

**“Customary Law of the *Dagara*” of Northern Ghana:  
Indigenous Rules or a Social Construction**

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**ABSTRACT**

The Ghanaian discourse on customary law assumes that there are uncontested rules of custom that are applicable to all its communities. And that these rules can be ascertained by applying the relevant rules stipulated by law. The view is that these rules are based on either immemorable customs or current social practices of Ghanaian communities. A number of rules are beginning to crystallise in the courts of law as general principles of customary law applicable to all communities. However, the basis of legitimacy of these rules has come under attack by litigating parties. This paper challenges not only the legal rules for ascertaining customary law but also questions the jurisprudential grounding for such an ascertainment. The paper explores the social interests groups who are considered competent in authoring the customary law and the ambiguous notion of *community* from which such rules issue. The customary land law of the *Dagara* ethnic group of Northern Ghana is used to illustrate the emergence and development over the years of the social construction of customary law rules. These rules have been problematized with findings from a case study conducted in the Upper West Region. This study concludes that the articulation of customary law by the courts fail to address important features of customary rules of land relations amongst this ethnic group and as such are incapable as a basis for resolving disputes over land rights.

## Introduction

Notwithstanding the levels of contestation on what constitutes law, legal discourse in Ghana unproblematically hold the view that there are settled rules of customary law out there, that are applicable to particular communities. While such a notion dates back to the colonial era, the focus of this article is on the current formulation of the legal basis for ascertaining customary law under the 1992 Constitution and the present Courts Act (Act 459, 1993). The constitution defines the laws of Ghana to include the Common Law of Ghana of which the customary law is a part. Customary law is defined as rules of law, which by custom are applicable to particular communities, written or unwritten. It also includes rules determined by the Superior Courts of Judicature (Article 2, 1992 Constitution)<sup>1</sup>. This way of formulating the basis of customary law has a number of practical consequences for litigating parties; as well as giving rise to a number of jurisprudential issues. While the former issue has received some scholarly attention in terms of what the courts do or fail to do, the latter has not received systematic articulation. It is in this context this article seeks to explore a number of theoretical insights the provision engender in terms of two related issues:

- (1) Who are the authors of customary law in Ghana?
- (2) Who constitutes community as bearers of the customary law?

This article seeks to problematize these issues with a view to indicating the implications they have for local communities as they encounter this definition of customary law. I use land relations among the Dagara ethnic group of the Upper West Region of Ghana and the state law construction of the customary law of Ghanaian communities as a useful point of entry. Given the number of controversial issues implicated in the study, I will make some conceptual and methodological clarifications to put the perspective of this article in focus. For example, the issue of who constitutes the Dagara is far from settled; just as the customary law in legal discourse is beclouded with meanings and categorisations as either legal pluralism (in its strong and weak forms), legal anthropology, indigenous law, traditional law, unofficial law. The focus of this article would be on interests in land and traditional practices of land administration at the institutional level, on *naalun* (chieftancy), *tendaalun* (custodian of the earthshrine) and *yir* (traditional family) institutions. Though gender interests and the plight of migrant farmers in land relations are important and topical, they merit entire studies of their own, which are current projects this author is working on.

## Methodological and Theoretical Issues

This article arises from a study conducted among the three ethnic groups (Dagara,

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<sup>1</sup> The Superior Courts of Ghana are the High Court, Court of Appeal and the Supreme Court.

Wala, and Sissala) of the Upper West Region of Ghana from April to September 1998. The study sought to investigate the relationship if any, between traditional and state law rules of land administration. Land administration in the study is given a broad meaning to encompass both statutory rules of the state and traditional normative structures. The notion of who constitutes the Dagara and whether it is a homogenous ethnic entity is also contested. However, this study considers the Dagara to be people under the traditional authority of the Kaleo, Nadowli, and Jirapa (excluding Lambussie) Lawra district paramount chiefs. In other words it is used in contradistinction with the Wala and Sissala ethnic groups of the Upper West Region.

Data was collected using a semi-structured questionnaire administered to a number of traditional institutions. The institutions relevant to this article are chieftancy, tendaalun, and traditional family farming units. A random sample of five paramount chiefs, five tengan dem and thirty family farming units were involved in the study. While the institution of chieftancy in Ghana includes paramount, divisional and sub-divisional chiefs our sample involved only paramount chiefs. This category of chiefs is relevant to matters of land administration among the communities in question. The tengan dem are custodians of earthshrines around which traditional rules of land administration revolve. They also hold the highest interests in land in customary law-the allodial title (see Rattray, 1932 and Pogucki, 1955). By traditional family farming units we mean a homestead as a productive economic unit among the Dagara (Tengan, 2000). The interests in land they hold are the customary freehold; sometimes referred to as the usufruct in Ghana land law jurisprudence (see Woodman, 1968).

The main themes for data collection included the following issues:

- The roles of the institutions in traditional modes of administering land.
- The relationships, if any, between the institutions.
- Bases of interests in land held by the institutions.

