Area of the Gonja, the central issue is to achieve political and social emancipation from a disputed 'residual overlordship', i.e. from the remnants of a political dominance of the Gonja<sup>12</sup>. The conflict is not so much about a disputed administration of land in everyday life as about the formal administrative subordination under Gonja 'overlordship' with its farreaching consequences. The assignment of the allodial title and the subordination which occurred under colonial rule were seen by the colonial administration primarily in terms of administrative convenience. Yet it 'loaded' the relationship between the different ethnic groups with a variety of meanings which become evident only within the regional socio-cultural context,

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<sup>10</sup> For the other legal spheres, the commodification of land and a drastic change of power relations as a result of the impact of actors on the national level are obvious examples.

<sup>11</sup> The case underlines the ambivalence of the term 'tradition', which in multicultural societies is often misused as an instrument in political confrontations. 'Traditional' law is supposed to legitimate the legal claim of a cultural minority by pointing to their rights supposedly derived from 'indeterminable' and 'eternal' values, even though they depend on external intervention (for 'invention of tradition' see Hobsbawn and Ranger 1983; Fitzpatrick 1990; for a succinct case with a debate on 'indeterminable' and 'eternal' values versus an understanding that underlines 'process' and 'change' in traditional property rights to land see Duelke 1999).

<sup>12</sup> The term 'overlordship' denotes the political predominance of one group over another and often implies rights to tribute and other privileges. (Van Rouveroy van Nieuwaal 1987: 10; see also below.)

and which were ignored by the British.<sup>13</sup> The Nawuris have confronted this problem primarily through the question of land law, since regulations within this legal sphere are at the root of the continuation of this social and political constellation.<sup>14</sup> In the mean time they demand separate administrative structures.

The conflict in Kpandai, this small part of a bigger scenario, reflects the relatively typical transformation of the relation between 'ethnic' groups which has occurred since colonial days as a result of colonial power politics. Within this picture, a negative 'synergy effect' has emerged which led in 1994 to the formation of alliances between the minority groups and the majority tribes respectively. In April and June 1991 the Nawuris slipped into a conflict with the Gonja concerning the recognition of their title to land and the legitimacy and position of their Chiefs. Already in 1992 clashes occurred between the Konkomba and the Gonja in the East Gonja District. In this case the Konkomba were allies of the Nawuri. The Gonja attributed their defeat primarily to the intervention of the Konkomba and the Basare, another minority group. Finally in 1994, the violent confrontation between the Konkomba and the Dagomba started. This conflict then spread all over the Northern Region, prompting the government to impose a state of emergency over seven districts for several months.

## 2. Background of the Conflict Scenario

### *2.1. Political-administrative structure and legal background*

As in most formerly colonised countries, there exist in Ghana parallel structures of administration. Basically, they belong to the modern nation state on the one

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<sup>13</sup> In addition to the historical confrontation between migrating or conquering Gonja and the Nawuri, which will have had in itself already enough potential for conflict, this British intervention into a West African socio-political system constitutes the next level of the burdensome legacy of the past in intercultural relations.

<sup>14</sup> In contrast, the central demand of the Konkomba is for their own Paramountcy, the highest position in the chiefly hierarchy, which would be independent from the Dagomba. They thus take a different approach even though they find themselves within a similar constellation of conflict, and even though they aim at the demarcation and separation of their 'homeland' from the Traditional Area of the Dagomba. The discussion below will seek to clarify the intricate connection between 'communal rights' to land and 'traditional' rule.



hand, and to the system of so-called 'traditional' rule on the other. In the modern state structure of administration Ghana is divided into ten regions and below that into a multitude of districts, administered respectively by Regional Ministers and District Chief Executives and District Assemblies (since 1989 elected bodies). For the historical approach of this article it is necessary to note the various subdivisions and renamings of the northern part of Ghana from colonial times. The colonial Northern Territories became at independence the Northern Region. This was divided into the Upper Region and the Northern Region in 1960, with a further subdivision of the Upper Region into the Upper West and Upper East Regions in 1983.

In the parallel 'traditional' administrative structure the region is divided into Traditional Areas. Their boundaries are in most cases based on colonial and postcolonial regulations which tried more or less successfully to take account of indigenous perceptions. Here administration is usually conducted, subject to the hierarchical structure of the particular society, by a Paramount Chief, the highest office of a traditional area. He then delegates functions to several Divisional Chiefs, Sub-Chiefs, Elders, and the earthpriests or *tendamba* (literally: owner of the land<sup>15</sup>). Within the Northern Region, the Yabunwura and the Ya-Na head the 'traditional' administrative structure of the Traditional Areas of the Gonja and the Dagomba respectively.

The lasting relevance of these 'traditional' institutions for the citizen results not only from the inadequacy of the material resources disposed of by state structures.<sup>16</sup> As in many countries, the corruption and lack of responsiveness of the actors and institutions of the modern state contribute to a lack of legitimacy on the part of the state. Furthermore, the socio-cultural foreignness of the normative and legal order of the modern state, which is, despite adaptations by the postcolonial state, a legacy from colonial times, adds to the popular alienation from the modern state and the continued attachment to 'traditional' institutions.

The lack of acceptance of state structures by those who prefer the 'traditional' mode is reciprocated by the 'modern' system. The modern understanding of law, which predominates in the politics of the modern state, usually presupposes regulation and recognition by the state to be a precondition for non-state law to be

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<sup>15</sup> Compare Kasanga (1994:20) for the various versions of the term (*tendamba* or *tendana*) primarily in the northern part of Ghana.

<sup>16</sup> Sometimes absence or de facto inaccessibility of state structures necessitate recourse to 'traditional' or other institutions, be they informal or hybrid. (See for hybrid or informal institutions of conflict settlement Schmid 2000b.)

accepted as 'law'. As a result, 'traditional' authorities often act in a legally 'grey area' or even in illegality, especially in the administration of justice.

### *2.1.1. Legal pluralism and legal reform in Ghana*

Regarding the role that traditional institutions should play in the administration, Ghana's legal history is formed by a constant reconfiguration of competing perceptions of social order.<sup>17</sup> There had been some degree of coordination between the existing legal orders, the English common law, a plurality of so-called customary laws and some Islamic Law. Efforts at coordination have been determined by various factors, the interests of the colonial administration being only one. The administration has been confronted by local elites fiercely articulating their interests, and by the effectiveness of the indigenous legal orders.<sup>18</sup> In addition mistaken interpretations of 'traditional' legal concepts or the supersession of indigenous by English legal concepts as they occurred in the case of 'customary arbitration' (Elombi 1993; Allott 1998) influenced legal development and led to distortions with farreaching consequences. This undermined the acceptance of legal regulations (Allott 1965). Despite these problems, a deliberate allocation of functions and competencies did enable a division of labour between the competing structures of administration that, in comparison to other countries, was more farreaching as well as legally clearer.

Related to this division of labour was an integration of 'traditional' law with the common law into a 'national legal system' and the creation of an extensive sphere of 'lawyers' customary law', i.e., that so-called 'traditional' law, which in response to the challenge of modern state jurisdiction has been reformulated in the context of the 'modern' courts (Woodman 1988). As with the division of labour, this integration was stronger than in other countries. The meaning of 'integration' of 'traditional' law in this context is twofold: The first meaning refers to a conscious coordination between legal orders. This happens when the 'modern' legal system of the state provides only a legal framework or legislation which is explicitly constrained to only complement 'traditional' law. Here, the state restricts itself to the adjustments or amendments necessary in a rapidly changing

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<sup>17</sup> This is illustrated by the various levels of inclusion into and exclusion from the administration of Chiefs or their representatives at the local or district level. (See Goldschmidt 1991: 179f, 183)

<sup>18</sup> Grove and Falola (1996), against the background of colonial policies of nature conservation, outline the ambiguous interests of Chiefs with regard to land law and concessions for the logging industry.

world.<sup>19</sup> The term 'integration' is chosen because 'traditional' law is not only an additional or alternative legal order accepted by the modern state in a legal sphere not crucial to the survival of this state. In Ghana, 'traditional' law is the decisive legal order in politically relevant legal spheres like land law and traditional authorities.<sup>20</sup> There exists a conscious 'strong legal pluralism' (see for this term below).

The second meaning understands 'integration' as the transformation of 'traditional' law into a Ghanaian 'Common Law'. Even though such a creation of Ghanaian Common Law has never been realised, the perceived significance of this possibility is evidenced by legislation and the debates at the end of the 1960s

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<sup>19</sup> One example is the regulation concerning the administration of family property. Here, according to 'traditional' law, the family had the right to demand from the head of family from time to time a rendering of an account for the property. Refusal on his part could implicitly result in his deposition. Consequently the responsibility to assert their own legal claims lay with the family. Yet enforcement of such a right against a head of family often proved difficult. Enforcement was strengthened by the Head of Family (Accountability) Law, 1985 (PNDCL 114). "The Law appears to impose an initial duty on a head to 'file' a written inventory with and to 'render' accounts to the family" (Woodman 1996: 273). Under this law, an action for accounts could be sued for before the courts, if the plaintiff could prove that out of court attempts at a settlement of the dispute had been futile. (See also Woodman 1998: 35.)

