

# **PRINCIPLES AND PRACTICES OF DISPUTE RESOLUTION IN GHANA**

## **Ewe and Akan Procedures on Females' Inheritance and Property Rights**

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**Victor S. Gedzi**

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## Reading Committee

### Promotor:

Professor dr G. ter Haar  
International Institute of Social Studies

### Co-promotors:

Professor dr B.M. Oomen  
Utrecht University

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University of Ghana

### Other members:

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Utrecht University

Professor dr W.E.A. van Beek  
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Professor dr J.M. Otto  
Leiden University

Dr T. Truong  
International Institute of Social Studies

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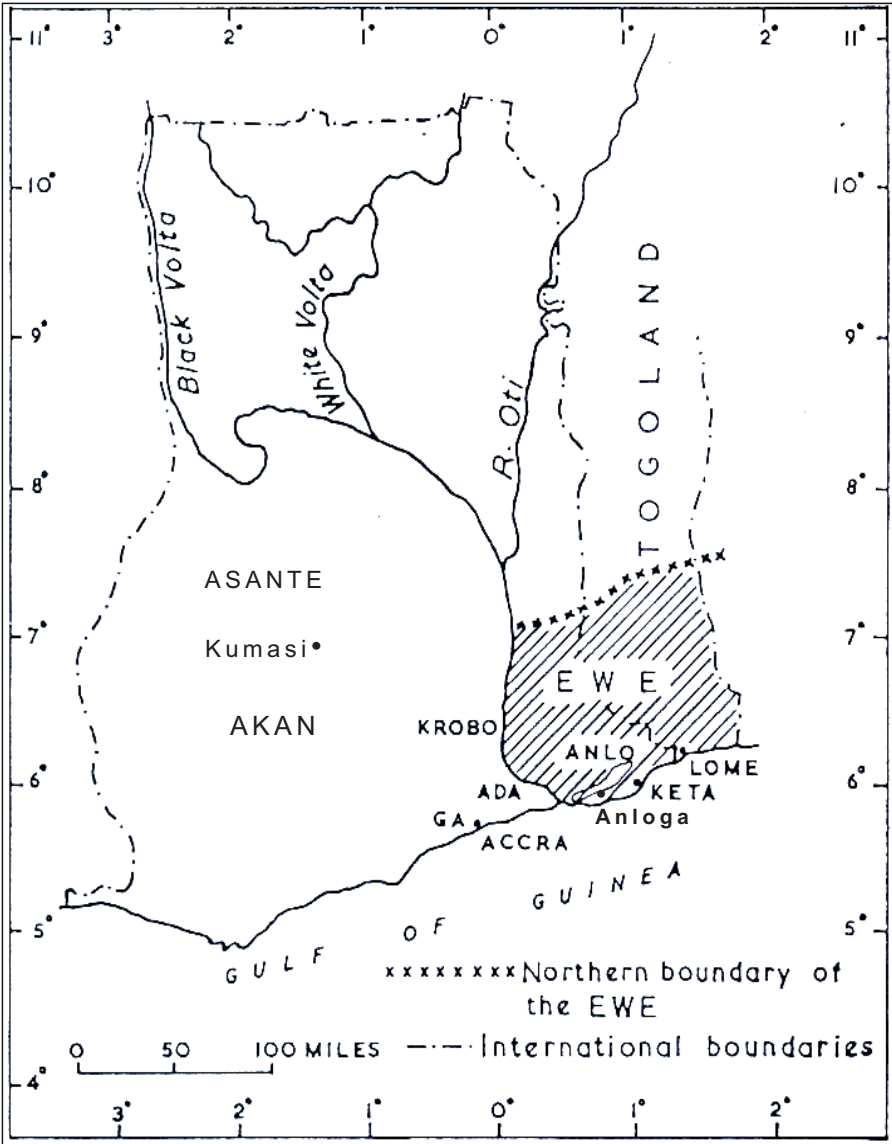
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Map of Ghana showing the research units of Asante and Anlo in the Ashanti and Volta regions of the country (Nukunya 1969)



## Abstract

The thesis analyzes core elements of variant dispute resolution procedures in chiefs' courts, and substantive laws among the Anlo and the Asante of Ghana. It delimits itself to studying dispute resolution procedures and proceedings on female's property inheritance among these two socio-cultural groups. The intention is to identify strengths and weaknesses of the dispute resolution institutions (including substantive laws), which infringe on women's inheritance and property rights in spite of legislative interventions to remedy the situation.

The research is necessitated by current inundation of the formal court in Ghana with cases. In the national and international discourses it has become clear that the formal sector alone cannot handle the enormous volumes of cases. Even though chiefs' courts in Ghana help to some extent in decongesting cases in the formal courts, it is alleged that they are gender biased, for example in their panel representation of legal decision-makers, and that not only procedures but also their court norms or principles are gender discriminatory. This calls into question whether indigenous institutions can play any meaningful role in the attainment of gender equality as propounded by the international regimes such as Protocols to both the African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The approach of the research is that of an anthropological qualitative case study. The study involved secondary and primary data with (participatory) observation, and explanations of indigenous proverbs and metaphors, which encapsulate how women are socially imaged by both the patrilineal and matrilineal family systems and how this social image defines their position in society in terms of their inheritance and property

rights. The primary data are obtained from fieldwork in Anloga and Kumasi, both in the Volta and the Ashanti regions of Ghana.

The findings of the research are that in spite of governments' legislative interventions, indigenous principles and socio-cultural practices of the research units continue to a large extent to determine intestate inheritance. In addition, when it comes to inheriting a man's property, women have fewer rights than men. My thesis is that negative social image of women is the cause of women's social and economic subordination to men in kinship structures in Ghana. Kinship or family structures, the domain of legal and socio-cultural practices of the Anlo and the Asante, often treat women differently from men in social and in economic relations. It follows that appreciation of the above, together with other cultural practices in the social universe of the two groups of people need to be considered in the reform of intestate succession law in Ghana.

The study uses the basic principles of the Protocols to both the African Charter and the CEDAW on women's inheritance rights as the assessment criteria. The research is significant because, *inter alia*, it contributes towards the strengthening of procedures in chiefs' courts, and in the reform of indigenous principles that are gender discriminatory. This may lead to a more credible and acceptable dispute settlement in chiefs' courts. This may reduce the congestion of cases in the formal courts in Ghana. Finally, the findings of the research, among other things, contribute to anthropological discourses on indigenous law and dispute resolution generally, and particularly in Ghana.



# PROCEDURES BIJ DE EWE EN AKAN TEN AANZIEN VAN DE ERFRECHTELIJKE AANSPRAKEN EN VERMOGENSRECHTEN VAN VROUWEN

Victor Selorme Gedzi

## Samenvatting

Dit proefschrift analyseert essentiële elementen van verschillende geschillenbeslechtingprocedures in gerechten van de chiefs en onderzoekt materieel recht bij de Anlo en de Asante in Ghana. Het onderzoek beperkt zich tot geschillenbeslechtingprocedures en procedures inzake erfrecht van vrouwen bij deze twee sociaal-culturele groepen. Het is de bedoeling om de sterke en zwakke punten van de geschillenbeslechttingsinstanties en van het materieel recht aan te tonen. De geschillenbeslechttingsinstanties doen afbreuk aan de erfrechtelijke aanspraken en vermogensrechten van vrouwen, ondanks wetgeving die is ingevoerd om de situatie te verbeteren.

De stortvloed van zaken die worden aangebracht bij de officiële rechtbanken in Ghana vormde de aanleiding voor het onderzoek. Op nationaal en internationaal niveau is duidelijk geworden dat het officiële rechtssysteem de enorme hoeveelheid zaken niet alleen aankan. Gerechten van de chiefs in Ghana nemen weliswaar een deel van de zaken van de officiële rechtbanken over, maar deze gerechten zouden niet sekse-neutraal zijn, bijvoorbeeld vanwege hun samenstelling. Ook zouden niet alleen hun procedures, maar ook hun normen en uitgangspunten discriminerend voor vrouwen zijn. Dit roept de vraag op of inheemse instellingen wel een rol van betekenis kunnen spelen bij het bereiken van gelijkheid van mannen en vrouwen, waarover op internationaal niveau afspraken zijn gemaakt. Deze zijn vastgelegd in het Afrikaans handvest voor de rechten van mens en volken (het Afrikaans Handvest) en in het Verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen (CEDAW).

Dit onderzoek is opgezet als een antropologische kwalitatieve case-study. Naast een literatuuronderzoek zijn er gegevens verzameld door

middel van (participerende) observatie. Verder geeft dit onderzoek een uitleg van inheemse spreekwoorden en gezegden die de sociale beeldvorming van vrouwen in zowel patrilineale als matrilineale familiestructuren weergeven. Daarbij wordt besproken hoe deze beeldvorming de maatschappelijke positie van vrouwen bepaalt op het punt van hun erfrechtelijke aanspraken en vermogensrechten. De onderzoeksgegevens zijn verzameld tijdens veldwerk in Anloga en Kumasi. Deze plaatsen liggen in de Volta- en Ashanti-gebieden in Ghana.

Uit het onderzoek blijkt dat inheemse tradities en sociaal-culturele gebruiken in het onderzochte gebied ondanks overheidsingrijpen door middel van wetgeving nog steeds een grote invloed hebben op wat er gebeurt in geval van erfenis bij versterf. Bovendien hebben vrouwen minder rechten dan mannen als zij het bezit van een man erven. Dit onderzoek stelt dat de negatieve sociale beeldvorming van vrouwen ervoor zorgt dat vrouwen in sociaal en economisch opzicht ondergeschikt zijn aan mannen binnen families in Ghana. De juridische en sociaal-culturele gebruiken van de Anlo en de Asante zorgen ervoor dat vrouwen vaak anders behandeld worden dan mannen in het sociale en economische verkeer. Met bovenstaande factoren en met andere culturele gebruiken van deze twee groepen moet rekening gehouden worden bij de hervorming van wetgeving op het gebied van erfopvolging bij versterf in Ghana.

Als beoordelingscriteria gebruikt het onderzoek de uitgangspunten van het Afrikaans Handvest en het CEDAW ten aanzien van de erfrechtelijke aanspraken van vrouwen. Dit onderzoek is belangrijk omdat het onder andere bijdraagt aan de verbetering van procedures in gerechten van de chiefs en aan de hervorming van seksistische inheemse uitgangspunten. Dit leidt mogelijk tot een geloofwaardigere en acceptabelere geschillenbeslechting in gerechten van de chiefs, waardoor de officiële rechtbanken in Ghana minder zwaar belast hoeven te worden. Ten slotte kunnen de resultaten van dit onderzoek ook een bijdrage leveren aan de discussie binnen de antropologie over inheems recht en geschillenbeslechting in het algemeen, en in het bijzonder in Ghana.