The author of this article is from Nandom in the Upper West Region and of the Bekuone patriline. He has also been involved in land litigation in the Upper West Region as legal counsel, and therefore has working knowledge on land related issues among the community in question. The personal location of the author in this study, however, has not denied him the level of reflexivity needed for a critical engagement with the issues engendered by this study.

## **The Emergence and Development of ‘Dagara Customary Law’**

The customary law of particular communities in Africa today has a chequered history and that of the Dagara is no exception. It is often presented as emanating from some immemorial custom. However, new findings in this area suggest it is one of a rather recent development. The study of Mamdani (1996: 118-137) offers useful insights to

its genealogy as commencing from the closing years of the pre-colonial period; was concretised under colonial rule; and continued in the post-colonial era.

As he noted, before the onset of formal colonial rule most African communities were caught up in a state of social upheaval. The process of traditional state formation, the development of markets, and the outlawing of slavery are held to have accounted for such social tensions. There were territory based claims of emerging traditional kingdoms that were engaged in struggles with kin-based claims of lineages for political power. Where the latter triumphed, non-centralised political entities were integrated into centralised mass political formations. This altered the social power configuration with the entry of new players as either kings or chiefs. Also, freed slaves could engage in economic activity with its attendant social mobility. Further, the emergence of market centres for trading in crafts and other wares also raised the social status of segments of the society who hitherto were considered the wretched of the earth (1996: 118-121).

These interrelated developments witnessed a deeper stratification of African societies. In which those without claims in the old order sought to establish claims in the new one. It was in the course of these struggles that most African communities encountered colonial domination and within which their customary laws were scripted:

Not surprisingly, every claim presented itself as customary, and there would be no neutral arbiter. The substantive customary law was neither a kind of historical and cultural residue carried like excess baggage by groups resistant to modernization nor a pure colonial invention or fabrication... instead it was reproduced through ongoing series of confrontations between claimants with a shared history but not always the same notions of it. (1996: 118).

The findings of Lentz (1994; 1997) on the Dagara of north-western Ghana lend support to Mamdani's thesis; that African elite themselves were not disinterested observers to the colonial attempts at constructing customary laws of their respective communities. As she observed, new institutions of power (chieftancy) created by the colonial administration were and continue to be appropriated by dominant segments of the community as their customary laws to serve particular political and economic ends<sup>2</sup>.

However, the Ghanaian experience with particular reference to the Dagara shows that the British colonial administration served as arbiter (though not a neutral one) in

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2 Also see Ranger (1995: 211-262) on the *invention* of tradition in colonial Africa, and Chanock (1991: 63-83) on the dominant *paradigm* of land relations in Africa under Indirect Rule.

institutionalising what we know today as their customary law. It is also the case that the Dagara communities as non-centralised polities were never successfully integrated into centralised kingdoms of the South of present day Ghana or the Northern Kingdoms of Dagbon, Mamprugu or Gonja. The dominant thesis has it that the Dagara are a rebel group that migrated away from the autocratic rule of Dagbon, under the legendary Na Nyanse (see Tuurey, 1982; Lentz, 1997).

Little is known of the socio-political pre-colonial reality of the Dagara beyond the scripts from missionary, colonial administrators and anthropologists. (see Cardinal; 1921; Eyre-Smith: 1933; Manoukian; 1951; Rattray; 1932; Holden: 1965; and Goody: 1956). These scripts remain contested but are at the same time readily appropriated to serve particular political and economic ends.

While historical evidence suggest that the customary laws of the Dagara were compiled by Captain Read in 1910, with the establishment of native courts in 1918 (see Lentz, 2000: 107-136), the onset of a systematic construction of the customary law rules of the Dagara is traceable to commissioned studies and a conference on the customs and constitutions by anthropologist of the so-called tribes of the hinterland of Ashanti. Of particular relevance to the Upper West communities were the conference organised in Wa in 1933 to ascertain the customs of the communities of the area and the studies by Captain Rattray and Saint Eyre-Smith (see NAGA, ADM 56/198; Rattray, 1932; Eyre-Smith, 1933). These studies arose from the need to integrate the Northern Territories into the colony-wide political institutions, with a view to establishing a local administration that would eventually transfer power to the natural rulers' (chiefs) as perceived by the colonial administrators. Little was known about the nature of political and social traditional institutions of the area that the colonial policy sought to recast in a modern mould. As observed by Ladouceur (1979: 55), the Wa conference "went beyond the re-establishment of traditional structures, to defining entirely new ones more in accord with the administrations requirement for the purposes of indirect rule".

For instance, the institution of *tendaalun* was marginalised in favour of *naalun* (chieftancy). The latter institution among the Dagara was a colonial creation as most of the communities were acephalous and did not have chieftancy as in case of the Wala and Malala (see Wilks, 1989 and Abdul-Korah, 1980 respectively). To prop up the colonial created institution of chieftancy, chiefs were given power under laws to determine what they considered to be the customary law of their areas of jurisdiction from time to time. In addition, they were to outlaw customs that were considered barbaric. It was also made a criminal offence to disobey a chief (Elias, 1962).