<sup>20</sup> About 80% of the land in Ghana is governed by customary land law. While in a country like Zambia, it is supposed to be even 90% which is under customary tenure, historically this land had been – contrary to Ghana – transformed into Crown land. Only upon application to the colonial administration, could land be registered and vested in a corporate body which would hold it in trust for a community which had an interest into this land. See Land (Perpetual Succession) Act of 1926 with amendments of 1964 and 1967 (Republic of Zambia). In addition, agricultural land in Ghana has a higher economic importance because of the cash crop cocoa (thus increasing the political relevance of land law), while Zambia always relied on its copper mining industry neglecting agricultural development. The other politically decisive legal sphere concerns the recognition of traditional authorities. In Zambia, government recognition is fundamental and not restricted to formalities such as gazetting as is the case – at least de jure under the 1992 constitution - in Ghana. At the latest since the constitution of 1979, the position of the Chiefs versus the state has been consolidated.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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regarding this option<sup>21</sup>. At that time, it was argued that those rules of customary law which were integrated in the sense of being transformed into a Ghanaian Common Law should consequently enjoy predominance over the English statutes of general application. In view of the Law Reform Commission Decree 1968 N.L.C.D. 288, Ofose-Amaah called even for a "thorough establishment of the corpus of the customary law and its rapid modernisation" (Ofose-Amaah 1969: 146). Bentsi-Enchill at one stage advocated explicitly the development of a unitary legal system, opposing legal plurality, which requires regulations on choice of law: "Our traditional systems of law are capable of harmonisation and adaptation to cope with present day circumstances, and the time has come for making a conscious attempt to do so" (Bentsi-Enchill 1971: 74).<sup>22</sup>

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<sup>21</sup> ...[T]hat machinery is as follows. The Minister responsible for Justice is empowered, either on his own initiative, or upon representations made to him by a House of Chiefs, to convene a joint committee of all Houses of Chiefs to "consider whether a rule of customary law should be assimilated by the common law". If the committee comes to such an opinion it is to submit an appropriate draft declaration of this rule to the Minister. If the latter, in his turn, after consultation with the Chief Justice, "is satisfied that effect should be given to the draft, either as submitted or with such modifications as he considers necessary," he is to give effect to it by making a legislative instrument embodying the draft or the draft as modified "declaring the rule to be assimilated in that form." (Bentsi-Enchill 1971: 61)

See also Ofose-Amaah, who comments on the Law Reform Commission Decree 1968, N.L.C.D. 288. The Commission was supposed "to take and keep under review all the law both statutory and otherwise with a view to its systematic development and reform ... This means that statute law, ... as well as customary law and the judicial interpretations of it will be subject to the same treatment." (Ofose-Amaah 1969: 143, 145). For the debate see also Ollennu 1970a, 1970b and 1971; Allott 1972; Woodman 1968 and 1988.

<sup>22</sup> Even though the legislation employs the term 'assimilation', here preference is given to the term 'integration' because components (the content of 'traditional' law and the form of common law), which are considered as equally significant, are supposed to be 'married' within this Ghanaian Common Law. In contrast, the term 'assimilation' can be associated with the connotation of dominant-versus-subordinate.

The idea that people might be able to rely without major adaptations on authentic indigenous law, sometimes with the connotation of an untainted precolonial law, remained an illusion. The same applies to the vision of harmonising the plurality of 'traditional' legal orders into one unitary set of common law rules of customary origin or Ghanaian common law. The multitude of manipulations likely to occur would have made this officially integrated customary law a matter of dispute. Again, to have recourse to 'traditional' law in the narrower sense of precolonial law is not possible. Pointing to the changed social context, Fitzpatrick comments that "even if such custom could be held intact [in terms of content and form] in the new situation, it does not take identity in itself; it takes identity also from its operative context, which has now fundamentally changed" (Fitzpatrick 1990: 16).<sup>23</sup> Furthermore, in modern courts, 'custom' is inevitably undermined through reforms, modern rules of procedure and other rules of evidence. (Woodman 1988) But already the existence of the modern state and the changed socio-economic context contribute to a transformation of 'custom' and of indigenous notions of law.

A special case, which might still be instructive on the question of change of 'traditional law and institutions', exists in the case of neo-traditional inventions like 'invented chieftaincies', that is to say in the case of chieftaincies which were created by the colonial administration when confronted by chiefless societies. If we follow Boaten then such Chiefs did win some authority even with the otherwise reluctant youth, when they took over religious functions (Boaten 1994: 19). This can mean that not only those offices which are founded on tradition and have been accessed through the appropriate procedures can command spiritual authority linked to these religious functions. There seems to be a possibility that exercising these functions opens the possibility to acquire spiritual authority. The dichotomy of 'traditional' and 'invented' chieftaincies thus would have to give way to a perception which allows an office holder to grow into the responsibilities of not only an administrator and judge, but as well those of the spiritual head of a community. Law as an element of culture does not preclude adaptation, reform and change.

Despite all this, indigenous law in the sense of folk law determines most parts of legal reality. Folk law is understood as 'locally grown' law. The enforcement of this law encounters to a large degree acceptance or at least toleration by the local

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<sup>23</sup> Fitzpatrick's 'content and form' take up the difference between substantive law and procedural law, which both undergo change if 'custom' is applied in modern courts.

community.<sup>24</sup> Even though this law cannot escape the impact of its 'operative context', it is applied in relative independence. Folk law constitutes one of the components of explicit legal pluralism as it is depicted in Griffiths' concept of 'strong legal pluralism' (Griffiths 1986). This strong legal pluralism exists in situations in which the state does not destroy the autonomy of the 'social field' within which folk law operates (Woodman 1998: 35). This folk law can coexist in many spheres with 'modern state' law. And it can serve as a source of law for a 'modern' jurisdiction that is open to reforms, inspiring a new line of precedents or complementary legislation. This form of integration of 'traditional' or folk law has time and again informed the administration of justice in Ghana and enabled the coexistence of norms and cooperation between institutions of the so-called 'modern' and 'traditional' sectors.

Another aspect of strong legal pluralism occurs in the case of the co-existence of several folk laws. However, the vision of harmonising different folk laws is liable to dissolve when the various representatives of these orders compete for authority or even for the same position within the framework of the 'traditional' administration. It may be possible to arrange a carefully designed division of labour, but this will require thorough negotiations resulting in a consensual compromise.

This brief review of legal pluralism in Ghana reveals a continuous reform process, which time and again has been revived to alleviate the legacy of colonial power politics through a constructive development of the law. Yet such reforms are carried out by an elite, which is itself often an interested party, which often belongs to the judicial as well as to the political 'caste', and which neglects even urgent reforms because of power politics. Thus, despite the reform-oriented policies of the courts and the legislature, most legal arrangements of colonial power politics, with all their proneness to conflict, remain in place.

### *2.1.2. Conflict-prone legal structures*

While there are various arrangements, which have a more or less direct impact on conflicts like that in Kpandai discussed here, only two of them can be outlined here shortly.<sup>25</sup> One of them is the construction of the 'allodial title', comprised of the 'interest of benefit' and the 'interest of control'.

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<sup>24</sup> Compare Derrida (1996) on the notion of enforceability as an immanent criterion of law.

<sup>25</sup> Compare e.g. Kludze (1998) on the jurisdiction of chieftaincy disputes.

'Benefit' would include any entitlement to exploit the land, meaning the actual use of the land, whereas 'control' would mean only the power to decide who may benefit from the land, when and in what circumstances. (Bennett 1985: 175). Bennett refers with this differentiation to Allott's analytical scheme, which makes it possible to discern various potentially concurring rights of ownership and frees us from the usual 'ownership model'. The right to decide who may benefit does not automatically include an entitlement to exploit the land. This 'interest of control' may include 'merely' a right of sovereign administration, with the 'benefit' being assigned to someone else. With this scheme, Allott outlines a notion of a 'communal land title' which, in contrast to the concept of the allodial title, attributes to the Chief only the 'interest of control', while allocating the 'interest of benefit' to the single farmer (Allott 1961).

Within the concept of the allodial title, both aspects are combined. On the one hand, Chiefs perform functions of administration of land and conflict settlement within a community and represent the community in conflicts with external actors over land. These competencies are not disputed and are exercised in cooperation with local office holders with whom there is a division of labour. On the other hand, the allodial title implies an 'interested trusteeship' by the Chief of the land by assigning to him as the responsible 'traditional authority' an income out of transactions with land.<sup>26</sup> Yet, from the revenue accruing e.g. from the grant of stool lands "both the traditional landowners and the citizens as a whole" were supposed to benefit (Report 1978: 44) - at least in principle.

Generally, the income can result from compensation for expropriations by the state or from allocations of land to foreigners, when payments may be required in addition to 'traditional' fees covering the administrative costs. ('Foreigner' is understood here in the sense of a non-member of the community. According to folk law, the Chief can demand from 'foreigners' in addition to a symbolic 'fee' a rent, while the local people in case of allocation of land have to pay, if anything at

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<sup>26</sup> The Constitution of 1992, continuing a rule of long standing, provides that any revenue from stool land has to be paid to the office of the Administrator of Stool Lands with this institution retaining 10%. (The term 'stool' refers in Ghana to the office held by a chief or to the community which the chief leads [Woodman 1996: 182ff]. The term 'stool' has developed in the central and southern part of Ghana; for the northern part of the country, the term 'skin' applies even though in legal texts the term 'stool' is mostly defined to include the term 'skin'. ) The splitting of the remaining revenues, as fixed in the Constitution of 1992, assigns 55% to the District Assembly within which the area is situated, 25% to the stool for the maintenance of the stool and the remaining 20% are to be paid to the traditional authority (art. 267(6)).