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# 1

## Introduction

It is impossible to ignore the phenomenon of conflict or dispute in our world. At home, at work or on an errand, we are constantly bombarded by both electronic and print media with news of all sorts of disputes, such as the recent events between Israel and Gaza in December 2008 and January 2009. Another example is the protracted conflicts between the Al-Qaeda and the Tālibān on the one hand, and the United States with its sympathising allies, on the other. In Eastern Europe, the deep scars left by the clashes between Russia and Georgia in south Ossetia and Abkhazia in August 2008 are unlikely to heal soon. In parts of Africa, the disputes in the Congo, Somalia and Darfur in the Sudan have caused untold humanitarian crises. These are a few examples that show the tentacular and cross-cultural character of dispute. Since conflicts or disputes are inevitable, we need effective ways of resolving them.

The present thesis is about dispute resolution systems. Dispute, as clarified in chapter 2, is a multifaceted concept in the sense that there are many types of it. There are, for instance, national and international disputes, organisational and corporate disputes, labour and commercial disputes, consumer and tort disputes, family disputes, property disputes and many more (See detailed analysis in chapter 2). Because of the vastness of the subject matter, this thesis deals with the procedures of dispute resolution with regard to females' property inheritance amongst the patrilineal Anlo and the matrilineal Asante of Ghana.

Ghana, a country in West Africa, was the first nation in sub-Saharan Africa to gain its independence from British colonial rule, on 6 March 1957. Before the advent of the British into the then Gold Coast (Ghana), most Ghanaians were organised into different microstates with kings or chiefs, elders, queen mothers or *mamagawo* as their leaders and rulers; and with institutions and systems of indigenous law, which governed the lives

of the people (Acquah 2006: 66). The rulers of the different polities presided over courts that dealt with different kinds of cases within their specific jurisdictions. Understanding of institutions such as indigenous law is therefore important because they play a significant role in dispute resolution on property inheritance among the Anlo and the Asante.

In Ghana, the concept of 'customary law' is used to describe both indigenous law orders that have been officially recognised and applied in the formal court, and unwritten indigenous law orders of various ethnic groups. This leads to confusion and ambiguity in the usage of the concept. In order to avoid this ambiguity, the thesis employs the term 'indigenous law' to refer to the unwritten local law orders of the Anlo and the Asante that are non-static or ever changing, which the two groups recognise and accept to govern their everyday lives, social and business transactions. Social practices such as, gender stereotypes of the family systems often influence indigenous law among the Anlo and Asante. This thesis uses the term, customary law only in a restrictive sense to refer to those indigenous laws officially compiled and used in the formal court in Ghana (See detailed discussion in chapter 2).

The British colonial power and the early post independent Ghana governments tried to substitute indigenous legal practices with Western justice (Stoeltje 2007: 1; Acquah 2006: 66-9). Indigenous courts were abolished and replaced by local courts presided over, primarily, by laypersons. With the passage of time, these courts became community tribunals. In present day Ghana, they have become District Courts. Lay participation in these courts was abrogated by the Courts Amendment Act 2002 (Act 560), which gave power to lawyers to preside over the District Courts (Acquah 2006). But this modern system of law is besieged with serious perennial problems. For example, there are difficulties in finding professionals, including laypersons, to preside over the courts. Lawyers are often unwilling to accept appointments to these courts. This has made it very difficult for the government to establish community tribunals in all areas of the country. Apart from the insufficient number of formal courts to handle litigation, the average Ghanaian finds it difficult to afford the cost of services in the court. The mentioned difficulties and other challenges have led to a sense of law nostalgia, which resulted in calls for a rediscovery and adaptation of indigenous dispute resolution systems (Uwazie 1991, 2000; Ayittey 1991; Albert et al. 1995; Comaroff and Roberts 1981). According to Justice Acquah,



It seems, therefore, that in the face of the Courts Amendment Act 2002 (Act 560), the most plausible solution to the problem of getting justice to the doorsteps of the people is to examine how far the arbitral tribunal of the chief can be moulded and regulated to handle minor disputes at the rural levels (Acquah 2006: 71).

The fact that the formal courts in Ghana, like those in other countries today, appear overstretched with more caseloads than they can handle on time necessitates this demand. Some attribute the increase in the cases to factors such as the opening of world markets characterised by diversities and differences. This relatively new phenomenon may have given rise to miscommunications with the effect of creating a massive volume of disputes (Popat 2003). Conversely, economic pressures emanating from complex modern life, the growth of consumerism and intolerance, *inter alia*, contributes to the number and complexity of civil disputes we witness today (Okudzeto 1994). This state of affairs appears not only at the national and international levels, but also at the individual and collective levels. Thus, the home, the work place, commerce and personal relationships share in the upsurge of disputes. Similarly, Jeremy Mathews noted that:

In recent years the court system of Hong Kong, which had previously prided itself on the speed and efficiency with which it was able to deal with claims, has shown signs of becoming overloaded. The number of civil claims has increased. In themselves, the claims are more complicated – perhaps because business is being more supplicated but partly because people are for the first time testing the system to its limit (Okudzeto 1994: 247).

The Hong Kong situation is comparable to the context in Ghana. In all this, it becomes abundantly clear that the task of dispute resolution has become too overloaded for the public sector to handle alone. It therefore follows that a society that does not take into account this upsurge in disputes and make provisions for additional ways of resolving them may have to discard them.

Systematic statistical data showing the number of cases tried per annum in any individual District or Circuit Court in Ghana is difficult to obtain.<sup>1</sup> However, research indicated that from 2003-2004, the total number of cases brought to District or Magistrate Courts nationally amounted to 59,031 (Crook 2004: 8). In addition, among the total number of cases, only 23,351 of them were resolved. An estimated 71 per

cent of the 59,031 cases were new cases. Crook has further shown that the High Court in Kumasi has recorded 19,525 cases in 2001 and 19,876 cases in 2002. Out of the total number of cases brought to the court in 2001, 772 achieved settlement while only 582 settled in 2002. The research has shown a 15.7 per cent increase in cases at the High Court (Crook 2004: 7). Interviews with some lawyers, judges, chief registrars and senior filing clerks have shown that there is congestion of cases.

According to Clement Amorfa, a lawyer at the Trinity Chambers at Adum in Kumasi, there is no doubt that there are piled-up cases from previous years. This congestion of cases comes partly from the nature of the cases and from the daily rate at which the case reports arrive. He explained that because of the nature of a particular case, such a case may be tried and disposed of, or be protracted. This means that in some instances, a judge is able to complete the trial of a case within a day. In other instances, a case may take one or more years. He indicated that the traffic of cases coming into the courts daily is enormous. He mentioned that even if his court were to receive one case each day, it means that at the end of the year, there may be about 365 received cases. Yet, because of their individual intricacies, not even a quarter of these cases reach trial in a year. This leads to overloading, especially with the other legal duties such as giving legal advice, placed upon judges and lawyers.

The senior registrar and the filing clerks at the High Court at Adum in Kumasi supported the increase in the volume of cases. The senior filing clerk for example, among other things, indicated that within January 2008 alone, he filed 22 land cases. He also mentioned devolution of estate cases, which he estimated at 60 within the same month. He explained that the number of cases 'augments' in some months, and concluded that property cases such as land and estates topped the cases filed at the High Court. Even though this empirical evidence may not be representative, it offers an idea of what may be happening in other trial courts in the country. Thus, in one of the daily newspapers,<sup>2</sup> the Chief Justice of Ghana, Mr G.K. Acquah, highlighted the problem facing the formal courts and warned that cases pending that have seen no proceedings in more than a year would be struck out. In the same paper, the Attorney-General and Minister of Justice, Mr Ayikoi Otoo expressed the vital need to 'incorporate' indigenous dispute settlement procedures and other alternative dispute resolution mechanisms for decongestion of cases in the trial courts in Ghana.

Chiefs play a remarkable role in dispute resolution in indigenous courts in Ghana; a power they have held since pre-colonial times. The interference of this power began as far back as 1844 by the British colonial power and was considerably curtailed in 1927 with the passing of the Native Administration Ordinance (No. 23). After this historical moment, ‘aboriginal judicial tribunals ceased to exist, and every tribunal which should exercise judicial functions as distinct from arbitral functions, had to be one which derived its jurisdiction from enactment’ (Acquah 2006: 67). The Ordinance viewed it as an offence for any person or group of persons who might hold or claim to have authority to hold a tribunal or take part in its proceedings without having been authorised by the ordinance (Sec. 54). However, this ban did not affect the powers of chiefs to hold or take part in proceedings of an extra-judicial nature. The curtailment of the judicial powers of the chief was complete with the passing of the Local Courts Act (No. 23 of 1958), which stripped chiefs of their native courts. The Chieftaincy Act of 1971 (Act 370) repealed the previous Acts, but sustained the restrictions put on the judicial powers of chiefs. Since then, chiefs have lost all their statutory powers to adjudicate on civil and criminal cases, except disputes involving their own chieftaincy institution (Acquah 2006: 68-9). They however have authority to act extra-judicially as arbitrators in any dispute when disputants voluntarily consented and brought their cases to the chiefs. In this limited judicial capacity, article 220(1) of the 1992 Constitution of Ghana also recognises the institution of chieftaincy and their traditional councils established by custom and usage.

## 1.1 Research Problem

Among the Anlo and the Asante of Ghana, chiefs’ courts are time-honoured institutions for dispute resolution. Despite the legal impediments, which considerably curtail their judicial power, chiefs continue to function in their courts. Still, some claim that these indigenous institutions are gender discriminatory and that this, among other things, affects females’ inheritance and property rights (Whitehead and Tsikata 2003: 93). Furthermore, some observe that traditionally, women seldom hold property or a position of authority and therefore females’ inheritance in indigenous law is of less importance. As a result, the rules governing devolution of female’s estates are not only fragmentary, but also seem different from the rules applicable to male’s estates (South African Law

Commission 1998: xviii). While this observation concerning women in South Africa comes in relation to indigenous law on inheritance, the same situation applies to the position of women in Ghana in the sense that law fed with kinship or family social practices (Whitehead and Tsikata 1984: 177) affects their inheritance rights. Kinship structures as the domain of legal and socio-cultural practices treat women differently from men as far as property inheritance is concerned.

In addition, these norms derive from the social life, which itself is gendered. This may influence the rules and decisions at the courts (Griffiths 1997: 134). Aylward Shorter claims that in Africa, men who more frequently accuse women of witchcraft are also the people who preside over the court at which the cases are heard (Shorter 1977); a situation similar to that of rural Ghana.

Last but not least, religion and culture, which are part of the social fabric everywhere as in Ghana, are said to influence legal decision-making and people's rights (Donnelly 1984; Durkheim 1966). For instance, because of fear of spiritual attacks and death, many people, especially women, find themselves 'silenced or unable to negotiate with others in terms of day-to-day social life' (Griffiths 1997: 12), let alone claim their inheritance and property rights.