The native jurisdiction Ordinance of 1935 gave power to chiefs to constitute native courts that would adjudicate on matters pertaining to customary law. The jurisdiction of these courts included matters on marriage and family law, land tenure, and rules of

succession of the various categories of chiefs (paramount chiefs, divisional chiefs, sub-divisional chiefs and village headmen). In sum, the colonial chief concentrated all the powers of traditional government in his hands as he was a legislator who declared customary law, a judge who presided over the native courts, and the executive who implemented the laws. The customary law rules made by the colonial chiefs for the Dagara, served as customary law up to the 1950s when the entire Northern Territories was represented in the legislative council of the Gold Coast (former name of Ghana) for the first time. The then existing laws for the colony became applicable to the Dagara. These included rules of customary law defined by the Supreme Court Ordinance as “local laws and customs” where they were not “repugnant to justice, equity and good conscience” (section 19 re-enacted as section 85 of Cap. 4).

An important feature of the customary law at the time was that it was a matter of fact to be proved before the court and not one of law. In essence, it had the same status as foreign law in private international law that needed to be proved in court. This presented an interesting paradox; one which lies in the fact that English legislations were considered statutes of general application and therefore a matter of law; while indigenous customary law became a matter of fact requiring further prove before the courts to have legal effect. The question is, even if the imperial domination of the Gold Coast gave English law such a privilege should traditional law be given the same legal status as foreign law?

By 1960, any question as to the existence or content of a rule of customary became a question of law for the court and not a question of fact (See Courts Act, 1960 section 67 (1) C. A 9; repeated in Courts Decree, 1966 (NLCD 84) section 65; and the Courts Act of 1971 (Act 372) section 50 (1)). This has been slightly reformulated in section 54 of the current Courts Act of 1993 (Act 459). In its current formulation, a number of rules are provided for ascertaining the rules of customary law. A situation which suggests that we are not yet out of the woods in terms of the legal status of customary law requiring further proof. From these rules the discernible sources of customary law generally are:

- (a) testimonies and or depositions of persons held to be knowledgeable in a particular custom or otherwise considered competent as such;
- (b) judicial precedent of the Superior Courts of Judicature (High Court, Court of Appeal and the Supreme Court); and
- (c) textbooks and commentaries by scholars on particular customary law rules (See rules under section 54 of the Courts Act of 1993).

From the above historical sketch, it is difficult to indicate with certainty what the general rules of the customary law of the Dagara community are. Are they the rules of custom codified by the colonial administration with the connivance of colonial chiefs; judicial precedents of the superior courts (if any); testimonies of persons

acknowledged as competent (and by whose standards); or textbooks and commentaries by scholars on the subject (legal or non-legal)?

Woodman (1996) has indicated the dearth of judicial precedent on the customary law of communities of Northern Ghana as well as the difficulty of using texts of other social sciences in creating legal rules. As he rightly noted, it is an area that calls for legal research. For such research to be meaningful, however, it is important to begin with some jurisprudential questions in particular areas of customary law that will serve as a guide to addressing practical issues. Land being an important asset among the Dagara and around which there is relative uniformity of rules, it serves as a useful starting point.

## **The Dagara as Community**

The Dagara have been variously constructed as Lobis, Lowiili or LoDagaba (Rattray, 1932; Goody, 1956; 1958). The difficulty with such categorisations is that they seek to construct different cultural communities from weak or non-existent ontological basis. Other scholars are more competent to engage in this debate, for our purposes, we share the views of Kuukure (1985) and Tuurey (1982) who view these categories as subsumable under one linguistic group of either the Eyaale (those who say eyaa when they speak) or Mole-speaking. While they are often referred to as Dagao, Dagarti or Dagaba; we use the term Dagara for consistency. It is our hope that the experts in Dagara linguistics can live with such loose and limited use of the word.

This notion of the Dagara is an ideal type construct for analytical purposes only, as the reality is fluid and does not lend itself to such a neat categorisation. The boundaries between the Dagara, Sissala and Wala is of much anthropological speculation; as the migratory histories so far scripted suggests a mixing and integration of the peoples of the region (see Rattray, 1932). It is in this context that I abstract the linguistic category of Eyaale as a relatively homogenous feature of the Dagara.

The stories on the origins of the Dagara are as many as its dialect groups and in extreme cases are as myriad as individual village settlements. It is also divided between scripts of Dagara elite and the local stories lower down the social ladder. As Lentz (1994: 464-483) observes, these range from legends of the hunter and his neighbours; dispute between brothers; conquest and intermarriage to theories of a Dagara rebellion against Dagomba and an Accra or Cape Coast origin. Though the “grammar of discourse” on the past (to borrow Appadurai’s expression) has obvious links; they answer to radically different needs. As argued, “village-level patrician

narratives provide charters for local boundaries and rights, while tribal histories see the Dagara as a political community within a modern state” (1994: 492).

With particular reference to land relations, the concept *tendaalun* is a common feature of the Dagara; though rendered as *tendamba*, *tendaana* or *tengan sob* by the different dialect groups. Northern Ghana land law jurisprudence on this concept is problematic and contestable at the conceptual level. Such a reservation would be made clear subsequently in the narrative. My argument is that in defining the Dagara as a community in terms of customary law, one has to be sure of the particular social charter one seeks to open. In land relations it would be important to ascertain whether the dispute is between members of the same clan, different clans, the same village but different clans, different villages or between the Dagara and another ethnic group; as the notion of community in these contexts vary. The flexibility of Dagara historicity adapts to changing needs in time and space and have varying degrees of plausibility.