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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all, only this symbolic 'fee'.) Each allocation of land to a foreigner results in an increase in the official income of a 'traditional authority'. Thus, the rent creates an incentive to allocate land to foreigners. This in turn asks implicitly for a comparable incentive from a competing local applicant.<sup>27</sup> Kasanga comments how practices regarding these symbolic fees, often called 'drinks money', have developed particularly in peri-urban areas where the pressure on land has increased:

In the past, depending on the community, a bottle of schnapps, some cola, tobacco or some token payment to the chief was enough. Today, 'drinks' money throughout the country is equivalent to the open market capital value of land. Hence the chiefs and queen-mothers are cashing in. (1999: 15)

The official regulations assigning to the traditional authorities income out of land have influenced the idea of a 'communal land title' as outlined by Allott even without these abuses occurring with the payments of 'drinks money'. The allodial title as a title to land has been more and more interpreted in a way that resembles the 'modern' understanding of property and that reaches even further than the 'territorialisation' of authority which had developed in colonial times. Thus this interpretation can only in part be explained as a preventative strategy of the Chiefs to defend their communities against the colonial state as a competitor for land<sup>28</sup>. The 'benefits' and rights of the Chiefs in relation to their 'subjects', their citizens, underwent de facto or even de jure increases to too large a degree to allow such an explanation. It must be concluded that the Chiefs used the explicit territorialisation of rule and the new concept of the allodial title, which developed during colonial times, to consolidate their power and some of them, like the Paramount Chiefs of the majority tribes, even to legitimate its extension through another conflict-prone arrangement. Still, this opportunity must be seen to result from a confrontation of diverse legal cultures.

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<sup>27</sup> This conflict-prone competition between locals and foreigners arises if there is a shortage of (good) land, which is usually primarily due to a growing population density or an increased cash crop agriculture - both being in their present extent historically new developments. Today's increasing migration equally changes the 'operative context' to this 'traditional' regulation of customary law, and this change may allow a foreigner to be charged.

<sup>28</sup> Ollennu defines positions in 'traditional' land law in terms which are clearly directed against the colonial powers' claims to land (Ollennu and Woodman 1985: 6). For critical discussion see Woodman 1996: 81.



This other conflict-prone arrangement is the subdivision of the whole area of the Northern Region of Ghana into the Traditional Areas of the four majority tribes and the attribution of the allodial title to their Paramount Chiefs as 'trustees' of these communities. This assignment of an allodial title to the top of the traditional hierarchy is already in itself problematic. As will be shown later, it becomes even more politically questionable when its legal consequences are considered.

The allocation of title to land to the top office of a centralised administrative hierarchy is by no means a necessary ill. This is evident from a Report of 1978 which describes the customary land tenure systems in the three northern Regions of Ghana and which notes the case of the Kassena/Nankani Traditional Area:

Unlike most Traditional Areas in the Northern and Upper Regions where there are Paramount Chiefs at the peak of a hierarchy of chiefs of various designations, the Kassena/Nankani Traditional Area has ten Divisional or Head chiefs of equal status and importance each being independent within his traditional area of Jurisdiction. (Report 1978: 29.)

Beyond that it became evident that it is not always the case that the authority for the administration of land lies with the highest ranking Chief who may delegate the everyday functions to Sub-Chiefs or an earthpriest:<sup>29</sup>

A varying testimony however was adduced by the chief of Kologo division to the effect that in this particular division it is the Tindana or tigatu [earthpriest] which literally means landowner, who wields absolute power over the affair of land administration. Besides, a few Tindanas or Tigatina from the Navrongo, and Kayoro divisions also expressed the view that they have a greater say in land matters than the chiefs, but agreed that they do co-operate with the chiefs in the allocation of land within their areas. (Report 1978: 29)

Yet, while the law of the modern state takes account of these different practices in the administration of land in the Upper Regions,<sup>30</sup> it has left in force the colonial regulation in the Northern Region.

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<sup>29</sup> The earthpriest allocates land, determines to some extent what crops are grown and is responsible for fertility rituals.

<sup>30</sup> Kasanga (1994: 5). Yet he notes

## 2.2. *Social structure and history*

The majority tribes probably came into the region in the 17<sup>th</sup> century, in part as conquerors, in part as traders. They used their connection between each other as well as economic power to increase their influence. Those tribes with military power carried out slave raids in the areas of the less hierarchically structured clan societies such as the Konkomba. But also they often formed agreements with local farmers, obtaining a right of settlement in exchange for protecting the local population against the slave raids of powerful neighbours like the Ashanti empire to the South.

Often the power relations between the different groups were asymmetrical and favoured the majority tribes. Yet before the colonial intervention this imbalance was by no means invariable. It resulted more from the economic and political networks and connections of these majority tribes with each other and other migrating or conquering societies and from a clever political engineering, than actual military strength. Then, with the colonial intervention, a specific historical moment within a process of social and cultural assimilation, which had usually proceeded asymmetrically yet was still reciprocal, was manipulated and frozen. The manipulation consisted primarily in a standardisation of a multitude of diverse cases into one system of chieftaincy and 'traditional rule'. This was to serve the policy of 'indirect rule'.

In the sphere of influence of the Gonja this historical moment was even a moment of decay of power, where the intervention from outside offered an opportunity to stabilize the decreasing power towards neighbouring aggression: "By 1898 when the British effectively occupied northern Ghana, the Gonja Kingdom had virtually disintegrated. The Salaga civil war had taken place in 1897." (Report 1991: 6.)

The Gonja and the other majority tribes have a hierarchical social structure which corresponds to the social order as it has been determined by their internal power relations and as it could be imposed on other groups. According to this social

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a discernible trend (entailing some protracted litigation) between chiefs and 'Tendamba' particularly in the Upper East Region, where some chiefs are trying to usurp the role of the 'Tendamba'. ... chiefs only assume the role of land allocator (for the financial benefits and related considerations), without adding the corresponding obligations of purification, pacification, rituals and sacrifices in respect of land. These are still supposed to be provided by 'Tendamba' without any benefits. (1994: 9-10)

order the tribe is subdivided into 'divisions'. In the Gonja traditional area the bearers of the high offices in the 'traditional' administration are recruited from the aristocracy. Even though some offices such as the 'War Captain Stool' are manned by representatives of the minority groups, they are subordinate to offices held by Gonja: "[The War Captain] is a soldier. We call him to duty and give him a Gonja Lieutenant. ... If he gets his army, the Singbinwura [who is a Gonja] is ahead." (Report 1991) The statement filed by the Gonjas to the committee of 1991 outlines the system of social castes:

1. The Ngbanye made up essentially of the offsprings of Ndwura Jakpa [the legendary Gonja conqueror] and his elders;
2. The indigenous people or Nyamase who comprise the conquered persons and those who in one way or the other yielded to the might of the conqueror.
3. The Nsua or Sakpare muslims who are essentially offspring of Ndwura Jakpa's spiritual companion Fatimarukpe.
4. The Mbonwura who were the war leaders; and
5. Of late settlers or 'strangers'.

Each of these groups has specific roles in the scheme of administration. In brief, the Ngbanye produce the chief who acts as the overall leader, the Nyamase provide the priest/chief who is in charge of the earth gods or K'dimang while the Sakpare groups provide the spiritual leader. The Mbonwuras produce the war leaders. These groups are still functional in all Gonja areas today and can be verified. (Report 1991: appendix)

The population of commoners pays tribute to the local Gonja nobility and is obliged to work on their farms. These duties are also obligatory for the *minority groups*:

... all citizens have usufruct of the land. ... In return the citizen is by custom required and has the duty to:

- (a) Help a new chief to start a farm by contributing his labour
- (b) Give a portion of his foodstuffs to the chief after each harvest to enable him feed visitors and himself. (Report 1978: 17)

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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Even though nowadays such duties are called upon, if at all, only in limited measure, they are by no means only symbolic. Moreover, it is not only the Gonja aristocracy, but also the non-noble Gonja who claim a social status superior to that of the minority group.<sup>31</sup> While such connotations of superiority of the Gonja, which include a clear judgment of value, would not be explicitly expressed in a legal order, they penetrate the notions of the social order. The above quoted statement of the Gonja continues, confirming their perception of status in metaphorical language:

All these components share a common authority – they all owe allegiance to the Yagbunwura through his Divisional/Subdivisional chiefs. The Chieftain of Yagbon in Gonja is like a big tree with many branches giving shade and protection to all under it, all under it enjoying the same level of protection despite the fact that some may be tall, others short while some may be fat and others slim. (Report 1991: appendix)

It is this social stigmatisation which can have serious consequences in everyday life, since, as I have argued elsewhere, "stigma makes the crucial difference in

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<sup>31</sup> This is also the case with the non-noble population of the other majority tribes, who also claim a higher social status than their minority groups. Even though the following example described by Souaré takes the case of an explicit former master-slave-relation in Guinea Bissau, rather than that of conqueror-conquered which is claimed between Gonja and Nawuri, it indicates the possible consequences. Souaré notes the legacy of unequal status that can be discerned in social practices such as the Dyokkere Endhan, the traditional system of reciprocal aid between villages in the region of Boé:

The relations between Madina and Dandun ... are strongly moulded by the stigma of their former relation between masters and slaves and are characterised by a unilateral Dyokkere Endhan which is the more bitterly resented by the youth of Dandun since they are still unable to defend themselves against this state of affairs. (Souaré 1998: 71 [my translation from the French])

Given that in Guinea Bissau no official state law entrenches this imbalance as it is indirectly entrenched in Ghana, and that the young generation of Gonja is convinced that it belongs to a conqueror group, the case suggests that, at least in social matters like the sphere of intermarriages, reciprocal (financial) support and employment, the exchange will tend to be more unilateral.

societies where social networks are not just of utmost importance for success, but often the last and only resort in situations of emergency; where references are not just indispensable for status, but for credibility and reliability” (Schmid 2000a).