### **Females' inheritance and property rights**

In the absence of a more appropriate word, the term 'female' applies to both girls and women in this thesis. Females' inheritance and property rights are important family issues in Ghana. Under the patrilineal and matrilineal systems of inheritance, the wife lacks full recognition as part of her husband's lineage. This means that the wife may not have the legal right to inherit her deceased husband's property and vice-versa (Rünger 2006: 6; Fenrich et al. 2001; Tsikata 1997). Additionally, even though children are legal beneficiaries of their father's estate in the patrilineal system of inheritance, female children appear not to have equal rights with their male siblings. The female child's position in relation to inheriting of her male parent's property like land is purportedly a matter of privilege and not of right (See Kludze 1973; Nkunya 1969).<sup>3</sup>

In the matrilineal system, on the other hand, children belong to the mother's family. Allegedly, indigenous law does not allow a wife and a child to inherit from a husband or a father. After the death of a husband, his maternal family inherits his property. Even though indigenous law in

both the patrilineage and in the matrilineage allows husbands to make provisions for their wives (and for children in the matrilineal inheritance system) in terms of giving them part of their self-acquired property before their death, often, many do not do it. The situation of females with regard to benefiting from their male parents' property seems less promising than that of the males.

The situation of indigenous law not favouring women when it comes to inheriting a man's property appears to be confirmed by the judicial decisions set forth in the following formal court ruling; the 'fact that a wife has served her husband faithfully during marriage does not by itself entitle her to a share in the property acquired by the husband' (see Offei 1998: 276; Fenrich et al. 2001). Thus, it appears that indigenous law, under which most Anlo and Asante marriages are contracted, does not make provision of inheritance for wives, divorcees, widows and women living in non-marital relationships when their husbands or partners die, or in the event of dissolution of such marriages. This may leave many women propertyless and even impoverished.

The formal courts in Ghana appear to have moved from the position. Presently, when a husband acquires property with the help of his wife, such property may no more be considered as solely belonging to the husband once the wife proves that she helped in the acquisition of the property. But according to Kunyehia (1990: 82), 'application by the courts of rules of equity ... still leaves wives at the mercy of judges and their interpretation of case law and also their understanding of rules of equity'.

This state of affairs in females' inheritance and property rights led to a legislative intervention by the then Government of Ghana, the Provisional National Defense Council (PNDC) in 1985, with PNDC Law 111 on intestate succession. The rationale behind the enactment of this intestate succession law was to ensure that a substantial amount of the intestate would go to widows and their children. However, the relatively new law, on intestate succession, seems besieged with serious flaws to the extent that some do not even see any major distinction between it and the indigenous law of succession in the patrilineal communities (see Fenrich et al. 2001; Dankwa 1998; Yeboa 1992). As a statute, the law applies only to intestate that is not included in a valid will. Thus, should a man die partly intestate, it means that the law applies only to the part of his estate not covered by the will. In other words, a husband who for some

reasons does not want his wife to benefit from his estate may override the provisions of Law 111 by simply making a will with regard to his property (Fenrich et al. 2001). Thus, this PNDC Law 111 on intestate succession, like the indigenous law, appears not to make provisions for divorced women and women in non-marital relationships, even though such women might have helped their partners in the acquisition of property.

Issues of females' property inheritance rights seem complicated by recent research findings that many women, especially those in rural Ghana, are unaware of the existence of PNDC Law 111 (Rünger 2006; Fenrich et al. 2001). Even those who are aware that the law exists either misapply or fail to apply it due to social pressure from families. It appears therefore that it is not only indigenous laws, but also the modern law of succession, which has fundamental problems. This implies that both the ancient and the modern laws of succession may not meet the standard prescriptions set by international instruments such as the Protocols to the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (See Gender & Development 2006: 71-8), reflected in the 1992 Constitution of Ghana.

In the first place, according to the international treaties, there should be equity in the regulation of access to property. Equality clauses in the international human rights instruments also insist that women receive equal protection before the law.<sup>4</sup> This objective has international acceptance as an important pillar of social justice and equity.

Second, Article 22 of the 1992 Constitution of Ghana supports the legal standards set on females' inheritance rights by the international treaties, which state that 'a reasonable provision' out of the estate of a spouse should be given to the surviving spouse, and this should be done irrespective of whether the former made a will before his/her death or not. The same article indicates that spouses should receive 'equal access to property jointly acquired during marriage' and that properties 'jointly acquired during marriage' be shared equitably between the spouses once the marriage has been dissolved (see Article 22(2, 3) of the 1992 Constitution of Ghana).

Article 17(1) of the Constitution further, maintains equality of all persons before the law. Additionally, it gives equal rights to every person to own property either alone or in association with persons (see Center for

Reproductive Rights 2003: 44; Article 18 of the 1992 Constitution of Ghana). Article 17(2) of the Constitution eschews all forms of discrimination based on gender, ethnic origin, religion, creed, social or economic standing of a person. Although the Constitution does not explicitly apply this provision to women, there is the general presumption that the constitutional guarantees of equality before the law and non-discrimination based on gender prohibit discrimination against women with respect to property. More so, it clearly stipulates in Article 36 (6) that:

The State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.

Ghana signed the international human rights instruments relevant to the subject, including the Universal Declaration on Human Rights (UDHR) in 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, the Convention on the Rights of the Child in 1990, the Convention on the Civil and Political Rights, the Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979; and the African Charter on Human and Peoples' Rights in 1989. Having ratified UDHR, Ghana has obligations under the provisions of these instruments, especially the Convention, to 'protect and promote women's rights to property' (Rünger 2006).

In spite of the international and internal constitutional provisions and the legislative intervention, indigenous law continues to affect the property inheritance rights of females adversely, particularly in rural Ghana. In view of the criticism against indigenous law and courts, I decided to conduct research into indigenous dispute resolution procedures, including substantive laws on females' property inheritance rights among the Anlo and the Asante. The primary goal was to find out whether the procedures in indigenous courts are generally unfair to women in relation to the latter's inheritance and therefore, their property rights.

## 1.2 Research Questions

Many anthropologists suggest that instead of abstracting indigenous rules for investigation on dispute resolution, it is appropriate to widen the analytic field to cover related issues in the 'total social universe' (Roberts 1976). This raises the general question: *What is the relationship between state*

*courts/law, and indigenous courts/law, including general principles and actual practices governing inheritance among the Ewe and the Akan, on the one hand, and the standards set by the international human rights regimes on females' property inheritance, on the other?*

In order to answer this question, the present thesis commences by looking into the history of laws of intestate succession in Ghana. It asks specific questions such as: what legislative intervention has the British colonial government made in relation to intestate succession in Ghana? What is the current intestate succession PNDC Law 111? What is the devolution of intestate property under PNDC Law 111? What is the people's conception of PNDC Law 111?

The thesis further discusses indigenous laws of inheritance among the Anlo (Ewe) and the Asante (Akan). It poses questions such as: what Anlo/Asante general principles or norms affect females' property inheritance rights? What are the actual practices of inheritance among the Anlo and the Asante? What is the social universe that characterises norms and actual practices of inheritance between the two socio-cultural groups?

In addition, the thesis analyses the international human rights protocols to the African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on females' inheritance. It asks the questions: what is the relationship between PNDC Law 111 and the international human rights protocols to the African Charter and the CEDAW in relation to females' inheritance as reflected in the 1992 Constitution of Ghana? What is the present status of PNDC Law 111 among the Anlo and the Asante?

The research also investigates the situation of traditional inheritance after PNDC Law 111. It asks the questions: what is the situation of women in relation to indigenous principles and actual practices on inheritance after government intervention with PNDC Law 111? In what ways does the belief in mystical or spiritual forces affect females' property inheritance? How rights conscious are women in relation to asserting or claiming their inheritance rights? Further, it looks into women's conceptions about both the formal and indigenous court systems. It poses these specific questions: what are the attitudes of Anlo and Asante women toward indigenous and formal court systems? How has the experience of property inheritance engendered by family legal and socio-



cultural practices of Anlo and Asante, influenced women's selection of arbitration types (courts) for defending or claiming their rights?

In addition, the thesis considers dispute resolution in Ghana. It specifically asks questions such as: what is the history of the formal and indigenous court systems in Ghana? What is the judicial structure of the Anlo and the Asante? Who occupies a legal role in indigenous courts and what do the role-players do? What are the procedures of dispute resolution on females' property inheritance among the Anlo and the Asante? What is the 'conversion process' of the legal system or how are demands handled, by whom, and how are decisions made? What laws/principles or norms are used in indigenous courts and are they different from social laws/principles or norms on property inheritance? What are the organising factors in indigenous dispute resolution processes among the Anlo and the Asante? In what ways do indigenous legal institutions not meet standards set in the international human rights instruments such as the Protocols to the African Charter and the CEDAW in relation to females' inheritance?

In chapters 3, 4 and 5, this thesis analyses these questions and chapter 6 contains an evaluation of the findings.

### 1.3 Research Objective and Significance

The main aim of this thesis is to contribute towards strengthening the existing indigenous procedures with a view to better delivery of dispute resolution services to help decongest cases in the formal courts in Ghana.

In light of the research problems that engendered the research questions, I think that if the existing chiefs' courts procedures were strengthened by research findings, they might offer more credible, effective and acceptable dispute resolution services. This might help decongest the cases in the formal courts in Ghana. This would mean, for example, that family disputes on property inheritance, divorce, marriage and domestic violence may be treated in chiefs' courts and other indigenous fora instead of taking them to the formal courts. This may be especially significant in family law and in marital disputes where the 'winner takes all' perspective that is dominant in the formal law seems less suitable. Moreover, indigenous dispute resolution institutions are time honoured, culturally embedded social processes, and therefore, their procedures, as well as their substantive laws, may be culturally more comprehensible,

accessible and financially affordable for the average Ghanaian. This assertion acknowledges the fact that the processes need modification to meet present day challenges (see South African Law Commission 1998). For, as ‘native culture is not “static”; its operational paradigm is nevertheless formulated on a continuity of exchange between and among kin groups that place the imperative of preserving and creating balance between and among those groups above all other imperatives’ (Damren 2002: 91).

Furthermore, the findings of the research may be a source of inspiration for the development of a new procedure—an integration of informal and formal dispute resolution procedures in Ghana—not only for an improvement of the legal procedure, but also its affordability. Ideally, it may contribute towards the development of a homogeneous dispute resolution procedure for the indigenous courts. In addition, since the indigenous court procedures are in local languages, locals who want their cases resolved in indigenous courts may easily understand them. This may make the decision-making system in Ghana more protective of the rights of the individual. This is because the individual may be conversant with legal proceedings and may be able to defend his or her rights when the need arises. Moreover, given the assumption that the indigenous dispute resolution approach is litigation-friendly, it may maintain or restore existing relationships between disputants. Last but not least, since the research tries to locate some core elements or principles of variant indigenous dispute resolution procedures (including substantive laws), its findings may contribute to anthropological studies on indigenous law in ‘small-scale societies’ in Ghana, as well as to the body of knowledge on dispute resolution procedures generally.

## 1.4 Methodology

### Validation bases

The research units for this study are Anlo and Asante ‘traditional’ societies. A number of factors, including, the different kinship or family systems of the two groups of people and the fact that both societies have a traditional heritage of dispute resolution influenced the choice.