From this brief sketch, is there a customary law of land relations that can be said to be of the Dagara? Can we equally consider the Dagara as “community” within the purview of the state customary law? My argument is that the constitutional and legislative provisions on customary law do not define community. The assumption is that there is a shared meaning of the concept by all ethnic groups in Ghana. However, what one discerns from legal discourse on particular communities is a generalisation of the customary rules of some ethnic groups in Ghana to all others. As Hill argues:

The meaning of community resides in both its spatial and its social dimensions [as] relation of community to action remains at best unproven. The nature of these relations varies according to the location itself, the social characteristics of residents, the meaning of community they hold, and their hierarchy of values (1994: 39).

It is my view that Ghana’s state law notion of community from which the rules of customary law issues, is imaginary and not real (see Werther, 1997: 24; West and Kloeck-Jenson, 1999: 483). As Lentz points out:

In order to do justice to the dominant reality of the precolonial period, with its small, mobile groups of relatives, overlapping networks (for example, in cults) and flexible boundaries, one must think rather in terms of images of the networks and clusters, of shifting centres and peripheries. *Yir* (Dagara) or *gyaa* (Sisala), which can be interpreted, according to context, as house, residents of a house or patriclan, and *tengan* (Dagara) or *tie/too/tebuo* (Sisala), earthshrine area, were the two central building blocks of local societies and are still meaningful today (2000: 110; original italics).

It is in the above context that one can meaningfully (re-)imagine the Dagara notion of community as regards land relations.

## Land Relations among the Dagara

The phrase land relations as against customary land tenure or law is preferred for reasons of conceptual clarity. The notion of land tenure has been the subject of much conceptual controversy as to whether these are rules considered legitimate by a particular community; guaranteed by government statute; known by the community though not recorded in writing; or how these rules are arrived at in the first place ( See World Bank: 1983; c/f Noronha et al: 1983; and Simpson; 1976). In the particular case of the focus of this article, such clarity is also needed as the so-called customary law applicable to the Dagara land relations remain contested; have not all been acknowledged by state law as such; and is further not a simple relation between people but a complex of interrelationships between people on the one hand and between people and the land on the other. The concept of land relations seeks to capture the wider social relations that have implications for customary rules pertaining to land. For the Dagara, land is not only seen as an objectified inert factor of production but one with social, religious and political significance as well. This article is concerned with the lived experiences of the communities in question and not what state legal stipulations consider as their reality

## Naalun and Tendaalun in Dagara Land Relations

The stories told by Dagara communities suggest that the idea of the *tindana*<sup>3</sup> be viewed more as an institution other than individual actors who are seen as *fetish priests*. Discussions with the *tengan dem* of some Dagara communities (Kaleo, Nandom and Lawra) reveal that the *tengan sob* is the head of a ritual structural arrangement together with other institutional actors. There are the *suo sob* who performs the actual acts of slaughtering animals to the *earthgod*; the *zongmogre* who performs the same role in relation to sacrifices at market land places; and the *gara dana* or *wie sob* in respect of hunting expeditions over land. In most cases all these role actors belong to the same patriclan or smaller clans that are offshoots from a main clan. A tentative conclusion I draw is that, such related and yet separate offices within *tendaalun* show that particular land uses are administered by different traditional players. This finding is significant in terms of the legal consequences of land use which in the present times, involves competing and conflicting land uses as the bane of land relations among the Dagara.

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3 A general term used in the literature to designate the *tengan sob* for all communities of Northern Ghana.

Another issue on the Dagara land law jurisprudence turns on the relationship between *tendaalun* and *naalun*. The debate revolves around the much critiqued view of Ollennu (1985: 9), that the allodial title to land in northern Ghana vests in *skins* in *Azantilow v. Nayiiri*. As rightly indicated, the *Azantilow case* turned on the procedural issue of *locus standi* of the parties<sup>4</sup> (Kotey, 1993: 56); and cannot therefore be generalised for all northern Ghana communities in terms of interests' holders of land. This issue arises from the assertion by some chiefs to be the traditional custodians of lands within their traditional areas. A claim that emanated from the colonial period and continued in the postcolonial era. This claim arose from the power given to all chiefs, irrespective of the particular community, to from time to time declare what they consider to be the prevailing custom on any issue within their jurisdiction (see Elias, 1962: 91; Act 370, 1971; Article 274 (3), 1992 Constitution). An example of such a statement of the chiefs' customary law on land reads as follows:

All lands in this traditional area are rental and not for sale. At any rate land is acquired through three persons: first the owner of the plot, the chief, and the *tengan sob*; but the chief must necessarily be in the know of all lands that are to be acquired, for he is the *custodian* of all land within his area of jurisdiction<sup>5</sup>.