This imbalance can be attributed only in part to the historical power relations. One may even doubt whether it would still exist if the British had not subordinated the Nawuri to the Gonja. The legal legacy of this entrenched subordination constitutes even today the basis for relationships which can be described as a now ‘residual overlordship’, and which provide, especially in view of the official equality in law of all citizens, a persistent source of conflict.

### *2.3. Consequences of ‘residual overlordship’*

In Ghana this kind of political ‘overlordship’ has been since colonial times linked to the assignment of the ultimate title to land, the allodial title. As a result, the allodial title of all land in the Northern Region is assigned to the Paramount Chiefs of the four majority tribes. This implies that political predominance accounts for the authority inter alia to allocate land and to exercise jurisdiction in conflicts about land as well as for the right to benefit from income of the land.

In Kpandai this means that everyday administration of land on the local level is conducted by Chiefs of the Nawuri, but the Chiefs of the Gonja majority tribe can benefit from compensation for expropriations by the state and income from leases granted to ‘foreigners’. Had it not been for the colonial rearrangement of inter-group relations, the Nawuri as first settlers would be entitled to the allodial title in their homeland and to all the benefits linked to it.<sup>32</sup>

Beside affecting fundamentally the fields of land administration, jurisdiction and social status, this legal ordering has effects on questions of political influence on the national level. Representatives in institutions of the state administration are recruited from the upper levels of the aristocracy of the four majority tribes. As a result, the population of the Region including the numerically strong Konkomba are represented, for example, in the Regional Coordinating Council and in the Regional House of Chiefs of the Northern Region only by the Chiefs of the four majority tribes. Presence in state or neo-traditional institutions which are part of the communicative infrastructure of the region can be crucial to the allocation of

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<sup>32</sup> Only total and sustained conquest in the area of the Nawuri through the Gonja would have changed their status. Compare footnote 4 above on ‘first settler’ and ‘conquest’ as the two foundations for a claim to land and section 3.3. below

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development projects. Within the context of discussions on Chieftaincy and ethnic identity, Boaten pleads in favour of groups like the Konkomba:

An acceptable, expanded definition should be evolved and adopted so that *all* sections of the Ghanaian people may be represented at the (National) House (of Chiefs). We are here, referring to the so-called acephalus societies some of whose representations are by leaders who regard the former as their 'slaves'. This question of discrimination which the House appears not to take notice of or to acquiesce is a phenomenon which should be dealt with in a more positive way. A typical example is the *Konkomba* case. ... The absolute feudal mentality of such leaders who are perpetuating this unwholesome feudal relationship must be made to change *not* by the government but by the National House of Chiefs (Boaten 1994: 6)

Furthermore, the status of Paramount Chief carries with it jurisdiction in chieftaincy disputes, since such proceedings are heard in special committees of the Houses of Chiefs, whose members are recruited primarily from members of the House of Chiefs concerned.<sup>33</sup> The importance of jurisdiction in chieftaincy disputes becomes evident if the question of destoolment, that is the deposition of a Chief who is accused by his 'subjects' of corruption or other abuse of power, is considered. Theoretically, the lack of Nawuri autonomy and the predominance of Gonja Chiefs in the Regional House of Chiefs could lead to a situation where Nawuri citizens demand the destoolment of a corrupt local Nawuri Chief and the Gonja Divisional or Paramount Chiefs protect him against his own 'constituency', in exchange for his loyalty to themselves.<sup>34</sup>

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<sup>33</sup> In example the Judicial Committee of a Regional House of Chiefs consists of three persons appointed by the House from among its members. The Committee "shall be assisted by a lawyer of not less than five years' standing appointed by the Regional House of Chiefs on the recommendation of the Attorney-General." (Constitution of the Republic of Ghana, 1992, article 274)

<sup>34</sup> For discussion of the possible exclusive jurisdiction of the Houses of Chiefs in chieftaincy disputes, with a recourse to the Supreme Court as the last and only option for appeal, and a Supreme Court ruling of 1995, as opposed to the argument for a concurrent jurisdiction of the High Court in this domain, see Kludze (1998).

The direct representation of Chiefs in the Regional Coordinating Council<sup>35</sup> and their indirect representation in the Lands Commission at the national level and Regional Lands Commissions<sup>36</sup> show especially clearly that the scope of action for traditional authorities is not limited to the 'traditional' sphere, where certainly the state has restricted the powers of the Chief. The functions and competencies of Chiefs in the 'modern' sphere have been successively expanded. Positions in modern institutions have been assigned to be occupied by traditional authorities or their nominees. But also the strengthening of hybrid institutions such as the Houses of Chiefs, which may be seen as the 'synaptic' linkage or 'interface' between the 'modern' and 'traditional' administrations, has increased the importance of traditional offices and especially Paramount Chieftaincies. Denial of access to such a position deprives a community of influence on the national level and potentially even of mechanisms to control the abuse of power.

### 3. The Conflict: Chronology and Committees

Attempts to understand the conflict in Kpandai in 1991 have to inquire into its sources. The foregoing discussion has sought to give some insight into the political-administrative, legal and socio-historical background and context. The central question of legitimacy can only be clarified through a historical summary of the specific legal developments and reforms up to the present. This may give an indication of the chances there have been to avert the conflict and they will help us to understand the escalation into violent 'ethnic' clashes.

#### *3.1. Colonial rule and the era of Nkrumah*

The continuous expansion of British influence in the course of the 19th century started with the establishment of a Protectorate, later transformed into The Colony, in the coastal area of the then Gold Coast. It reached the central area after the military conquest of the Ashanti Empire at the end of the century,

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<sup>35</sup> Article 255(1)(c) of the Constitution of 1992.

<sup>36</sup> Articles 259, para. (b) and 261, para. (b) of the Constitution of 1992.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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proceeding then into the north. Only in 1902 were Ashanti and the Northern Territories annexed.<sup>37</sup>

In the south of the country (the Colony and Ashanti), the Chiefs and indigenous elites were to a great extent able to avert the loss of legal control over their land. But in the Northern Territories the colonial power intervened with a series of laws from the 1930s onwards:

The position was different in the Northern and Upper Regions from what it was in the South. For there, the colonial Governor-in-Council, without a Legislative Council, by two enactments, the Land and Native Rights (Northern Territories) Ordinance [1931] and the Minerals (Northern Territories) Ordinance [1936], succeeded in asserting a great deal of control over land and mineral resources. (Ollennu 1971: 163-4.)

While these Ordinances gave the colonial government far reaching control over those regions, they did not in principle affect the title of the 'traditional' owners:

It would appear that the validity of the titles of the various traditional owners and interest acquired by natives from them were protected under section 3(a) of the Ordinance; but the Governor was still to have control over all the lands in the two regions whether occupied or unoccupied. (Report 1978: 3.)

In the first decade of colonial rule following a policy of divide and rule, the British restricted the territorial organisation to small so-called 'native states'. This was abandoned in favour of more economic larger units only after revolt seemed impossible. After 1910 they promoted the creation of 'large native states'; "small ethnic communities were either persuaded or coerced to merge with the larger units." (Report 1991: 7)

In 1930, the British administration even organised a conference at Yapei to unite the Gonja. Then, at the end of the 1930s, they established and deepened the 'overlordship' of the Gonja over the Nawuri. They assigned title over the area of

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<sup>37</sup> The Ashanti Order-in-Council of 26 September 1901 and the Gold Coast Order in Council of 26 September 1901 both came into force on 1 January 1902. The new system of government was set forth in the Ashanti Administration Ordinance No. 1 of 1902 and the Administration (Northern Territories) Ordinance of 1902 respectively (Laws of Ashanti 1920; Report 1978: i); more generally see Kimble (1963: 322ff).



the Nawuri to the Gonja and introduced a system of 'Native Authority Councils', in which only Gonja were represented. For the Nawuri, this meant political subordination and marginalisation as well as the loss of their title to land, in Kpandai as elsewhere. The overriding of their rights and a programme of military recruitment in the Second World War, which was exercised by the Gonja to the detriment of the Nawuri, led to a petition in 1950 by the Nawuri to the Secretary-General of the United Nations. In reaction to this, the British colonial government created a commission of inquiry under the chairmanship of Dixon, a colonial officer. Eventually the Dixon Report of 1954 confirmed the *status quo*.

In 1960 the two colonial ordinances affecting jurisdiction on land in the Northern Territories<sup>38</sup> were formally repealed by the State Property and Contracts Act, 1960 (C.A. 6) under Nkrumah, the first President after independence. But at the same time this law vested all land which had been expropriated under the colonial government, in the President. Even more far-reaching, there followed in 1963 the actual expropriation of all lands in the Northern and Upper Regions which had been held as stool land,<sup>39</sup> and their vesting in the President.<sup>40</sup>

### 3.2. *The Committee of Inquiry of 1978*

This appropriation of land by the government was repealed by the Constitution of 1979, article 188 (Woodman 1996: 58). The reform was initiated by a memorandum of the Ministry of Lands and Mineral Resources of 1977, which supported the return of land to the 'traditional owners'. The Committee of Inquiry on Ownership of Lands in the Northern and Upper Regions of 1978 under the

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<sup>38</sup> Administration (Northern Territories) Ordinance, 1902 (Cap.111, *Laws of the Gold Coast*, 1951 rev.); Land and Native Rights (Northern Territories) Ordinance, 1931 (Cap.147, *Laws of the Gold Coast*, 1951 rev.); see Report 1978: iii.