Anlo society, one of the Ewe subgroups in the Volta region of Ghana, is located in the southern part of the country. The Atlantic Ocean forms its western border, while the Keta Lagoon marks its eastern

border. From the east, Anlo stretches from the River Volta to Aflao, which borders the Republic of Togo. Anlo also extends inland to the southern boundary of Adaklu, another subgroup of the Ewe (Amenumey 1968). This implies the Anlo people do not have much land since the effect of the expanding sea and Keta Lagoon has taken much of it. Thus, many disputes are land-centred.

Despite their socio-cultural commonness with other Ewe groups, linguistic characteristics differentiate the Anlo from them. Proper Anlo comprises 36 towns (Amenumey 1968) with 15 clans namely, Lafe, Amade, Adzovia, Bate, Like, Bamee, Wifeme, Klevi, Agave, Ame, Dzevi, Xetso, Blu, Tovi and Tsiamé. The main occupation of the people is fishing, farming and trading (Kumassah 2003; Abotchie 1997). Anloga, the site of the fieldwork, is the traditional capital of Anlo. A recent national census put the population of Anloga at 20,000.

The Asante are located in the southern central hinterland of Ghana. Asante society constitutes a confederation of satellite 'states' such as Dwaben, Kokofu, Nsuta, and Bekwai, which united in the 17<sup>th</sup> century under Kumasi to form the Asante kingdom. Kumasi, the second fieldwork site, is also the traditional capital of the Asante kingdom. It is a bustling city and an important transportation hub. The population grew at an average rate of 4.2 per cent per annum from the beginning of 1960. Today, the population of Kumasi is 1,400,000 (Ubink 2008: 23). This rate of population growth would naturally put pressure not only on land but also on housing, creating accommodation related problems in the city. The main occupations of the people are farming and trading (Sarbah 1971; Goldschmidt 1981).

The fact that the two societies represent the patrilineal and matrilineal family systems in Ghana influenced the choice of the Anlo and Asante socio-cultural groups for this research. These two lineages are the foundation of the social organisation in Ghana. One naturally belongs to either of them by birth. The Anlo are a subset of the patrilineal Ewe people, while the Asante belong to the matrilineal, generic group known as the Akan. Each lineage group has a degree of socio-cultural commonness among its various people; a commonness, which sometimes, in some ways, cut across both cultures because of social exchange and communication. Kludze (1973), for instance admitted that in general, the Ewe share the same socio-cultural heritage of intestate succession. He further points out that 'the Anlo political organisation ... bears a great

similarity to that of the centralised Akan states of Ghana such as Akim Abuakwa or Akwapim; but the degree of centralisation does not go as far as we find in Asante with an extra tier in the hierarchy' (Kludze 1973: 5). Some other scholars, such as Agyekum (2006) and Rattray (1929), equally demonstrate in their research on Asante law that they share a common political and socio-cultural organisation with the Akan groups in general.

The indigenous capitals, Anloga and Kumasi have some strategic advantages in that both are not only traditional capitals but also host kings, queen mothers or *mamagawo* and elders who, according to the traditions of the respective groups, embody indigenous values and traditions. In addition, indigenous 'Supreme Courts' and the 'Court of Appeal' are also located in both capitals. Further, both capitals have long histories of involvement in dispute resolution procedures.

Finally, Kumasi has an added interest. That is to say, despite its 'indigenity', it is also cosmopolitan. This means that there is the possibility of an exchange between indigenous and the formal laws, which may in turn, affect indigenous dispute resolution. Therefore, I selected Kumasi in order to avoid the bias of restricting the research to purely typical 'indigenous' areas.

### Methods, techniques and sources of data collection

The research is located at the domain of dispute resolution systems, but the achieved domain has been Ewe and Akan procedures of dispute resolution with regard to females' property inheritance rights. I provided Anlo and Asante dispute resolution procedures (and substantive laws) within Ewe and Akan procedures of dispute resolution, as examples. Since the subject matter is interdisciplinary and relates to decision-making procedures with ethical, religious and legal components, and falls within the fields of anthropology and legal anthropology, the primary research strategy used was anthropological, qualitative case study. In regards a case study, Verschuren and Doorewaard (1999) observe that one can obtain a holistic picture of the project if the researcher does not limit the focus to only certain aspects. The holistic quality manifests itself in the use of a qualitative, unstructured, but open way of gathering data, such as the open interview, (participatory) observation and the interpretation of textual and audio-visual material. Consequently, I strategised the research work on the collection of secondary and primary data including (participatory) observation.

## Textual materials

Despite having some formal recognition, there has been little systematic development in indigenous court procedures in Ghana (Acquah 2006), and therefore, they have not reached the level of formal court procedures. In addition, there seems certain principles that must be followed if the jury wants to obtain justice. However, court deliberation in these indigenous communities is influenced to some extent by indigenous religious and cultural beliefs and convictions, and by gender considerations. Further, queen mothers, *mamagawo*, male chiefs, elders and family heads in the judicial structure play a core role in the judicial process. In addition, indigenous procedures tend to emphasise collective decision-making. This also involves knowledge of laws of succession among the Anlo and the Asante.

The concepts implicated in the research context would determine the researcher's ability to accomplish the research objectives. To this end, I investigated academic literature and other documentary evidence that encapsulate and explicate key concepts such as dispute or dispute resolution, females and society, procedures on dispute resolution, African indigenous religious and cultural beliefs, human rights, inheritance and property, gender and indigenous law, indigenous law and society, chieftaincy and other institutions in the judicial structure. The interdisciplinary character of the subject matter determined the method. The approach, therefore, helped me familiarize with first-hand interdisciplinary knowledge on the research object.

## Fieldwork

From March 2006-February 2007, I conducted fieldwork on dispute resolution procedures on females' inheritance and property rights among the Anlo and Asante. The key informants comprised paramount chiefs, queen mothers or *mamagawo*, subchiefs, elders and family heads from both socio-cultural groups. Selection of the key informants was purposefully based on their popularity, experience and traditional knowledge. Second, these indigenous leaders are regarded by their subjects as repositories of values and traditions and are therefore believed to have key information on the objects of investigation, since they were directly involved in the actual dispute resolution activity, making them good choices for study.

The fieldwork included the selection of a number of women from each research unit and tracing their life histories concerning their inheritance and property rights; some of them poured out their concerns. Augmenting these cases is a number of trouble cases found in the courts during fieldwork. This last reality is very important because indigenous legal decision-making procedures are alleged to infringe on human rights, especially the rights of women. The indigenous system of law also allegedly regards women as residual categories. As such, there is a general perception that women are most affected by decisions taken by men in courts, and by certain cultural or traditional practices in their respective communities. Thus, the information obtained from the women acted as a check on the information received from the indigenous male leaders. The choice of these women did not only strike the gender balance dimension of respondents or informants, it also reflected the realities that perennially confront them.

Additionally, I interviewed a number of female and male lawyers, judges, magistrates, court registrars and senior filing clerks; all of whom furnished their perspectives on Ghanaian indigenous institutions in dispute resolution and the situation at the formal courts. I considered this aspect important because as experts in law their perspectives about the role of Ghanaian indigenous institutions in dispute resolution would be valuable and serve as expert substantiation for the non-expert respondents. Here too, the criteria for selection of experts in law were their experience, popularity and knowledge.

I used unstructured, open, individual and group interview techniques. These techniques helped to form a complete picture, and not just certain aspects of the research object. Some of the interviews and procedures were recorded using audiocassette and/or video tape.

The relatively small number of informants (40 men and 40 women from both research units), obliged the use of a strategic sample for detailed individual and group interviews. However, I also conducted a strategic survey comprising 486 respondents of both research units in order to deduce what mode of inheritance was popular among the Anlo and the Asante. I further conducted a survey consisting of 300 respondents (100 men and 200 women) from both research units to learn people's patronage of traditional inheritance among the Anlo and the Asante. It seemed prudent to register more women because, as indicated, there is a general belief that women are most affected by decisions made by men;

and cultural practices in their communities disadvantage them. Additionally, to understand the gender dynamics in access to both indigenous and the formal courts in the socio-cultural groups qualitatively, analysis of the court-records of property-related cases in both Anloga and Kumasi was required. In Anloga, the study examined Avadada's<sup>5</sup> indigenous court records and those of the District Court (formal court), both from the period of 2001-2006. Then, a similar study on Asantehene's indigenous court records from 1994-2000 and 2005; and on the Adum Circuit Court (formal court) in Kumasi from 1998-2006. The surveys were consciously guided by the conceptual design or the information I intended to extract. In other words, chance was replaced by the set of problems I envisaged dealing with when selecting the research units. In all, the primary intention was not to quantify representatively various characteristic differences between men and women with regard to conflicts about inheritance and therefore property relations, but essentially to describe and analyse qualitatively females' situations after hearing many of their stories.

The objective of the present research was realised by the study of core elements of variant indigenous court procedures (including substantive laws) among the Anlo and the Asante. It involved an analysis of so-called trouble-less and trouble-cases. The latter came from the indigenous courts. Trouble-less cases were obtained through observation of everyday life and the normal range of activities of the communities studied. I considered that the trouble-less cases might offer 'a fair idea of the normative principles of lawful actual behaviour' (Holleman 1986: 116-17). The intention was to use the trouble-less cases as a check on the trouble ones. The result was assessed in light of the international instruments such as the Protocols to the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Thus, the purpose here is not to propose a completely new legal order or system to relegate that of the state.

This strategy of relating normative principles of lawful actual behaviour to cases in courts seems important because, in my opinion, any court decision should be viewed in line with what people think is normal or acceptable in everyday life (see also Friedman 1969-1970: 34). For instance, in every society there exists a legal consciousness peculiar to the culture of the people (Merry 2006) on issues like who inherits property if

the owner dies unexpectedly. Who benefits from it and who does not? Or, how are properties distributed among children, male or female, if parents die? Normative objectified conceptions may answer questions of these sorts in any given society. This is why it is significant to use trouble-less cases that reflect the normative objectified conceptions in order to judge the trouble-cases. This approach may lead to the social norms renewing or updating 'the law-in-the books' with current development issues in the social context, and not the other way around (Holleman 1986: 123). This is necessary because, according to Holleman, there is a danger of the law slipping out of its social context.

One way of helping to counteract this danger, and to contribute to a wisely directed evolution of customary law and creation and effective reception of more unified modern law, is constant and vigilant research into the different ways of law observance and its enforcement on all levels (Holleman 1986: 125).

Geertz describes law as an 'imaginative structure' of meaning and maintains that symbols provide the material for the creation, communication, and imposition of this structure. He proposes the hermeneutical approach for the study of law. According to him, this involves a search for the ideas that underlie the social institutions and cultural formulations of law, rather than the postulational examination of how logical principles inform structures of thought and practice (Guillet 1998). Since certain principles encapsulated in symbols such as proverbs and metaphors seem to dictate indigenous dispute resolution procedures, I endeavoured to search for the ideas behind these social institutions and their cultural formulations of law in the two societies.