This notion of *custodianship* of lands by chiefs among the Dagara seem to form the basis on which chiefs *witness* (but in effect *endorse*) land transactions as part of the process of land interest transfers. As to whether such a development in land relations among the Dagara is a healthy one or not, is very much dependent on the contingencies in particular traditional areas; as it shows contradictory outcomes. An example of the standard form used for endorsing land transactions is as follows:

#### TRADITIONAL COUNCIL ENDORSEMENT

I confirm that the above named..... is head of the..... family/clan and that he by tradition and custom is authorised to make grants of the lands in the Area.

.....

(Paramount Chief)

.....

Registrar (Traditional Council)<sup>6</sup>.

The legal effect of chiefs *endorsing* land transactions among the Dagara remains problematic. Does it give validity to the transaction or is only a testimony that the transaction did take place? While there is no decided case on this issue, data from our

<sup>4</sup> This refers to the proper person in law who can institute legal action in respect of land.

<sup>5</sup> Nandom Naa's Palace (1978) "Customary Laws of the Nandom Traditional Area": 3-4.

<sup>6</sup> Collected from the Office of the Lawra Traditional Council during my Field Study, in August, 1998.

field study reveal that land administration institutions in the Upper West Region would not accord validity to a land transaction that is not *endorsed* by the paramount chief of the area in which the land is situated<sup>7</sup>. The legal basis for such an administrative practice remains mysterious as chieftancy among the Dagara is not a corporate land holding entity.

My argument is that the institution of *tendaalun* in land matters among the Dagara of Ghana would fade into oblivion in time, based on the slow but perceptible increased role of *naalun* in land matters. This is more the case where most lands in the Upper West Region have been reduced to family possession, in which the *tengan dem* role in their administration is limited. It is also the case that the constitution, legislations and land policy documents do not expressly mention the *tengan dem* as land holding entities. At the political and social level, the institution is relegated to the symbolic, if not esoteric role of pouring libation at official ceremonies. As is always evident in such ceremonies, the chiefs take their prominent positions of privilege; while the *tengan dem* emerge from obscure corners, perform their rituals and disappear for the rest of the programme.

An explanation offered by state land administrators on the non-visibility of *tendaalun* is that its head is often illiterate, untutored in modern ways, and lives a Spartan life surrounded by mythological practices. This view suggests that the state modern legality cannot or should not attempt to handle such complexities and myths. The echoes of legal certainty in the western jurisprudential myth of the *rule of law* (in which we see more of the rule of men) can be heard in such assertions. However, do such views try to inform themselves as to whether modern law also has its mythological sources. Dominant modern legal epistemology we take for granted also has its mythological sources (see Fitzpatrick, 1992).

To consider the mythological practices associated with the institution of *tindana* as not amenable to legal cognition is to make an ideological or political preference. It is as well a preference that privileges particular forms of legal *knowing*. As argued by Geertz (1983: 215), if law is viewed as a form of *local knowledge* (in a cognitive sense), it would free us from misleading representations of our own way of rendering matters justiceable and “force into our reluctant consciousness discordant views of how this is to be done”.

## The Family and Land Relations

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<sup>7</sup> This position was confirmed by the Secretary to the Regional Lands Commission of the Upper West Region in our discussion with him in July, 1998. The Commission validates all land transactions in the region.

The concept *family* is one of the most complicated issues in Ghana land law jurisprudence. It is also one susceptible to much confusion as regards the different ethnic groups in Ghana. This situation is not much helped by the binary features of *patrilineal/matrilineal*, *principal/junior* members articulated in customary law jurisprudence on the concept. Anthropological studies on the Dagara further befog an understanding of the family in terms of land relations. In most of these studies we again encounter the binaries of *minimal/maximal* and *extended/nuclear* notion of family. Goody (1958) for instance, sees the nuclear family among the Dagara as neither nucleus in the productive nor reproductive process as in the process of reproduction the smallest unit is the conjugal pair or the minimal lineage. And in the process of production, different groups emerge at various stages of the cycle-distribution, preparation and consumption.

However, as argued by Kuukure the Dagara do not even have the word denoting family in the nuclear or elementary sense:

By means of the term *yir*, the Dagao designates simultaneously the family grouping which live in the interior of the house and the house itself-the physical building. The husbands and wives with children are constitutive elements of the *yir*, whose members are subject to the authority of the *yir sob*; the elementary units occupy different quarters of the house, called *dio* or *logr* (1985: 33).

Tengan reaches a similar conclusion thus;

To conclude our attempt to define family/house, we can say that, though the notion *yir* is the closest translation of the term family, it is so polyvalent in meaning and signification that we always have to look at the context to see whether the term refers to the total patri-House (*yiilu*), a segment of the house (*logr*) or the married couple (*die*). For the Dagara, these four levels of the house are interconnected and ultimately form one totality (1997: 51).