<sup>39</sup> The term 'stool land' refers to any land controlled by a 'stool' or 'skin'. For the term 'stool' or 'skin' see above footnote 26. See also Woodman 1996: 71, 182ff.

<sup>40</sup> Administration of Lands Act, 1962 (Act 123); Executive Instrument 87 of 11 July 1963 affecting the land in the Upper Region; Executive Instrument 109 of 14 September 1963 affecting the Northern Region.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

---

chairmanship of R.I. Alhassan was intended to prepare the ground.<sup>41</sup> Surveys on the spot were to record legal claims to ensure that the transfer could be implemented without problems.

The Alhassan Committee Report quotes the position of the Nawuris as claiming that "...it was through 'trickery they (Gonja) held themselves as overlords' of the Nawuris by virtue of the Administrative arrangements of 1935" (Report 1978: 14), when their area, then belonging to the Krachi District, was merged with the Salaga District for administrative convenience.<sup>42</sup> The Dixon report, which is also quoted, had commented: "It is agreed that ethnically the Gonjas are alien to the Nawuris. It was not the Gonja practice to interfere with indigenous customs or rights of people who had accepted their 'overlordship'." It continued: "There is, therefore under these circumstances nothing strange in the Gonjas following one set of customs and the subject people another." (Report 1978: 16)

But had the Nawuris actually accepted an 'overlordship' with the loss of right to land and a relationship making them subject to the Gonja as masters? Dixon's focus on 'overlordship' as the relevant criterion implies a shift away from the basic question whether 'first settler status' or 'conquest' as one of the two foundations for a legal claim to the allodial title are applicable. It seems that his attention to power relations leads him to equate any kind of 'overlordship' with 'conquest' and a subsequent right to the allodial title. This interpretation with its recourse to a supposedly 'traditional' legal claim made it easier for the colonial administration to justify and uphold the legal-administrative decisions taken in the '30s.

The findings of the subsequent committees of inquiry allow a more differentiated picture and at one point even propose a different conclusion. According to the latter the Nawuri had accepted only a defensive alliance against slave raids from the Ashanti and others, albeit this alliance was asymmetrical in nature. But subsequently the alliance was transformed into a formal 'overlordship' with the indirect support of the colonial administration. Yet the Alhassan Committee still

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<sup>41</sup> The Commissioner of Lands and Mineral Resources, Lt.Col.Ibrahim Abdulai decided to set up the committee. Letters of appointment for the members of the committee were issued by the Commissioner on 6 January 1978 and it was inaugurated on 14 February 1978. (Report 1978:1) The report does not refer to an Executive Instrument, which would constitute the basis of the committee.

<sup>42</sup> The committee report of 1991 (see below) refers to different years which probably just takes account of the different administrative steps becoming effective in 1934 or 1935.

followed the Dixon report. The reason may be a certain conceptual negligence similar to the one displayed by Dixon.<sup>43</sup> Again it is the implicit interpretation of overlordship as a criterion for title to land (here articulated in their comments on the rights of the minority tribes in the Bole Division):

Whether by conquest or settlement it is incontrovertible that the Gonjas have been overlords of the indigenous tribes, a fact they appear to have accepted over the years. We hold therefore that Allodial ownership of land in the Bole Division vests in the Yabunwurah. (Report 1978: 15)

Over the years the Nawuri repeatedly submitted petitions stating that their homeland was the land of their ancestors and belonged to them. One of the specific complaints raised was that the Gonja had withheld the compensation paid by government for loss of land and harvest through the building of the Akosombo dam. Yet they were not the owners of the land and it had not even been their harvests which had been affected. Whether the Gonja actually kept all of the compensation or just part of it, is for the sake of the argument irrelevant, since the Nawuris claimed to be entitled to all.

Other complaints concerned the repeated statement by the Gonjaland Youth Association that the land of the Nawuris was part of Gonjaland. While this was correct according to the legal regulation introduced by the colonial administration and while claim to the land by conquest was propagated by representatives of the Gonja, neither reason was accepted by the Nawuri; they were not considered as legitimate or true respectively.

### *3.3. The Committee of Inquiry of 1991*

In 1990 a statement of this type was made which fanned old tensions. The decision of the Gonjaland Youth Association and of the Traditional Council of the Gonja, to hold meetings in March 1991 in Kpandai, was interpreted by the Nawuri as a deliberate provocation. Again the Chiefs of the Nawuri submitted a petition to the central government. On the advice of the Regional Secretary and the Bureau of National Investigation, the government prohibited both meetings

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<sup>43</sup> Other interpretations could suppose that returning the title to the majority tribes who held it before the transfer of title to the President was considered a first step that would be for the moment farreaching enough – with anything more ambitious threatening the regional stability by provoking the majority tribes - or partiality on the side of the Alhassan committee in favour of the majority tribes.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

---

from being held in Kpandai. In their petition the Nawuri Chiefs had demanded a conclusive clarification of the legal situation in favour of their claim:

In the circumstances we the NAWURIS RESOLVED ... that having been oppressed over the years by the Gonja and having been rendered helpless by virtue of the fact that our complaints and protests to the central government in Accra through our Regional Administration in Tamale were never forwarded by the Gonjas who have always controlled the Regional Administration; ... APPEAL TO YOUR EXCELLENCY ... to ascertain who is cheating who and who is telling the truth. (Report 1991: 32.)

In this situation, an old dispute about a particular plot of land escalated in April and June 1991 into violent clashes. Again a committee of inquiry, this time chaired by Justice A.K.B. Ampiah was installed. The committee<sup>44</sup> was to inquire into these clashes between the Gonja, Nawuris and others who had become involved.

The report which followed recommended a final removal of the predominance of the majority tribes. The right by conquest, one of the arguments supporting the 'allodial title' of the Gonja, and thus tending to establish their privileged position, was held to be invalid:

Although the Gonjas claimed that the Nawuri are subject to them it has not been clearly indicated how the 'overlordship' was established. There is no evidence that any fighting ever took place between the Nawuris and the Gonjas. (Report 1991: 41)

The second legal basis for a title to land, the status as first settler, did not need clarification, since it was not disputed that the Nawuri settled in Kpandai before the Gonja. In its findings the report comments explicitly what they perceive as right and reality – a reality which does not correspond to the law:

The allodial title in the lands occupied by the Nawuris in the KPANDAI area resides in the Nawuris. ...

The Gonjas have possession only to that part of the Nawuri

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<sup>44</sup> The Committee of Inquiry into the Gonjas, Nawuris and Nanjuros Dispute, 1991 was established under Rawlings, then still Chairman of the PNDC (Provisional National Defence Council), by Executive Instrument 23.

lands which they have reduced into their possession and effectively occupied. (Report 1991: 68)

It is interesting to note that the report does not only clearly reject the claim that conquest occurred which could have constituted the foundation for an allodial title of the Gonja. At the same time it seems to create a new possible interpretation of "possession ... to that part of the Nawuri lands which they [the Gonja] have reduced into their possession and effectively occupied". The choice of terminology – 'possession' and not 'ownership' – seems to indicate the search for a compromise solution for those areas outside of Kpandai, which might be 'effectively occupied' by the Gonjas. It seems that the term 'possession' is supposed to avoid assigning the allodial title outside of Kpandai to the Gonjas, while trying to accord them a right to stay – possibly in the sense of 'adverse possession' or a 'possessory title' – to prevent expulsion and new injustice. The recommendations of the committee support this interpretation. Among others it makes the following consequential proposals:

(4) Separate Traditional Areas and Councils be created for the Nawuris and the Nchumurus.

(5) Membership of the Nawuri Traditional Council to be created, be extended to include the representatives of all heads or chiefs of other ethnic groups, including the Kanankulaiura, Chief of the Gonjas at Kpandai, if he so wishes to attend. The Nawuriwura should be the President.

(6) Although the wish of the Nawuris is that the position of Kanankulaiwura [the sub-divisional Chief of the Gonja in this area] should be abolished, there is no reason why the Gonjas in the Alfai area, with the Kanankulaiwura as their Chief, cannot continue to be given their rightful place in the traditional and modern administration of the area. ...