Further, in his anthropological study of property relationships among the Mnangkabau people in Indonesia, Franz Von Benda-Beckmann discovered that in spite of societal 'objectified normative conceptions' or 'imaginative structures' on property claims, the people actually came up with their own arrangements as to who should inherit their property. As a result, he advised that the anthropologist must retreat, look at both the actual behaviour of the society's members and their system of objectified normative conceptions. Moreover, he must try to assess how the system of conceptions may influence human activity and how the latter may in turn influence the conceptions through historical time (Benda-Beckmann 1979: 382). The current fieldwork among the Anlo and the Asante, therefore, notes the indigenous 'objectified normative conceptions' on



property relationships, and the actual practice of it and how each influenced the other concerning inheritance.

### *Participatory observation*

Besides opinions received from individual informants and groups, content analysis of scientific literature and others, the fieldwork involved attending settlements of a number of trouble-cases (48) in chiefs' courts in both research centres, parts of which form the case studies of the thesis. In addition, I observed trial cases in the District Court in Anloga as well as in the Circuit Court at Adum in Kumasi. The above was supplemented by observation of trouble-less cases on disputes. This was possible because I lived in the research communities for 12 months, and so managed to have a reasonably clear impression of the everyday life and the normal range of activities of the people. This enabled me to obtain a fair idea of the normative principles of lawful and actual behaviour. This dimension is important because many believe this technique reveals much more about 'living law' than discussions with informants. Finally, the reason I decided to widen the case study method to include trouble-less cases was to 'provide a broad insight into the guiding normative principles and values covering the full range of socio-legal traffic' (Holleman 1986: 113-17).

It is important to note that the research departs from a legal framework and as a result, employs an anthropological research approach. Accordingly, the study conceives law as variable. The questions raised about law and the methodology on which the research is based, distinguishes it from legal science or at least from 'the normative and dogmatic sciences of law, which elaborate correct interpretations of general legal abstractions with respect to concrete problematic situations and philosophical reflections on what and how law should be' (Benda-Beckmann 2002: 41). Therefore, this study is not primarily concerned with using legal language or concepts, interpretation of legal technicalities or texts.

Apart from a few persons who allowed the use of their names in this thesis, some informants, especially women, requested anonymity. Pseudonyms stood for such informants. Pseudonyms were also employed for the male and women litigants in the thesis. In the land dispute in the second case study in particular, pseudonyms were used for not only the disputants, but also their witnesses and relatives connected with the case.

The same applies to the names of villages of the litigants who had their case tried in Avadada's indigenous court.

All the information used in the thesis derives from textual, auto-visual and field materials, including (participatory) observations; citations attributed to individual informants come from the field material.

Finally, the triangulation of the different methods, sources and techniques such as unstructured interviews, personal observations, interpretation of textual and other materials, and explanation of indigenous proverbs and metaphors, contributed to a holistic approach to the research.

## 1.5 Research Limitation

The research limitation is that the studies are limited to only two of the many patrilineal and matrilineal socio-cultural groups in Ghana. Fred-Mensah puts the approximate percentage of the Akan in Ghana at 47 per cent and that of the Ewe at 13 per cent of the Ghanaian population (Fred-Mensah 1999: 961). Not all Akan are matrilineal. For example, sections of the Akuapim Akan such as the Larteh, the Mampong and the Adukrom (Guans) are patrilineal. Moreover, both socio-cultural groups represent the patrilineal and matrilineal family systems in Ghana in a limited sense. As a result, this representation may limit the generalisation of the research findings. In other words, it fits contextual or situation-specific cases.

In addition, most informants during the fieldwork among the Asante use both Twi and English. This helped during interviews, because it afforded the opportunity to ask for clarification on certain local vocabulary terms.

The fieldwork took place in light of Holleman's suggestion that in a situation where informants/respondents would not be open to provide information, the researcher could rely on hypothetical cases in which the former shared their views. Moreover,

Once an investigator has lived long enough in a community to have a reasonable clear impression of its everyday life and normal range of activities, he does not always need trouble-cases (however much he will welcome them as dramatized set-pieces for observation and analysis of contending views and interest) to get a fair idea of the normative principles of lawful actual behaviour (Holleman 1986: 116).

This last, however, did not lead to dropping trouble-cases and interviews with respondents or informants. For as an Ewe proverb puts it, ‘too much meat does not spoil the soup’.

## 1.6 Organisation of Thesis Chapters

The thesis is organised into 6 chapters.

Chapter 1 discusses the research context, problem, questions, objective and relevance; methodology and research limitations.

Chapter 2 deals with the theoretical and the analytical framework of the study. It first defines the key concepts in identifying the relevant theory framing the research and it links the concepts in theory.

Chapter 3 has two parts. The first part describes the people of Anlo and Asante. The second part deals with the history of intestate succession in Ghana. The section analyses Provisional National Defense Council (PNDC) Law 111 on intestate succession. The law came into force in 1985 to correct the anomaly in intestate succession, purportedly to help children and their female parents obtain the larger share of intestate property of husbands or male parents. The chapter evaluates how people conceive of the law and some of its weaknesses. It relates PNDC Law 111 to the international regimes such as the Protocols to the African Charter on Human and Peoples’ Rights and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), reflected in the 1992 Constitution of Ghana. It also discusses Anlo and Asante laws or principles that continue to govern property inheritance relations amongst the two groups of people and gives reasons why the two groups hang on to their legal heritage of inheritance.

Chapter 4 examines how women in both socio-cultural groups experience indigenous principles of inheritance in their lives and how these affect their inheritance and property rights. The chapter also discusses how fear of mystical or spiritual forces affects females’ inheritance and property rights. It considers how women view both the formal and indigenous courts and how apparent discrimination of the indigenous inheritance systems have not significantly determined women’s selection of arbitration types.

Chapter 5 contains a discussion of the two main ways the Anlo and the Asante socio-cultural groups in Ghana resolve their disputes with the purpose of ascertaining if there are some principles or norms that govern the dispute resolution processes, and whether the court principles are the

same or different from social norms or principles that dictate property inheritance.

Finally, chapter 6 evaluates the preceding chapters and draws some conclusions.

## Notes

<sup>1</sup> Interviews with lawyers, judges, chief registrars and filing clerks took place in Anloga and Kumasi in the Volta and Ashanti regions of Ghana respectively. The interviews took place during my fieldwork among the people from March 2006 to February 2007. The findings pointed to the fact that systematic statistical data are generally not available in Anloga District Court and in Adum Circuit Court, Kumasi.

<sup>2</sup> Refer to the Saturday, 7 January 2006 version of the *Ghanaian Daily Graphic*.

<sup>3</sup> Refer to footnote 1, Nukunya (1969: 42). *Kinship and Marriage Among the Anlo Ewe*, London: University of London, Athlone Press.

<sup>4</sup> Refer to the first eight articles of the Protocol to the African Charter of Human and Peoples' Rights on women.

<sup>5</sup> Avadada is the second in command after the Anlo king within the Anlo judicial structure.

## 2

## Theoretical and Analytical Framework

The introductory chapter suggests using other dispute resolution mechanisms such as that of the chiefs' court to ease congestion for the trial courts in Ghana. Nonetheless, some consider this type of dispute resolution gender discriminatory leading to inequality, which would call for modification. Insofar as the Anlo and Asante social and religio-cultural universe contributes to shaping people's perception and definition of female identity, it could be a cause of gender inequality. This implies the need to consider a number of factors or issues within the respective social universe to obtain a fuller understanding of dispute on females' inheritance and property rights in Ghana.

The present chapter negotiates a research model and a method for research. In order to arrive at a model, I first analysed some pertinent concepts. It appears that concepts like 'dispute', 'indigenous law', 'female in society', 'property inheritance', 'human rights', 'religion and culture', do not stand alone. Institutions and structures generate and define these concepts. As such, they are social arrangements. It is, therefore, important to explain some of the basic concepts to the understanding of the social institutions and practices detailed in this thesis. Second, the chapter reviews some theories by various scholars on anthropological approaches to the study of disputes in society. Finally, the concepts and the other considerations are linked in a theory.

### 2.1 Basic Concepts

Concepts basic to the discussion include disputes, indigenous law, family, the image of the female in society, human rights, inheritance and property, religion and culture.

## Dispute

For some, there seems to be no clear-cut difference between ‘conflict’ and ‘dispute’ since both involve a disagreement over something. *Oxford Advanced Learner’s Dictionary* defines conflict as a serious disagreement or argument between people, groups or societies. This disagreement may come from an incompatibility of opinions, rules or norms and others between the people, groups or societies over a particular claim (2005). According to Brown and Marriot, conflicts are bound to occur where there is incompatibility of interests (1993: 5). Moreover, there exists ample observation that conflicts, whether verbal or behavioural, which are not contained may lead to violence and may even escalate to an international level. These shades of opinion seem to indicate that there is a small-scale conflict and a large-scale one. Many believe these small-scale conflicts find easy resolution. Nevertheless, conflict seems endemic to human culture. Even though certain conflicts can be resolved through ‘dispute resolution procedures such as injunctions, or interdicts or court orders, which may restrain unlawful behaviour, by arbitration and by mediation they are not necessarily amenable to resolution by dispute resolution processes’ (Mwenda 2006: 13).

Dispute, on the other hand is said to be ‘an assertion of opposing views claims’, ‘a disagreement as to right; especially, one that is subject of proceedings for resolution’ (Ammer 1997). According to David Foskett in *The Law and Practice of Compromise*, an actual dispute does not exist until assertion of a claim by one party and disputation has occurred by the other (1989: 5). This disagreement may be resolved by negotiation, mediation or by any other dispute resolution mechanism, which may involve a neutral third party. The difference is objectively qualifiable by the disputing parties themselves or by a third party, who then gives his decision on the case. According to Brown and Marriot (1993), ‘the question as to whether or not a “dispute” exists can be highly relevant, for example, where arbitration or other dispute resolution provisions in a contract provide that disputes are referred to arbitration or any other stipulated process. If no dispute exists, then a party wishing to enforce any aspect of the contract may do so through the courts; but if a dispute does exist then the specified process is mandatory. According to Patterson and Sea (2001), dispute is part of human interactions. This happens whenever people gather—it could be a family gathering, clubs, teams, political parties, nations or international coalitions.