My findings on the Dagara concept of family, show that it is understood in three interrelated contexts; with primary, secondary and tertiary levels of meaning. The term *yir* in the primary sense, designates both the physical building and the grouping living within it; with the *yir sob* as the head. These primary *yie* (plural of *yir*) further constitute a *yir* in the secondary sense. The latter often trace their descent to a common grandfather within a settlement. The most senior male among them acts as its head. The Dagara refer to him as *yir nikpen* and he often continues to live in the oldest house of the group known as *yir kura*. It is in this house that important rituals and funerals are held; and the custodian of the family common earthshrine (*maalu zie*) often lives in this house. There is a further use of the term *yir* in a tertiary sense, to designate the wider patriclan that could be separated in *space* and *time*. This group is

held together by Rattray's (1932) *totemic avoidance* known as *kyiru*. It is at this level we have the *tengan sob* as its head if the groups are the first settlers on the land.

Thus, the interests in land held under *tendaalun* and by the varying contexts of *yir* are interlocking and require some clarification. In Ghana land law jurisprudence, it is the position that the allodial interest in land in some northern communities is held by the *tindana* (see Cardinal, 1921: 60-61; Harley, 1951: 54). The questions that arise are; whether such a *tindana* is an individual actor or representative of an institution? Is there a distinction between this *tindana* and the head of the *yir* in the tertiary sense among the Dagara? In the same context, the family, where its members are of the first settlers are considered as having the *customary freehold* interests in the lands they have reduced into their possession (see Woodman, 1968). But is that the end of the story? Are we here referring to family in the primary, secondary and tertiary sense of the word as understood by the Dagara? We explore these issues in detail in the subsequent sections of this paper.

### **A Case Study: The Kabanye Land Dispute of Wa**

This dispute gave rise to the first significant land case that came before the new High Court in Wa, and as such it can be considered the watershed of state law approach to customary rules of land relations of the Upper West communities. Given the importance of judicial precedent<sup>8</sup> as a legal method in Ghana, lower courts in the region (see section 115 of Act 459) would follow the principles laid down in this case<sup>9</sup>.

This dispute involved rival claims to land in Wa popularly known as the *Kabanye lands*. The parties are the *Banja* clan of the *Kabanye* and the *Danaayiri* clan, both of Wa. The dispute arose when a portion of the land became the subject of acquisition by the state for the construction of a SSNIT (Social Security and National Insurance Trust) Housing Estate. The latter clan erected billboards on the land claiming ownership. The former clan who claims to have being in possession as owners, petitioned the Wa district assembly. The matter was referred to the Regional Co-ordinating Council and a committee was set up to make findings and recommendations on the rival claims.

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8 This is a legal method in which Lower courts are bound to follow the decisions of Higher courts on points of law, except where there are conflicting decisions of the Higher courts where Lower courts can opt to follow one of them.

9 Also see Bimpong-Buta, S. Y. "Sources of Law in Ghana", in (1983-86) *15 Review of Ghana Law*: 129-151 at pp. 145-150 for a detailed discussion on judicial precedent in Ghana.

The Committee found that the disputed land belonged to the *Danaayiiri* clan. The Committee was of the opinion that they had adduced sufficient evidence to prove their case; as against the *Kabanye* clan who could not prove same. The latter clan rejected the Committee's findings and instituted an action in the High Court (*Alhaji Adamu Iddrisu & Others v. Danaa Yakubu & Others*)<sup>10</sup>. The High Court decided in favour of the plaintiffs (Kabanye clan) and the defendants (Danayiiri clan) appealed against the decision to the Court of Appeal (*Danaa Yakubu & Others v. Alhaji Adamu Iddrisu & Others*)<sup>11</sup>. The Court of Appeal upheld the High Court decision.

While there are important legal rules laid down by both courts in this case, our focus is on some jurisprudential issues relevant to land relations of the Upper West communities. Where relevant, we will therefore reproduce the relevant portions of the judgments. In the decision of the High Court, his Lordship Justice Sampson held that:

I have not had any difficulty in accepting the plaintiffs' evidence of *tradition* to discharge the onus of proof upon them to establish their title to the disputed land. I also accept as overwhelming the plaintiffs' *overt acts of ownership and possession* of the disputed land (Record of Proceedings: p. 52; emphasis added).

On the issue of *tradition*, the court relied on the periods of reign of two chiefs of the Wa paramountcy in tracing the respective root of titles of the parties. It concluded that the plaintiffs had title to the land, having acquired it from the *tendamba* of *Sokpariyiri* during the reign of *Na Pelpuo I* (1681-1696); as against the defendants who asserted that they acquired title to the land from *Na Seidu Takora* (1888-1897). On the issue of *overt acts of ownership*, the court found that the plaintiffs had over a hundred compound houses on the land; as against four houses of the defendants. In addition, the court held that the plaintiffs had made dispositions of portions of the lands to third parties in the past. The only evidence of similar dispositions by the defendants was only after the Committee wrongly found that they had title to the land.

In arriving at its decision, the High Court relied on the principles laid down by the Court of Appeal in *In Re-Adjancote Acquisition: Klu v. Agyemang* ([1982-83 GLR 852]). Two relevant rules in that case stated by the High Court are as follows:

- (a) Oral evidence of tradition is admissible and might be relied upon to discharge the onus of proof if it is supported by evidence of living people of facts within their own knowledge.