(9) The Gonjas should retain whatever land they have effectively reduced into their possession. (Report 1991: 74-75)

The reference to the Kanankulaiwura indicates that a solution is envisaged where there is a coexistence of the various groups clearly under the traditional authority of a Nawuri Paramount chief as the head of the land-owning community, yet with the right to representation of non-members of this land-owning group through their own Chiefs in the respective Council of the area.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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To support its findings and recommendations, which despite the compromise approach constitute a clear departure from the existing regulation, the report outlined the different versions of precolonial history which were supposed to prove or refute the existence of an encompassing 'overlordship': the right to hospitality granted by the Nawuri to the Gonja, or the abuse of this right; the (mis-)interpretation of gifts as tribute; and the (mis-)interpretation of a Chiefly status granted to the Chiefs of the Gonja by the Nawuri. Each of these could have been claimed to be evidence supporting the notion of a progressive acceptance of Gonja 'overlordship' by the Nawuri, confirmed by the legacy of the British policy of recognising positions in the 'traditional' hierarchies. In its recommendations, the report argues against this "feudalistic state of affairs":

The practice whereby the Gonjas had to protect the minor ethnic groups in return for services and tributes has ceased to have any meaning to the people. ... The system of 'overlordship' can no longer be tolerated in this era of our civilization. It is inimical to the aspirations of the people and must be considered obsolete and unworkable at the present time. (Report 1991: 41)

In conclusion the report supported the demands of the Nawuri for the full integration of their Chiefs into the aristocracy of the Northern Region. They were to gain their own Paramountcy, the registration and publication of their Chiefs in the official gazette, representation in the Regional and National Houses of Chiefs, the establishment of separate Traditional Councils, and the demarcation of a distinct District Assembly. But implementation did not follow. Any comment on the reasons for the shortfall in implementing these recommendations would be mere speculation, due to lack of information. Yet it seems still appropriate to note that although the recommendations would not in any circumstances have been binding on the Government, the shortfall might be the result of the particular historical development at this time: the political transition from the regime of the Provisional National Defence Council under Jerry Rawlings to a multi-party democracy with elections in 1992.<sup>45</sup>

Even the Kumasi peace agreement, which was concluded after the civil war of 1994 following long negotiations, stated only that both parties to the dispute

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<sup>45</sup> In May 1991, the government had accepted the recommendations of the National Commission for Democracy to establish a multi-party democracy. A Consultative Assembly was established in August 1991 and submitted a draft constitution in March 1992. The following stages in the political transition included elections in December 1992 and the installation of the new government in 1993.

accepted that there was a problem to be resolved and that this should be done peacefully. The agreement required the Nawuri to assist the Gonjas with their resettlement to Kpandai. Like the recommendations of 1991, this agreement was not implemented. The resettlement has not occurred, and representatives of government have threatened to enforce it by force if necessary and against the wishes of the Nawuri (*Daily Graphic* 1999).

#### 4. Law and Culture as Instruments of Local Power Politics

What is the connection between these legal issues and the nature of multi-cultural societies? A connection exists because the relationship between different 'ethnic' groups cannot be reduced to cultural factors. At least in times of conflict, cultural practice discloses its normative or legal foundations as well as its political roots. Differences in so-called 'socio-culturally' embedded notions about social order can lead to conflicts, since these social orders determine the allocation of powers and duties. If such conflicts are not constructively dealt with and eventually settled, they are liable to develop into violent political confrontations or even civil war. Too often these conflicts are not constructively handled because their sources are not acknowledged in terms of their political or legal backgrounds, and they are accounted for under the label of 'cultural' and 'ethnic' conflicts.

The case of Kpandai shows that cultural plurality cannot be understood only as a 'horizontal' plurality in the sense that a plurality of 'ethnic' groups coexist side by side. It becomes discernable that cultural plurality often displays different 'layers of culture'. This phenomenon can be linked to social stratification and a disputed assignment of social status. In addition, and more important, the case demonstrates that this assignment of social status according to ethnic identity is, at least in part, legally entrenched.

In the case study the legal constructions and structures of the officially recognised 'traditional' land law provide indirectly the basis for this social stratification. Yet this so-called 'traditional' law - or more precisely that part of it which does not have colonial origin - has forfeited much of its legitimacy as a result of various manipulations within this legal order and their political instrumentalisation by the (post-)colonial state and the majority tribes for their own ends.<sup>46</sup> Furthermore, the proponents of this disputed law claim, by invoking 'tradition', an 'immutability', which is not sustainable and even inappropriate. The discourses on the "principles of the perpetual nature of land ownership" and on the "inextinguishability of

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<sup>46</sup> The 'colonial part' of the 'traditional' law (the concept of 'allodial title', the standardization of traditional hierarchies etc.) never had any legitimacy.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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traditional rights to land” have given way to notions of “process and change in traditional land ownership” (Duelke 1999: 9).

Thus ‘traditional law’, which has been entrenched by state intervention like the assignment of the allodial title, must be distinguished from folk law. The state has not eradicated the autonomy of the ‘social field’ in which folk law develops.<sup>47</sup> Beyond the limits set by the state, there is space where a folk law can emerge which remains more open to adaptation. In addition, the entrenched ‘traditional law’ must be distinguished from lawyers’ customary law which has not been made a taboo and declared immutable for the purpose of legitimising specific interests.<sup>48</sup> Such lawyers’ customary law which has remained open for change may be further developed with the aim of strengthening social integration and conflict settlement. In the cases both of folk law and of lawyers’ customary law legitimacy and adaptability can be claimed. In principle, they allow everybody to initiate reforms through cases which set a precedent for the settlement of conflict and promote social change. Entrenched ‘traditional law’ in contrast, is marked by stagnation.<sup>49</sup>

The multiple linkages of land law with other legal spheres like constitutional law, chieftaincy or administration of justice tend to further strengthen this entrenched ‘traditional law’. They help to maintain the status quo especially in times of conflict over the validity and legitimacy of the various interpretations. The reason seems obvious: reforms within land law produce shifts of power in other spheres.

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<sup>47</sup> This formulation follows Woodman’s above mentioned comment on ‘strong legal pluralism’ (Woodman 1998: 35).

<sup>48</sup> The emergent concept of ‘customary freehold’ is a particularly interesting example because it illustrates the influence of social and economic change, but within this context it is also ambivalent because it carves individual (or family) interests out of the allodial title which can be “so extensive that they extinguish it”. (Woodman 1996: 87ff).

<sup>49</sup> Even if the colonial state had only fixed the asymmetrical defensive alliance between the Nawuri and the Gonja including the subsequent tributes, this would not have taken account of a changed reality, with no more slave raids from the south and where the Ghanaian state with its armed forces takes responsibility for security issues. The additional danger of establishing ‘immutable’ rights as a result of manipulations or even just mistaken interpretations becomes evident with the standardized traditional hierarchies, an alliance between communities which has been commuted into an overlordship or with the invention of the allodial title.



As a result of this stagnation within 'traditional' law, groups which were once distinct, but which have in the course of generations largely become integrated in their languages, religions and other cultural features, remain visibly distinct in terms of social status. Social and 'traditional' legal order re-enforce each other and perpetuate the conflict. Without the allodial title, the Nawuri are not the 'owners' of their own land. Without this title their Chiefs are not represented at the regional let alone national level. Even within the 'traditional' administrative structure they cannot participate on an equal level. The Nawuri do not share the title with the Gonja as it would be e.g. in the case of complete integration. Despite the de facto autonomy in the daily administration of land, they are subject(s) to the authority of the chiefly hierarchy of the Gonja. Here, law does not settle conflict and support social integration by promoting social change – it is part of the conflict.

For northern Ghana with its cultural plurality, the result was that only limited and asymmetrical social integration could develop. These factors obviously are sources of conflict in democratic systems in multi-cultural societies which proclaim that they are based on equality, but which e.g. deny equal representation. Disputed, but officially entrenched 'traditional' law perpetuates legal and social distinctions which are incompatible with the democratic understanding of citizens' rights. The recognition of legal and cultural plurality can be legitimately demanded only as long as it is not directed against 'the other', the 'foreigner', since in multi-cultural societies these terms include the fellow citizen of a different 'ethnic' group.

#### *4.1. Different variants of a 'residual overlordship'*

It would be mistaken to ignore the historically based differences between the various conflict scenarios in the Northern Region. Bogner (1998) points out that many Konkomba in the traditional area of the Nanumba, another majority tribe, have been to a large extent assimilated. Differences in social prestige seem to be less relevant in that case because there has been more inter-marriage between Konkomba and Nanumba. It is also evident that the Konkomba in this area are historically only migrants. Differences of status are less and, probably because of the Konkomba status as migrants, to a certain degree accepted. The title to land is not in dispute. A source of conflict is

... whether it is permitted to the [Konkomba] settlers, to settle disputes not through the Chiefs [of the Nanumba], but persons from their own ranks...

[O]ut of court settlement of conflicts [is] the most important or

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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one of the most important sources of income for the Chiefs of North Ghana ... Even though nobody is by modern law obliged, yet it is established practice everywhere to bring disputes first before the Chiefs, who receive in the course of this activity judicial fees and fines in money or kind. (Bogner 1996: 166, translated by the author)

However, even though land rights are not disputed, landlord-tenant relations between the Nanumba and the Konkomba migrants produce sufficient conflict. The foundation of a regional Konkomba association (KOYA, the Konkomba Youth Association) is understood as a reaction to the difficulties faced by Konkomba migrants:

Now, one other reason for the formation of [KOYA] was result of the fact that these Konkomba migrant farmers ... started having trouble, conflicts with their landlords, because they found out that the charges, the taxes they were asked to pay for the land they were using was increasingly getting too burdensome. (Bogner 1998: 50.)<sup>50</sup>

This rallying together of the numerous and thus militarily strong Konkomba and the improved representation of Konkomba interests through KOYA aroused on the side of the Nanumba aristocracy fears about the increasing influence of these 'strangers'. Yet they are 'strangers' only according to 'traditional', not 'modern' law. Under 'modern' law they are citizens with equal rights, who may be classified as 'strangers' only for issues related purely to land, which is regulated according to 'traditional' law.

With regard to the settlement of conflicts, the Konkomba can at least theoretically ignore the local customary law, which obliges them to settle conflicts through the chief's courts of the Nanumba, and turn to another arbiter or 'modern' court. As in the remarks on legal pluralism and legal reform above noted it makes a difference whether customary law is applied by 'traditional' institutions or 'modern' courts; this holds equally for customary land law. Different procedures, the jurisdiction from other parts of the country and not least a judge's experiences with developments in other customary laws will influence the outcome. With stronger representatives supporting them, there is an increased probability that Konkombas whose cases have a far-reaching impact, particularly an economic one, or who are sufficiently rich, will choose this new option.