For Popat Prathamesh (2003),<sup>1</sup> due to the opening up of world markets, their diversities and differences, miscommunications and therefore, misunderstandings, emerge and these sometimes lead to complex disputes. Moreover, the phenomenon of the global village initiated by e-commerce and the Internet contributes to this. Further, in developing countries like Ghana and in the research units of Anloga and Asante, individualisation of life as one of the effects of capitalism is bringing about a considerable transformation in the family systems from what used to be a more cohesive extended family to a smaller, nuclear one. Individuals are now more concerned about what they can do for themselves and their immediate families, where immediate families often refer to children rather than a wife or members of the extended family. At the same time, there is pressure from the extended family to control its members and property. This leads to tension and conflicts between individuals and the extended family. This situation affects females' property inheritance. Thus, while some families may consider the female child in the distribution of a deceased father's property, some do not. Historically, among the Anlo, property of a deceased polygamous husband was shared according to the number of wives he had, so that a wife and her children could benefit from it. Today, there is a shift from this practice to sharing it among the number of children. In a situation like this, often, the widow and female children do not benefit. In both Anlo and Asante, some individuals also control and use family property without giving shares to other family members. All this causes family disputes. 'The unsavoury result of this has been that disputes are not only arising at a far greater pace than ever before', but also entailing 'even greater complexities due to their cross-border and cross-culture nature' (Mwenda 2006: 14). Andrew Pierie also indicates that the manner of dispute resolution may lead to a redefinition of relationships, redrawing of boundaries, redistribution of wealth, reform in laws, restriction to movements, removal of barriers, reshaping of thinking and moreover that it may contribute to reframing of problems (Pirie 2000: 3).

One argument states that even though conflict can be negative and can cause distress, it can also function positively. This is to say that it can motivate people to change their situations, which may lead to development and may bring improvement to the lives of the subjects of conflict (Folberg, Golann et al. 2005: 20).

In spite of the conceptual differences that some scholars have indicated, it appears such distinction does not make much difference. This is because the analytic discourse makes it clear that both conflict and dispute are susceptible to dispute resolution procedures. Where this is not possible is when there is a large-scale conflict. Similarly, there are disputes whose scale is large and which are not easily containable. Like conflicts, disputes assume international proportions. Moreover, disputes or conflicts are expression of differences between people. Airing differences creates an opportunity for peaceful resolution leading to a better understanding between parties (Mwenga 2006: 14). Thus, the two concepts are used interchangeably in this thesis. In other words, dispute is one of the primary concepts of the research, but where conflict is used, its meaning is synonymous to that of dispute.

### *Nature of disputes*

Disputes differ in nature and scope. Conceivably, even within the same category of disputes there may be apparent differences. It may be possible to explain these differences by acknowledging the issues and factors that can influence opposing parties. In this light, it is logical to say that one particular process of dispute resolution may not be applicable to all types of disputes (Mwenda 2006: 15). For this reason, while one type of dispute may be resolved through negotiation, others may require other methods such as mediation or the intervention of a neutral third party. The expectation placed upon this neutral third party is to devise procedures that can assess and possibly evaluate the issues at stake. Some disputes may even 'require an expert neutral party' or the use of an adjudicatory process. Others may involve application of a combination of methods. Thus, processes may involve informal, relatively formal or formal procedures depending upon the relative complexity of the issues at stake. It may be critically important to note that in the case of a neutral third party like a chief with his or her panel of elders, for example, there is need to understand the particular disputes with its implications. This will determine the kind of procedure used. This also involves knowledge of the disputing parties, their concerns, motivations, aspirations and interests (Mwenda 2006: 15).



### *Dispute and its subject matter*

It is difficult to have a neat categorisation of disputes. However, dispute analysts such as Brown and Marriot attempted classifications. According to this classification, there are disputes that involve:

- a. International issues including matters of public law,
- b. Constitutional, administrative and fiscal dimensions—including issues relating to citizenship and status rights, local authorities, governmental and quasi-governmental bodies, planning, permission, taxation, and social security,
- c. Organisational disputes—including issues arising within organisations involving management, structures and procedures, and intra-organisational disputes,
- d. Labour disputes—including pay claims and industrial disputes,
- e. Corporate disputes—including disputes between shareholders, issues arising from liquidation and receivership,
- f. Commercial disputes—this broad category includes contractual disputes, issues arising from commercial relationships such as partnerships, joint ventures and others,
- g. Consumer disputes between supplier and consumer,
- h. Issues arising from tort—including negligence and failure of duties, insurance claims,
- i. Trust issues including issues between trustees and beneficiaries,
- j. Disputes giving rise to consequences in criminal law,
- k. Neighbourhood, community, gender, race and ethnic issues,
- l. Interpersonal disputes arising between individuals,
- m. Property disputes including those between landlords and tenants, rent reviews, boundary disputes and the like,
- n. Issues arising from separation and divorce—including those relating to children, property and all financial matters, and finally,
- o. Other family disputes including Inheritance Act claims, family businesses and other disputes within families (Brown and Marriot 1993: 2; Mwenda 2006: 16-17).

As seen, dispute as a subject matter seems too vast to complete within the economy of time. For this reason, this thesis limits its analysis to dis-

putes related to females' property inheritance within the Anlo and Asante patrilineal and matrilineal family systems in Ghana.

### *Issues of dispute resolution*

Most anthropologists in the Malinowski research tradition emphasise two important features of dispute. First, they see dispute as part of life in any community or society in which it occurs. As such, they suggest a holistic approach in the treatment of dispute. This implies treatment of dispute should involve a) the genesis of the dispute, b) attempts made to resolve it and, c) subsequent history of relations between the parties involved. The second important feature of these studies focuses attention on disputants' activities and objectives. Earlier legal studies to some extent gave attention to judicial behaviour, but the litigant's perspective remains largely neglected. Thus, in recent years, analysis of institutions received less serious investigation than the litigant's perspective (see Roberts 1976: 676). Procedures among the Anlo and the Asante societies in Ghana reflect the mentioned features in their dispute resolution practices. Even now, attention goes to a disputant's wider goals in pursuing a particular quarrel; the ways in which he recruited support; the manner in which he chose the agency before which he brought the dispute for settlement; and the tactics he adopted before that agency. One feature stressed repeatedly is the element of compromise, which tends to be present in any given outcome and gives the dispute settlement process a 'bargaining' flavour markedly different from the 'zero-sum game' of win-or-lose adjudication as characteristic with the common law model (Roberts 1976: 676).

### **Indigenous law**

Various concepts, including customary law; native law; native law and custom, native customary law and traditional law are used to refer to the indigenous law systems of various communities in Africa. Before embarking on the exercise of investigating the types of laws, principles or norms that underline property inheritance amongst the Anlo and the Asante of Ghana, it is of crucial importance to make distinctions in the concepts.

Customary law may be argued to derive its existence from custom (see also Article 11(3) of the 1992 Constitution of Ghana). Custom is the accepted and uniformed beliefs and practices of a particular people in a

particular society or community. Even though these socially accepted beliefs and practices may not formally be part of any written body of law, the people recognise and use them to regulate their everyday life. In this sense customary law refers to unwritten local laws. This description suggests there is no dichotomy between law and custom and as such, customary law seems incompatible with codification and written records. However, not all customary law is unwritten law (Goldschmidt 1981; see also Allott 1960: 3-5, 1970: 145-7). One particular case that comes to mind is India, which has a written customary law.

Secondly, not all customs may be good or acceptable as basis of customary law. Notable illustrations are the *Trokosi*<sup>2</sup> and female genital mutilation practices in parts of Ghana. In order to avoid such bad norms or customs crystalize into customary law, article 55 of Courts Act, 1993 (Act 459) of Ghana stipulates some guidelines regarding the use of customary law in the court. The article states among other things, that 'any question as to existence or content of a rule of customary law is a question of law and not a question of fact'. In other words, the fact that a particular society or community practices a particular custom over a passage of time does not necessarily make the practice lawful. It may mean that in a situation where custom directly conflicts with legislation the latter prevails. Thus the decision regarding which custom is legal or illegal rests with the court.

In Ghana, customary law describes both the unwritten local law orders that operate in various communities and those written and officially compiled and used in the formal court. This situation leads to confusion and ambiguity in usage. Goldschmidt argues that the choice of a suitable term for such normative orders is not only a problem of terminology but also lack of consensus of the right term. Heightening this difficulty is the fact that each term, as indicated, has its own implied meaning. Moreover, there are cases where the meaning does not relate or capture the subject it intends to describe.

For Goldschmidt, there is an added difficulty since the choice of a special term may be seen as an implicit value judgment of Europeans towards African institutions; partly if it is denied that African law may possess the same characteristics of a developed system of law like European legal systems. It is, for example, unusual to talk about 'Dutch customary law' systems if one is referring to law not influenced by Roman or French law (Goldschmidt 1981: 11; Mensah-Brown 1976: 19). Yet, we

distinguish the law existing in African societies from the relatively new body of imported law of the modern state.

Furthermore, while the term 'native law' seems to bear colonial connotations, 'traditional law', seems to signify an historical or evolutionary context (Goldschmidt 1981: 11ff).

Due to the lack of appropriate terminology, the temptation is to turn to Eugene Ehrlich's concept of 'living law' (Ehrlich 1936: 493)<sup>3</sup> to describe these ever-changing kinds of law order in Africa. The term makes distinction between what lawyers are actually doing and what legal doctrine orders them to do (Ziegert 1998: 5). Second, Ehrlich locates law within social life by indicating that norms are always social norms and as such are the products of social relations. Because of this, it is important not to treat legal norms as if they belong to a higher order of social norms since they constitute one of the rules of conduct like any other rule. It follows therefore that all legal operations are social operations; that is, operations that reproduce social structure. However, not all operations are legal operations (Ziegert 1998: 5). Ehrlich's central argument seems to point out that law is made of the same material as social life at large. In order to describe, understand and explain law, one must look at social operations at large (Ziegert 1998: 5-6). In addition, the 'living law' concept, among other things, seems to indicate that a normative order precedes dispute (and 'official law') (Ziegert 1998: 7).

Even though Ehrlich's concept of 'living law' has the benefit of connecting law with social life as its origin, the definition seems too inclusive. For instance, it does not make any distinction between what kind of law—formal or informal. For him, all rules are rules of conduct. Moreover, the concept of 'living law' might invoke Biblical connotations for Christians. For instance, some Biblical authors like St. Paul, portray faith in Jesus as the 'living law' not carved in stone, but written in the hearts of Christians (Rom 8: 2-4; Gal 2: 16; Jer 31: -33). Thus, clearly the concept contains other shades of meaning, which render it ambiguous.

In view of the difficulty of finding a right terminology, I prefer to use the terms 'indigenous law', 'indigenous principles' or 'indigenous norms' to refer to the unwritten local law order of the Anlo and the Asante of Ghana. Furthermore, I employ 'customary law' or 'native law' to refer to indigenous law that has been codified and officially accepted into the state legal system of Ghana.

The indigenous law of the Anlo and the Asante is a kind of law order that is undeveloped, unsystematic and yet recognised by the traditional societies themselves, from whose social life it originates, grows and is used to govern judicial relations. It refers to the non-static or ever-changing forms of ordering, different from the fixed customary system of law of the state. Such a depiction recognises the changing character of the law order as the law of a specific society at a specific time (Goldschmidt 1998). The term as used in this thesis therefore, is distinct from the codified customary law raised to the status of state law.