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<sup>10</sup> L. S. No.1/93. Judgment delivered on 4/3/96 (unreported).

<sup>11</sup> Civil Appeal No. 96/97. Judgment delivered on July 22, 1999.

- (b) Where there is conflict of traditional history, the best way to find out which side is probably right was by reference to recent acts in relation to the land (Record of Proceedings: pp. 50-51).

Though the High Court's findings in this case are highly commendable, they do give rise to a number of important jurisprudential issues on land relations of the Upper West communities. Firstly, do the reigns of successive chiefs in Wa serve as the only historical basis for ascertaining root of title to land in Wa? Should the number of houses (physical structures) on the land or land dispositions made over the years serve as sole determinant of *overt acts*? The *Kabanye case* turns on its peculiar facts as pleaded, and I do not seek to diminish it. However, given the likelihood that lower courts in cases pertaining to other communities (including the Dagara) of the Upper West Region might follow the decision, I recast these principles within traditional modes of land relations in these communities. By this, I seek to indicate the context in which the principles enunciated in the *Kabanye case* can be applied as general legal stipulations to the Dagara and other communities in the region. My argument is based on findings from a field study we conducted among the Wala, Dagara and Sissala ethnic groups from May to September 1998 and from June to September 1999 on the Upper West Region.

My findings on the Wala community show a consistent pattern in the history of arrival and settlement of three main groups. The first settlers in Wa were the *tendamba* of the *Suuriyiiri clan* who met the *Lobis* (Dagara) and drove them further westwards along the Black Volta River. Some brothers of *Suuri* (clan head) migrated to other settlements such as Sokpariyiiri (basis of plaintiffs' root of title), Logu, Charia, Guli and Kpaguri. The *Nabihi* (*princely clans and basis of defendants' root of title*) who were settled in by the *tendamba* followed the *tendamba*. The last main arrivals were the Moslem community (plaintiffs' community) who were granted land either by the *tendamba* or *Nabihi* clans. In the latter case they could only be granted interests in land to the extent of the grantors<sup>12</sup>. These findings are supported by extensive historical studies conducted on the Wala community (see Dougah, 1966; Wilks, 1989). The Siiru Na (Na Seidu Braimah) also shares this historical position<sup>13</sup>.

It is my candid opinion that courts of law and committees on land disputes among the Wala communities can be guided by this historicity. While the reigns of successive chiefs of Wa turn on the facts of the instant case, it can have unintended consequences

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12 If the grant of lands was by a *tendamba* clan, they could grant interests in land up to an absolute title. But if land grants were by the *Nabihi* clan they could not grant such rights without the consent of their grantors.

13 Siiru-Na, "Ownership, Control and Use of land, Wildlife, Tree Resources and Water Bodies within Local Tradition and Wala Customary Regulations", in a paper presented on behalf of the Wala Traditional Area at a Workshop on *Savannah Resources Management Project for Opinion Leaders*. Wa, 24-26 June, 1998.

among the Dagara if it is uncritically replicated. We are likely to revisit the spectre of chiefs claiming to be *custodians* of lands within their jurisdictions. The Courts Act of 1993 (Act 459) further gives discretion to the courts in ascertaining relevant customary law rules, to have recourse to *textbooks* that may be appropriate (Section 55 (2) of Act 493, 1993). While the interpretation of what should count as relevant *textbooks* would be highly contestable, there is still room for considering historical texts in resolving land disputes. Though I appreciate the levels of subjectivity in scholarly texts in these matters, all texts (legal or non-legal) issue from particular positions of subjectivity. As socially constructed scripts, one will be hard pressed to explain why only legal scripts on social phenomenon should be privileged; beyond the self-referential attributes in legal hermeneutics on law as an autonomous entity. A view of law that has been sufficiently critiqued (Griffith, 1986; Fitzpatrick, 1992; Moore, 1978).

Applying this historicity of the Wala communities to the instant case, the evidence shows that the plaintiffs' root of title is traceable to the *tendamba* of *Sokpariyiri*; as against the defendants who trace the title to a *Wa Na* (Chief of Wa). Once there was no evidence from the defendants linking their title to a *tendamba* clan, the plaintiffs' title to the land was more probable. Approached in this way, historical texts in this case provides a jurisprudential grounding to the decision of the court and not as evidence as defence counsel sought to do in his address to the court (see Record of Proceedings: 76-89).

The Court of Appeal succinctly captured this issue of the *tendamba* as original owners of the land in the following words:

In short, there are three Tendamba in Wa who as the original owners of the land have separate and distinct portions of land they control. Some of which they gave to other clans, families and individuals to settle on. So that a particular piece or tract of land owned by one tendamba family could only be given away by that tendamba and not two or all of them at the same time. Therefore, any traditional evidence of later acquisitions cannot be investigated without finding out which particular tendamba owned the land and consequently gave same away (per Benin, J. A: 9).