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<sup>50</sup> This is a quotation from an interview by Artur Bogner of a former chairperson of KOYA.

Another example of historically based differences is described in Tait's comments on the situation of the Konkomba at the beginning of the century in Gushiego, a Chiefdom in the traditional area of the Dagomba:

It is in this chiefdom that the Konkomba are most closely integrated into the Dagomba system. They number more than half the population of the chiefdom and were neither expelled nor assimilated by the Dagomba. It is here and only here that they hold offices under the chief. They act as his Kambonsi, the infantry of the chiefdom, though not all the Kambonsi are Konkomba. Twenty-one out of thirty titles are held by Konkomba." (Tait 1961: 10)

Tait impliedly identifies the different options which historically determined the relationship between the immigrant and partly conquering Dagomba and the locally settled Konkomba: expulsion, assimilation, and social integration without full or farreaching cultural assimilation. Even if this social integration in Gushiego was limited, and political and social participation with equal rights was refused, it did avoid a confrontational exclusion.<sup>51</sup>

This example confirms again a general picture which can be summarized for the whole of northern Ghana and beyond. Through the political and legal intervention of the colonial power, different phases of a process of assimilation or integration between the so-called majority tribes and the so-called minority groups were, as by a series of snapshots, registered and their legal development stopped. The various scenarios were interpreted according to the knowledge matrix of the colonial administration and each manipulated to fit into the standardized model of chieftaincy hierarchy and 'traditional rule' with its own levels of hierarchy and variety of concepts of rule<sup>52</sup>. The results of this process of constructing an administration of 'indirect rule' were legally entrenched.

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<sup>51</sup> However, greater differences of status in the relationship between the Dagomba and the Konkomba are found in other areas of the Dagomba traditional area, notwithstanding that the Konkomba are numerically stronger and that some of their farmers have had outstanding economic success (Bogner 1998).

<sup>52</sup> Compare for a critical discussion Skalník (1987) and, for a historical account of such developments in the Upper West Region which formed part of the historical Northern Territories, Lentz (1998).

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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The different variants of the conflict scenarios<sup>53</sup> indicate that centralised social organisation was instrumental in achieving the allodial title. The partners of the colonial administration in the process of interpretation and manipulation were all those who were interested parties themselves and expected an upgrading of their powers and an expansion of their sphere of influence. But they also had to have knowledge of as well as access to this process. This includes all those who were called as 'expert witnesses'. According to these criteria the leadership of the more centralised societies seemed to constitute the 'natural' contact for the colonial administration which would otherwise have had to 'consult' with a multitude of Chiefs, elders and tendambas.<sup>54</sup> The role played by ethnographers, missionaries

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<sup>53</sup> In the case of the Gonja and Nawuri, the existence of Chiefs was recognised on both sides; yet the Gonja's hierarchy was seen to be more centralised. None was considered migrant any more. Differently the case of the Nanumba and Konkomba: although the Nanumba were themselves in part only migrants to the area where they now command the allodial title (the other part was another unknown autochthone population which was assimilated by the migrants to a considerable degree (Skalnik 1987: 307)), they exercised predominance over the (more recent) Konkomba migrants. The latter, then a 'chiefless' society, demand in the mean time "recognition of their need for chieftaincy" (1987: 316). They are still perceived as migrants. In the case of the centralised society of the Dagomba and Konkomba, the conflict arises in areas which the Konkomba consider their homeland as well as in areas where they are themselves migrants. The account of Lentz (1998) seems to indicate that no such equally centralised societies existed in the area of Wa allowing a less pronounced system of Native Authorities.

<sup>54</sup> Lentz describes this necessity to negotiate with a multitude of Chiefs when in 1897 the British extended their influence in the Wa area. Initially they had made a treaty with the Chief of Kaléu, but already the next day a delegation of Dagarti chiefs indicated to the British commandant "that there is no King of all Dagarti, as this country (which is a very large one) is split into several parts, each having its own separate King". (Lentz 1998: 112) But this necessity seems more pronounced since at that time the scenario was still open and the relations between the different actors were still in a state of flux.

and the like should not be omitted. Their more or less interested contributions were (and are still today) often responsible for the outcome of such a process.<sup>55</sup>

But the proponents using these contributions effectively for their own ends have been and still are primarily the leaders of the majority tribes and the administration of the (colonial) state. The interests of the minority tribes received serious consideration only after the conflict escalated into 'ethnic clashes'.

#### *4.2. Law: no 'instrument of social change'?*

In view of the divergence between statements of the historical 'facts' by the parties – be it the alleged conquest or the voluntary acceptance of an overlordship – it must be asked whether historical justifications which lack consensus have any relevance. They are more often than not based on historical, ethnographic or similar reports of travellers or administrators, which do not always reflect reality. Often these reporters are manipulated by the people they had been questioning or their descriptions are influenced by their own interests or their own projections. Objective decisions on the truth of such reports and particularly their conclusions are not possible. Written accounts have value as historical documents only when a many-voiced canon emanating from contrary positions points in the same direction, and even here the findings are limited to the understanding of social relations. However, it is questionable whether historical justifications are either necessary or desirable. If law has to rely on them and can not acquire legitimacy from its present effects, it has lost its spirit and becomes open for abuse.

The question, how far an emphasis on historical 'facts' is desirable, arises not only from the consideration that such a claim might be incorrect. But what has been right in the past can be wrong today. Then a decision in favour of continuity means stagnation. Finally, to focus on the past can also prevent the correction of historical mistakes, such as that made in this case when the interest of control and the interest of benefit were interlinked in the legal concept of the allodial title. But

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<sup>55</sup> Even beyond an intentional manipulation, there is an impact of a third observing and potentially (but not necessarily) intervening party whose presence and attention seem to have the effect of a catalyst on the elaboration of ethnic criteria. The discussion on ethnicity being a phenomenon of boundary areas where ethnic identities are being defined has been explicitly started with Barth (1969) and continues until now (Diallo and Schlee 2000). The impact of such a third party might result out of its potential role as a forum for representations for both 'parties'. Yet the effect of a catalyst would be expected primarily in situations of conflict, when both sides search for allies.

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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more often than not, questioning the past could serve both – necessary reforms to adapt to and promote social and economic change as well as some righting of historical wrongs.

The Alhassan Committee of 1978 omitted the opportunity to go beyond returning the land of the northern Regions to those ‘traditional owners’ where the allodial title had been vested before it had been transferred in 1963 to the President, and to establish legitimate ownership which did not depend on colonial assignment. The dominant social and political actors favoured the legal status quo. It would have been necessary not only to adapt to an existing social change, but to promote change. Its limited approach avoided the more complex and conflictual process of a detailed inquiry into historical ownership and questions of present day legitimate rights. A one month time schedule could not allow for more. The extent of limited time and other restrictions become even clearer if one compares the time and other resources available to the permanently institutionalised mechanisms of inquiry in countries like Australia and New Zealand.<sup>56</sup> Yet even though a detailed approach might have proved conflictual in the short term, it could have been – as history seems to confirm – the only one to prevent outright civil war.<sup>57</sup>

The Ampiah Committee made such an attempt in its three months period, working only on one out of a multitude of cases. This time, at least on the national level the socio-political setting was more favourable for reform and recourse to the ‘modern’ social and normative order were taken to promote social change. The Committee did not only distinguish between colonial intervention and the local legal order(s). It inquired also into these historical rights and ‘feudal’ practices and their appropriateness in today’s society.

The issues of appropriateness and legitimacy on which the Ampiah Committee focused are actually more important than the reference to the colonial intervention and the historical power relations.<sup>58</sup> Compared to this, the argument from history

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<sup>56</sup> Compare the institution of Land commissioner for Australia (Duelke 1999) and the Waitangi Tribunal for New Zealand (Noack 1999).

<sup>57</sup> Giddens’ comparison to archaeology and its methods of excavation and analysis of the past provides an interesting approach. This would allow us to dismantle legal constructions into their single components and would facilitate an analysis of their reciprocal impacts and a possible discarding of the one or other (set of) rules, if shown to be inappropriate and harmful. (Giddens 1993:458-9)

<sup>58</sup> The reference to the colonial intervention is important for the analysis of the causes of such conflicts and facilitates a more critical attitude on the side of the proponents of the status quo. For the actual reform it is dispensable.

appears less convincing, particularly with regard to historical overlordship. This point can be strengthened with an even more legal argument, if one considers the application by analogy of the principles of forfeiture of rights or failure of a contract through breach of a fundamental term. Those who accept the duties which result from membership in a community, respect for its norms and duties, and acceptance of its sanctions for their breach, should be able to enjoy the rights which are linked to this membership, such as free access to land, equal representation, and should not be burdened more heavily, for example, with stronger recruitment for military service in times of war. It can be argued further that only those who fulfill the duties of overlords can claim the rights and powers which are linked to that position. While the Gonja do not (and can not) fulfil their duty to protect the Nawuri against slave raids from the southern neighbours (since they no longer occur), they force the Nawuri to be represented by the Gonja Chiefs in the regional institutions. With such a fundamental change of the constituent conditions of a contract, its *raison d'être* becomes obsolete. Moreover, to invoke the other function of an overlord, the settlement of conflicts, as proof that he is exercising the duties of an overlord, even though this 'option' is forced upon the subject, as in the case of the Konkomba in the traditional area of the Nanumba, does not seem legitimate.