The term indigenous law, in this case is a principle or norm useful in the research context because it distinguishes what the ordinary Ghanaian recognises as law in addition to the state law, and serves to give direction to his or her social life. In this sense, it is a 'semiautonomous social field' (Moore 1973). As a semiautonomous social field, indigenous law is 'vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' (Moore 1973: 720). Tamanaha's non-essentialist definition of law that is 'whatever people recognise and treat as law through their social practices' (Tamanaha 2003: 319) seems to agree with this perspective. Second, it is 'indigenous' in the sense that it evolves from particular local communities or traditional societies and is therefore indigenous to the people. Finally, it is in this sense that indigenous law and indigenous courts appear in the thesis. The term should not therefore, generate anachronistic or static conceptions. For, as Barbara Oomen puts it, this kind of law 'is negotiated within ever-fluctuating social and political settings, which it simultaneously reflects and shapes' (Oomen 2005: 203). It is important to note that where the terms customary law and native court appear in the thesis, they refer to the state's version of indigenous law and indigenous court as seen especially in chapters 3 and 5. Further, the words 'traditional' or 'traditionally' appear in adjectival or adverbial sense to qualify how a particular indigenous institution evolved over the years when and where the need arose.

## **Family**

There are two main family traditions in Ghana. These are the patrilineal and the matrilineal extended families. The patrilineal family traces its descent from a male ancestor while the matrilineal family traces its origin from a female ancestor. All Ghanaians trace their descent from one of the two families or lineages. In other words, every Ghanaian is born into

either a patrilineal or a matrilineal family (Kuenyehia 1990: 72). The Anlo are patrilineal while the Asante are matrilineal. The word 'family' used in the thesis refers to this sense of extended family. There are a few cases, for example, in the final chapter that the word 'extended' is used to qualify the family when explaining the old and the modern (nuclear) forms of family.

Another type of family in Ghana is the immediate family. This comprises a man and his wife or wives with their unmarried children and other dependants. Where this smaller unit of family appears in the thesis, it is qualified as 'the immediate family'.

Thus, both the extended and the immediate types of families in Ghana are completely different from the Western nuclear family, comprising husband and wife with their children.

Family is a key concept in indigenous law and in particular in property relations in Ghana. As an institution, it has predominant influence on marriage, domestic authority, legal transactions and proceedings, 'succession and rights in property of all kinds' (Kludze 1973: 30). An individual's socioeconomic status is determined to some extent by his or her membership to the family. In addition, a marriage contract does not only involve the consent of the bride and the bridegroom but also that of the families of the bride and the groom without which the contract may be nullified (Awusabo-Asare 1990: 2). This means that marriage in any of the ethnic groups in Ghana is not simply a union between the bride and the groom as in the West. It is as well 'the establishment of a permanent relationship between the families to the marriage. Consequently, the death of one of the parties does not of itself, terminate the marriage' (Kuenyehia 1990: 75).

Finally, the patrilineal and the matrilineal kinship or family systems are the principal sources of indigenous law. To be more specific, these family structures of the Anlo and the Asante are the settings for legal and socio-cultural practices, which treat women differently from men when it comes to inheriting a deceased male's property (Whitehead 1984: 177). Indigenous law, influenced by socio-cultural practices of the family systems, makes it possible for men to have more access to property than women do. This apparent discrimination has been heightened by the fact that according to indigenous law, married couples do not have a 'community of goods; but each has his or her particular property' (Kuenyehia

1990: 77).<sup>4</sup> This may create economic imbalance between the sexes and may put a majority of women in financial difficulty.

### Image of the female in society

For analytical reasons, it is significant to explain how the Ghanaian society conceives of women. I consider it significant because this societal conception defines women's position and status in society. It is unfortunate that most literature on gender analysis in Ghana pays little attention to the everyday language and metaphors used by the people, which lay thought systems and people's conceptions of other people bare. For example, the Anlo say that 'the palm tree in a woman's farm does not bear fruit'. This means that women are considered less economically viable than men are. This implies that a man's economic security is more important than that of a woman. That is why among the Anlo and the Asante, when a boy and a girl are both attending school and there appears to be economic difficulty to sponsor the studies, parents may ask the girl to sacrifice her schooling so that her brother can proceed. In some cases, the girl may have to labour with her parents to see her male sibling through school.

Second, the concept 'woman' respectively called *nyonu* (Ewe) and *obaa* (Twi) among the Anlo and the Asante<sup>5</sup> in Ghanaian society mentally evokes both goodness and weakness. For example, a man is described as being a woman when he shows some good qualities. Chiefs who are kind to their subjects are regarded as reflecting good motherly qualities. Among the Asante, God is called the 'nursing mother' or *Obaatan paa* (Clark 1999: 722). MacCormack (1972) also identified similar usage of the word in Sierra Leone where a male chief who was serving under a female paramountcy was described as being like a mother, probably because of his care and love for those who came to him to resolve their cases.

On the negative side, when a man is not physically, politically or economically strong, he is described as being a 'woman'. Among the Anlo and the Asante for instance, a wife who finds her husband lazy could make derogatory remarks such as, 'you are a woman', or 'a womanish man'. Such words also may apply to men who do not show courage.

On the other hand, a woman who is hard working is depicted as being a 'man'. According to Clark (1999), while male traits remain positive, female traits are always negative and this is regardless of who takes them

on. He indicates that 'Asante attribute positive as well as negative female traits to men' (Clark 1999: 772). In addition, society paints a picture of a woman as a helper to man, keeper of the house, and a 'reproductive channel'. Finally yet importantly, a woman is seen as part of the husband's economic units. These images are operative both in urban and rural areas of Ghana. Yet they are less applicable to women who are educated, who are well to do and who can provide for themselves and their families. These women are independent of men's control.

It is significant to note that the definition of women's social identity begins at birth. In Ghana, the birth of a male child is more joyful than that of the female child. To show appreciation, husbands usually present special gifts to mothers for giving birth to male children.

From early age, society assigns gender-based roles. Girls have household jobs such as cooking, sweeping, fetching water and firewood, doing the washing and other household chores. This differentiated socialisation of girls and boys in Ghanaian families limits equality of opportunity for girls, even when they become women. For example, as women they must divide their time between work and home. Many of these other female associated responsibilities come through marriage. Despite this, women have to compete with men who scarcely do any work at home. The unequal division of roles seems to cripple initiatives such as affirmative action because it does not give the same support to women as it does to men (Ngcongco 1993: 6-7).

Societal subjugation of married couples to kinship groups may also be partially responsible for women's inferior status. This is because the non-individual nature of marriage reflects the overriding value of the Ghanaian family. This is sometimes referred to as 'the collective or communal' aspect of the marriage relationship. It therefore makes marriage an alliance between two kinship groups. Here, even though the two married couples are important, the interest of the group takes precedence. Nhlapo (1991) criticises this saying that the system of kinship and marriage masks inequality under the guise of group interests. Incidentally, women and children under such a system who lack a say in the articulation of such interests find themselves disadvantaged. This seems extreme in patriarchal societies where men's interests tend to frame group interests (Nhlapo 1991: 138). Radcliffe-Brown, for instance, notes that 'for the understanding of any aspect of the social life of an African people—economic, political or religious—it is essential to have a thorough



knowledge of their system of kinship and marriage' (1950: 1). This may partly explain why inequality is such an enduring part of African indigenous systems (Nhlapo 1991: 137).

These social norms succeeded in influencing the official customary law in conceiving a wife as part of the husband's economic unit. This means that a wife's claim to her husband's property is very limited or nonexistent. Her labour, reproductive or otherwise, is merely seen as a contribution to satisfy 'her preexisting marital obligation and does not give her an ownership stake' (Fenrich et al. 2001: 276).

According to Ngcongco, to understand the dilemma of African women, it is necessary first to look at the traditional criteria of what being a 'good woman' entails. This, as indicated, ranges from one who cooks, does her husband's laundry, allows her husband to make major family decisions, to not being controversial with the husband or not attempting to access the kind of benefits or pleasures the husband does (Ngcongco 1993: 5-6). In the Ghanaian world, often the women must dance to the drumbeat of the men. Thus, most often a woman is supposed to seek consent of her husband before she undertakes any venture.

Furthermore, gender relations in the socio-cultural universe show men's violence against women, and women's violence against fellow women. Mariam Awumbila explains that this latter kind of violence is perpetrated because a woman thinks another woman is snatching her husband away from her (Awumbila 2001: 36-7). She also mentions sexual harassment of women in offices, schools, university campuses, community networks, churches and at home. Non-sexual violence against women includes physical violence, psychological, financial and institutional abuses, assault on girls, mothers and grandmothers, widowhood rights, child betrothal and marriage. Other non-sexual violence includes female genital mutilation, banishing of suspected witches (usually old women) to witch villages in some parts of northern Ghana and female religious bondage popularly known as *Trokosi* or *Workoye*. All this happens in situations of unequal power relations (Awumbila 2001: 37). Many of the above non-sexual forms of violence stem from indigenous norms of gender relations and which perpetuate women's subordination. For example, in certain parts of northern Ghana the preservation of tradition, pursuit of aesthetics, preservation of virginity, and fulfilment of some religious beliefs are some of the reasons given in support of female

genital mutilation. Basic among the reasons, however, is the need to prevent promiscuity among girls and women and thus, it is a social control mechanism (Awumbila 2001: 38).

Colonial and postcolonial government policies, which did not give equal opportunities for the socio-economic development of the sexes, worsened the conception and position of women in traditional society (Awumbila 2001: 34; Mikell 1989; Vellenga 1986).

In short, indigenous societal structures and symbolic classification reveal an attitude to the sexes based on the idea of complementary opposition. In other words, the difference between the sexes is normally emphasised and it is on this differentiation that complementarity is based (Shorter 1977: 4).

## Human rights

'Human rights are a set of universal claims to safeguard human dignity from illegitimate coercion, typically enacted by state agents. These norms are codified in a widely endorsed set of international undertakings' (Brysk 2002: 3 as quoted in Merry 2007: 6). The foundational principle being that all humans possess certain inalienable rights by virtue of their humanity, irrespective of their place in society. By their nature, human rights are universal (Hellsten 2004: 61).

Some also consider human rights as a cultural and value-laden concept that emanates from two broad conceptions of rights such as negative and positive rights (Elechi 2004: 4). Negative rights seek to protect the individual from the coercion of the state and from other individuals. For example, the Bill of Rights of the United States Constitution seeks to protect the individual from the power of the state. Second, the positive rights doctrine puts obligations on the state to provide the necessities of life such as food and clothing, education and medical care, and shelter (Elechi 2004: 4). The underlying assumption is that active and meaningful participation in the affairs of one's community is possible when one is not constrained by hunger, poverty, illiteracy, fear and other impediments. Still it is important to note that the rights represent statements of entitlements rather than protection unless they are enforced (Elechi 2004: 4).