Though the works of Dougah (1966) and Wilks (1989) were cited and rejected by both courts, this was in the context of defence counsel seeking to use these historical works as evidence without pleading them or leading evidence on them. And as they are not rules of law but opinions that may guide the court, its discretion in rejecting them at the address stage is well founded in law. As argued by the Court of Appeal:

Counsel for the appellants dwelt extensively on a book *WA AND THE WALA* written by IVOR WILKS. Counsel quoted facts from this book to support the defendants' case. Much as books are a source of information, especially those on

law, that are often relied upon by the courts, it must be stressed that facts contained in books cannot be used in place of evidence given on oath before the court. Indeed facts contained in books are not evidence per se (per Benin, J. A: 17; original emphasis).

However, in the light of section 55 (2) of the 1993 Courts Act, it cannot be interpreted to mean historical texts are irrelevant as a guide to resolving similar disputes. The relevant provision states that:

If there is doubt as to existence or content of a rule of customary law relevant in any proceedings before a court, the court may adjoin the proceedings to enable an inquiry to be made under sub-section 3 of this section after the court has considered submissions made by or on behalf of the parties and after the court has considered reported cases, *textbooks* and other sources that may be appropriate to the proceedings (section 55 (2) of Act 459; emphasis added.)

It is my view that textbooks of history on the Upper West communities though not evidence, may contain important facts on traditional history that can guide courts of law. This is more the case where there are conflicting accounts by the parties of such history. In the heat of litigation over an important resource such as land, the temptation to reconstruct historical events even under oath is great. Scholarly works more often than not have only an intellectual interest in their findings and are less likely to want to manipulate facts to serve immediate socio-economic ends<sup>14</sup>.

On the issue of *overt acts* as a basis for ascertaining interests in or possession over land, my findings show that the notion of *earthgods* among the Upper West communities is important. While the *earthgods* have particular clan names and designations, the Wala, Dagara and Sissala ethnic groups generally refer them to as *tengbama*, *tengan* or *vene* respectively. Their respective custodians as owners of the lands on which they are located can only sacrifice to these gods. It is my submission that the rituals and related practices associated with the concept of *earthgods* constitute *overt acts of ownership and possession* of land among these communities.

While this issue did not come up in the *Kabanye case* and did not turn on the facts as pleaded, it is nonetheless an important aspect of land relations in such land disputes. In the case of the Wala community, Na Seidu Braimah (1998) observes that; “a pond like *jeng jeng* is being pacified by the *tendamba* of Wa every year. *Bator* is also a river around *Siiru*, which is pacified by the *tendamba* of *Siiru* yearly (Ibid: 5).

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<sup>14</sup> This is not to be taken to mean that scholarly works may not be self-serving. But in the context of Ivor Wilks (a European), he is likely not to have a material interest in Wa lands. It is however significant to note that one of the key respondents in Wilks study of the Wala history was Alhaji Dodo who was P. W. 5 in the *Kabanye case*

My argument is that, while the principles on traditional history laid down in *In Re-Adjancote* are relevant to most communities in Ghana, the evidence required to ground them do vary. And also, while contemporary developments may entice us to use modern infrastructural developments as a guide in ascertaining *overt acts* of possession on land, it might have limited utility in other social settings without such developments.

## Conclusion

The basis for ascertaining the rules of customary law applicable to particular communities in Ghana is far from satisfactory. The authorship of such rules over the years has been one of only the dominant social forces, which script such rules within the shadows of their vested interests. As is the case, the perspectives of the social majority on these rules remain silenced. In this paper, I have argued that this is particularly the case of the state law approach to rules of custom held to be applicable to particular communities. I have used the rules of customary law held to be applicable to the *Dagara* ethnic group of Northern Ghana as point of entry. The emergence of these rules and their development over the years to the present time have been explored in terms of the social forces state law sees as its legitimate authors.

Using a case study and other findings from our field study of the *Dagara* ethnic group, we have demonstrated the distance between the state land law rules of custom and the social practices amongst this ethnic group. Our findings show that the courts of law often fail to define correctly or recognise the wider social contexts of traditional structures of land relations among the *Dagara*. This leads to a failure to see the distinction in levels of traditional authority in land relations and contributes to the production of customary law rules which are unrecognisable and highly destructive of the lives of the ethnic group in question. For instance, mandating a chief to speak to rules of customary law on land disputes, will give him power that is considered highly untraditional by the *Dagara*; and can contribute to the abuse of such a power.

We have also indicated that the state law perception of traditional authority in land relations with its notion of *community* over which it is exercised is “imaginary”. That is to say, it is invented, created, produced and reproduced in the midst of an ever-changing historical context. At each point, these rules are rewritten as new social forces emerge and are brought to bear on the fabrication of political legitimacy (West and Kloeck-Jenson, 1999: 483). Therefore, discourse on the rules of customary law applicable to a community have to be posited in larger questions such as; who claims legitimacy to author the customary law; by what argument; who is persuaded and why?

Inevitably, the customary law in the future of Ghana will be a product of multiple and some times conflicting *imaginings*. This is all the more true as state law appears reluctant to define what community from which customary law issues means. I can no better define *community* in this paper than the various actors in the Ghanaian customary law landscape. My suggestion is that any imagining of the customary law of the *Dagara* that ignores its contradictory history is bound to encounter, or to create more problems than one that takes this history into account.

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