If the understanding of social and power relations is based on the idea of a social contract, an idea which seems to be intrinsic to the concept of folk law, then historical justifications for claims to power lose some of their immediate relevance and credibility. The classical notion of a social contract implies itself a historical justification for claims to power.<sup>59</sup> Yet this cannot be valid unconditionally. An approach is needed, which takes into consideration the initial factors, which were the cause to create and agree to this contract. The historical justification stems only from the fact that at some date in the past a specific arrangement was agreed to. Yet not only the fact that there was an agreement, but also the reasons for this agreement are decisive. If they have fundamentally changed, the contract loses its foundations, since they must be considered as constituent parts of any contract.

The binding effect of decisions taken in the past cannot be denied. Trust in the enduring validity of contracts is a crucial prerequisite for any agreement not only in the field of economy and between individuals, but also in the field of politics and between societies. Trust as a prerequisite is equally valid for social contracts. But here as there, the possibility for review, reform or adaptation are as much crucial to the idea of 'trust' as is the principle of 'pacta sunt servanda'. Any party to a contract must have the security that the contract will be adjusted or abolished, when the reasons for the contract perish and its effects become destructive. Intrinsic to the idea of law and – at least implicitly – part and parcel of any

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<sup>59</sup> I thank Gordon Woodman for drawing my attention to this point.

contract is not only the notion of durability, but also the idea of reform, abolition, forfeiture and dissolution, and thus of change.

In African folk law, where immutability of the contract between ruler and ruled has long been supposed, because the discourse of the sanctity of 'traditional rule' suggested eternal validity, the rightful murder of a tyrant chief, whose tyranny breaches the basic contract between ruler and ruled, is just the most spectacular example of repudiation. Crabbe, a Justice of Appeal in Ghana, summarizes this point concisely and it seems transferable to the wider African context: "[T]he *Omanhene* - king - in days gone by, was the source of law, religion and morals. If he became a tyrant, he was 'sent to the village'" (Crabbe 1992: 631) - a modest circumlocution for regicide.<sup>60</sup> Today, neither regicide nor strict adherence to a (manipulated) legal legacy provide a possible let alone legitimate solution. What remains is reform - the political solution.

#### 4.3. *Resumé and conclusions*

This contribution has tried to show how legal pluralism can be "used as a political instrument". It has illustrated, how actors, who - if possible - otherwise refrain from making reference to another legal order, selectively choose, recognize and employ another legal order to serve their own interest. This has been the case with the colonial administration, which suppressed e.g. the application of folk law in criminal or witchcraft cases. But to enforce its indirect rule, the same colonial administration accepted central components of the legal order of the Gonja which regulated hierarchy and authority within the socio-political order of the Gonja as it was presented to them to apply for themselves and others like the Nawuri and which formed the basis for their claim to land.

The case of using legal pluralism "as a political instrument" becomes clearer if considered from the perspective of the Gonja. While colonial law must have been primarily tolerated only as the law of conquerors, its concept of an allodial title, the assignment of an interest of benefit to traditional authorities and the vesting of this title in the Paramount Chief of the Gonja together with all the powers assigned to him as head of the Native Authority were used to enforce their political and legal claim to the land of the Nawuri.

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<sup>60</sup> For similar references to regicide or other sanctions of tyrant rule see van Binsbergen (1981) for Zambia, Geschiere (1997) for Cameroon. Weber refers in his comment on traditional rule to the traditional limits and points out that disregard of these limits by the ruler would lead to a traditionalist revolution. Weber (1980: 140)



In addition, this contribution tries to illustrate how the institution of law becomes a source of supposedly 'ethnic' conflicts. The impact of legal pluralism, which offers opportunities for the abuse of law, is of particular interest. It seeks to demonstrate how one party to a legal dispute comes to perceive violent conflict in the form of 'ethnic clashes' to be the last option for addressing their claim. In this context, the role of a third party, the state, becomes evident: as partly initiator, partly potential mediator of the disputed arrangements. In the end, the contribution aims at highlighting the 'legal roots' of highly politicised ethnicity and 'ethnic' conflicts in multi-ethnic societies and at outlining attempts to counter escalation by addressing these 'legal roots'.

For that aim, the paper reflects on the history of one of these conflicts noting some of the events which initiated it or which gave an opportunity to address it. The establishment of the Native Authority of the Gonja out of communities which were forcefully merged by the colonial administration and the reports of the various committees of inquiry with the farreaching consequences of their recommendations are central. These events were conscious decisions, or more precisely interventions into the legal status of communities in view of their relationship with each other.

Furthermore, the paper points to legal and administrative developments which aggravated the conflict. Here the concept of the allodial title, with its combination of interest of control and interest of benefit, and the vesting of this legal title to land in the highest representative of the political-administrative structure of the (Native and later) Traditional authority were decisive. The (mis-)understanding of ownership concepts to land as outlined by Allott and Bennett had an impact on the balance within the whole legal order by shifting rights and duties. The interest of benefit constituted an additional right for the Traditional Authorities. The transfer of the interest of control together with this additional right to benefit from the (actual or supposedly) chiefless to centralised societies occurred without providing any balance in the form of compensation or legal safeguards against abuse. This legal 'innovation' and the transfer of rights became equivalent to expropriation and suppression.

The transfer of resources and power had wider political consequences. They had an implicit impact on other arrangements like the integration of 'traditional rulers' into 'modern' or 'hybrid' institutions of the state. With regard to this arrangement, another legal development, the standardization of Chieftaincy hierarchies, was instrumental in discriminating the now relegated Chiefs of the less centralised or clan societies and their communities. The integration, which otherwise proved by-and-large positive by providing a link between 'traditional' and 'modern' structures of administration and by promoting participation, backfired here by deepening the rift between the included Gonja and the excluded

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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Nawuri and by indirectly entrenching a social stratification which assigned different social status according to ethnic affiliation.

In Ghana's multiethnic society law became a source of conflict when the colonial state shifted rights and powers between neighbouring ethnic groups. This decision was the result of the policy of 'indirect rule' which was designed to create native states out of territorial units large enough to be economically viable that would be administered by Chiefs. The legal policy which was to support this economic and administrative objective implied the territorialisation of rule, the standardisation of Chieftaincy hierarchies and the merger of smaller units under a centralised elite. Legal policy was thus instrumental in pursuing the policy of 'indirect rule' which did not have just and fair administration as its main focus. One of the lessons of this process is that law is never apolitical. Another one is that those in high traditional offices who today oppose the reform of 'traditional law' with the argument that it is an element of culture, but in the past have accepted the advantages of these interpretations and manipulations, contradict themselves. Yet not manipulation, but consensual reform should be the mode of change.

The colonial as well as the postcolonial state missed several explicit opportunities to address this legal conflict, when committees inquired into the protest voiced by the Nawuri since the 50s. The inquiries under Dixon and Alhassan both followed the established rules as if to preserve or return to a continuity that was to guarantee stability. Only the committee of 1991 took the opportunity to question the legality of the Gonja claims, which were based primarily on the law as established by the colonial state and on a disputed assertion of 'conquest' which was supposed to comply with the requirements of 'traditional law'. In addition, the committee included in its discussions questions of legitimacy and appropriateness noting the change of context: no more external threat through slave raids and a polity on the national level whose basic assumption stipulates equal rights for all citizens.

Even though a failure, because its recommendations were not implemented, this last committee points to the other possibility of how the state can intervene in 'inter-ethnic' relations: by helping to overcome a legal legacy. While there could not be a return to arrangements of days gone by, it sought to balance legitimate historical claims and equally legitimate present interest. Thus it took up the challenge posed by the requirement not to correct historical wrongs by creating new ones. Still, historical wrongs had to be addressed as far as possible and social change to be promoted – particularly since they affected the present day life of the Nawuri through still valid law. If embedded into a broad debate, the results of the inquiry into the past might have helped those parts of the Gonja population which grew up with the perception of the legitimacy of their claim, to review their

position and consider compromise as a possible and just solution<sup>61</sup>. Reform does not entail arbitrariness if it is guided by consensual rules and shared norms.

The case of Kpandai has demonstrated that law in multiethnic societies such as Ghana quite probably will become a source of conflict, since the various ethnic groups have usually merged under political and other pressure – be it under a colonial administration or (for Europe) the hegemonic rule of a dominant group or region. This case showed also that such conflicts may remain non-violent for decades and turn violent only after being not sufficiently addressed. Despite the increasing numbers of ‘ethnic’ clashes and civil wars related to ‘ethnicity’, most of these conflicts exist today as a conflict of interest, which is sometimes articulated, but often remains more or less latent. It seems possible to avoid their escalation into violent conflict otherwise than by just repressing an outbreak. Yet the above references to the short time schedule and high workload and limited resources of the committees of 1978 and 1991 indicate the challenge and usual restrictions on such a preventive approach. It is not surprising that the examples given for a more sustainable approach are to be found in the economically stronger Australia and New Zealand.

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<sup>61</sup> Compare Duélke’s discussion of the case of two aborigine communities in Australia where both claimed title to land. She notes the painful realisation of the younger representatives of one community when they were first confronted with the fact that their community were only migrants to the disputed region – a knowledge which the older generation had not passed on to them. (1998, 1999)

## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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## CONFLICT IN MULTI-ETHNIC SOCIETIES: GHANA

Ulrike Schmid

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