The concept of human rights assumed international status with the adoption of the United Nations Universal Declaration of Human Rights on 10 December 1948. The objective of the Declaration is to act as a

common standard of achievement for all peoples as seen in Alderson (1984: 9). There are two parts to this Declaration. The first part, also known as the first-generation of rights, protects the individual's civil and political rights, which include the right to life, freedom from torture and inhuman treatment, the right to liberty and security, equality before the law, and freedom of thought. The second-generation rights protect such rights as the right to work, the right to favourable work conditions, the right to social security, the right to education, housing and healthcare (Elechi 2004: 4-5). Creative diversity also demands that there is full implementation of cultural rights known as a third-generation of rights (collective rights) as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. According to these rights, not only do all persons have the right to express themselves, but also create and disseminate their work in their own languages. Moreover, they are entitled to quality education and training that fully respects their cultural identity. They also have the right to participate in the cultural life of their choice and conduct their own cultural practices provided these do not contravene human rights and fundamental freedoms (Perez de Cuellar, Arizpe et al. 1997). Thus, cultural rights encompass two main concepts; the right of peoples to practice and continue shared traditions and activities, and the right to scientific, literary and artistic pursuits of society.

The focus of the first- and second-generation of rights is the individual as a human being with inalienable rights, and with integrity and dignity (Elechi 2004: 4-5). This implies the rights protect against arbitrary deprivations of life and liberty. This may include equal treatment, the notion of a fair trial, right to confront witnesses and present evidence, appeal and many more.

The UN Bill of Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other Protocols. Finally, the subject of human rights invokes the perennial, cross-cultural and universal questions about the relationship between individuals and their larger society, and thus links our discussion with human rights in Africa.

### *Human rights in Africa*

Maine (1889) argued that in pre-colonial Africa, it is impossible to differentiate law or rules of social conduct from custom, hence such rules were oppressive. Similarly, Durkheim (1966) made distinctions between organic and mechanical societies. While he associated the former with Western societies, he attributed the latter to pre-industrialised societies like Africa where religion and law worked together with little or no differentiation between the two. According to Durkheim, the law that pertained to societies characterised by mechanical solidarity was repressive. The implication of Durkheim's assessment is that there is scarcely any observation of human rights in mechanical solidarity societies (Elechi 2004: 7). Last, Donnelly (2007) implied that recognition of human rights simply was not the way of traditional Africa, with obvious and important consequences for political practices. He thought in cases where Africans had personal rights vis-à-vis their governments the basis was not a person's humanity per se, but on membership in the community, status or on some other ascriptive characteristics. Donnelly makes a distinction between human rights and human dignity. The two for him are not the same. For example, he conceives human rights as rights that are inherent in the individual by virtue of his or her humanity, while human dignity is attached in situations where the rights of the individual are dependent upon his or her membership of a particular community, hence its ascriptive status.

While there may be some truth in the forgone discussion pertaining to the subject matter, it is noteworthy to observe that regard for human dignity may be an expression of the natural and moral rights of the individual. For example, the Anlo and Asante view life as a fundamental right founded on the nature of the human being. This is why abortion is frowned upon among these people. They view it as the destruction of life. Euthanasia and suicide are, likewise forbidden. Traditionally, among the Anlo and the Asante, there are sanctions against the taking of human life. Yet it is equally true that the societies often lay emphasis on communal rights and not those of the individual for the common good of the people. This may make women's subordination within the family structures, especially in the patrilineal rural areas, difficult to change.

### *Rights and the communal structure of society in Africa*

Communalism, according to Gyekye is not necessarily antithetical to the doctrine of human rights. This is because first, the individual is self-determining, autonomous and communal. As an autonomous being, the individual has the capacity to evaluate or re-evaluate the entire practice of his or her community. Such evaluations or re-evaluations may touch on matters of rights, the exercise of which a self-determining individual may see as conducive to the fulfilment of the human potential, and the denial of which he or she may raise some objections (1992: 114). In this sense, communitarianism, for Gyekye, cannot disallow arguments about rights of the individual in the community.

Secondly, he notes that respect for human dignity as a natural or fundamental attribute of a person leads to regard for personal rights by the communal structure. In other words, the fact that an individual person is a member of a community does not rob him of his dignity or worth, which is fundamentally inalienable to his humanity (Gyekye 1992: 114). According to African traditional religious belief, God endows this human dignity. Moreover, for Gyekye, respect for human dignity and the right of the individual accrues from the rational ground that the individual person is a rational being and an end in himself and should be treated as such (1992: 114-15). This leads to the notion of moral rights (innate rights in the Kantian sense), which belong to every human person by nature and which can be called natural rights.

Gyekye's third point is that at both theoretical and practical levels, communitarianism implicitly recognises the dual features of the self as an autonomous, self-determining entity capable of evaluation and choice and as a communal being. As such, it is committed to, and acknowledges, the intrinsic worth of the self and the moral rights that necessarily belong to it. For communitarianism to set itself against the rights of the individual person will be tantamount to removing its own basis, according to Gyekye's analysis. This is why communitarianism among societies of Anlo and Asante recognises the political morality of the individual's rights as a conceptual requirement. At the practical level, it is realised when people may exercise their unique qualities, talents and other dispositions freely, it may enhance the cultural development and the success of the community (1992: 115).

Further, Gyekye, as a note of caution, states that:

... in any scheme of value, ranking occurs or is resorted to when situations require that preferences for some values be made over other values.... Thus, in the communitarian political morality, priority will not be given to rights if doing so will stand in the way of attaining a more highly ranked value or a more preferable goal of the community. Rights would, therefore, be held as absolute in the communitarian theory, even though I think they will—in fact they should—have some place in that theory (1992: 116).

He stresses that in a social situation where there is concern and compassion for others, and other communal values arise, insistence on some rights may not be necessary. On the other hand, communitarianism would give priority of the duties to every member of the community instead of individual rights. Duty, for him, is the supreme principle of morality in the community—duty to help others in distress, duty not to harm others and so on (1992: 117).

From the discussion, it may be gathered that Gyekye premises his human rights theory on Africa on the dignity of the human being. What he has not stressed is the fact that apart from the human dignity as a basis of human rights, traditional African societies like the Anlo and Asante also recognise human nature as the source of individual human rights. Part of this recognition shows in the people's value for, and preservation of, human life. The traditional societies of Anlo and Asante see human nature as not only physical but also divine since they believe the ultimate reality called God created human beings. Therefore, anything done against the human being also has a spiritual repercussion. Thus, they view human rights emanating from human nature and dignity as having a divine as well as physical dimension, making them utterly inalienable.

### *Inculturation of human rights*

In her analysis on the theme 'Localizing Human Rights and Rights Consciousness', Sally Engle Merry (2006)<sup>6</sup> asks 'How do people come to see their problems as human rights violations and how are human rights incorporated into local cultural systems?' She noted that knowledge of human rights, especially within village communities, is quite limited. She indicated that even in urban situations not everyone knows his or her rights. This limitation of knowledge of one's human rights seems applicable to several communities in Ghana. Even where knowledge of this is possible or where people are highly rights-conscious, there is the reluc-

tance for assertion of rights. Nevertheless, as we shall see in chapters 4 and 5, there are also situations for example, in Anloga and Kumasi where powerless women at least threatened to use the rights framework or actually accessed it for understanding their problems.

An-Na'im (1992b) maintains that for human rights to be culturally legitimate, they have to be made to fit into the existing normative structures and ways of thinking of the people. He subsequently suggests the need for a dialogue between incompatible local values and universally accepted values striking the importance of universal standards (1992b; 2002). This position corroborates social movement theorists' point of view that 'frame needs to be culturally resonant for the ideas to be adopted' (Merry 2006: 136). However, Ferree argues that dialogue discourses are not as radical as those without dialogue are, and that the latter has the potential to induce social change (2003: 305). Like Ferree, Merry thinks there is no need to make universal values dialogue with specific values in other cultures. She thinks the exercise will be 'a costly choice since it may limit the possibility of long-term change' precisely because it will not only end up sacrificing ideals but also limit demands on authority and may even exclude perspectives and visions of significant groups in human rights movements (2006: 136). For her, 'it is the challenge that human rights conceptions offer traditional ways of understanding relationships that gives them their power to change local legal consciousness' (180). Merry consequently proposes exposure of people, especially those in rights-abused situations, to rights framework ('through rights-based social services and human rights activities'). She argues that translating these universal normative values into the vernacular does not take away the people's earlier perspectives 'but layer the rights framework over that of kinship obligations' and that with time, the former may eventually displace it (2006: 180-1).

The difficulty with this model is that it assumes there is no possibility of realising genuine human rights comparable to universal standards in local practices or custom, and so can only have alternatives in 'national or international human rights regimes' (see also Nyamu 2000: 393). However, if Merry rightly argues that human rights are universal values, it is precisely because of their universality that such values can be found in any culture be it western or non-western. Thus, if universal human rights concepts are to be meaningful and relevant for local people they must be made to dialogue with similar local ones. To 'translate', for me,

suggests ‘bartering’ of similar concepts. In other words, translation presupposes a dialogue of some kind.

In her article, ‘Are Local Norms and Practices Fences or Pathways? The Example of Women’s Property Rights’, Celestine Nyamu-Musembi argues that it is possible to achieve gender equality, for instance, through local norms and practices since local custom has the potential for change. She gives a number of reasons for this assertion, namely that what is normally said about custom is a partial truth. The completeness of such truth is only verifiable ‘in actual social interaction’. She sustains that ideologies of culture often fail to capture all of social reality. The validity of this statement is seen that while local practices vary, people’s daily activities or interactions reveal more of living cultural norms (2002: 132), rather than ideologies.

Sally Falk Moore also argues that there is a gap between social reality and ideological systems. The ideological systems include laws, procedures, customs, rituals, and symbols. They are characteristics of social life. She sees customs, laws, rituals, symbols and rigid procedures as a cultural framework that tries to articulate social life mainly because social life ‘is difficult to fix’ since ‘cultural and social change is continuous’ (Moore 1978: 37-9) All this implies that in spite of the challenges presented by cultural ideologies, in every culture there may be values that may coincide with international normative values. There can be healthy exchanges between such values. This is important, for as Kymlicka (1995) argues,

a person’s social culture enables meaningful individual choice and supports self-identity: Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in confronting questions about personal values and projects (105).<sup>7</sup>

The question will be how does this observation relate with issues regarding property inheritance among the Anlo and the Asante so far as rights to equal treatment, property and culture as enshrined in the international instruments, are concerned?

### **Inheritance and property**

As indicated in the introductory chapter, the achieved domain of the research concerns procedures on females’ property inheritance rights. As such, inheritance and property are some of the basic concepts. The main purpose of a law of succession is to counteract or mitigate ‘the disruptive



effect of death on the integrity of a family unit'. Accordingly, it 'transmits some or all of a deceased's rights and duties to selected members of the surviving kin' (South African Law Commission 2000: 1). The two concepts, 'succession' and 'inheritance' often appear interchangeably to depict this process. However, it appears both concepts denote two different things. For example, while succession means transmission of all the rights, duties, powers and privileges associated with a social status, inheritance on the other hand, means the transmission of only property rights (South African Law Commission 2000: 1). It is within this latter understanding that the thesis uses the term 'inheritance'. It is only during the discussion concerning the history of intestate succession of Ghana that the term 'succession' is used.

Etymologically, the Akan concept for inheritance is *adedie*, which comes from two words: *ade* ('a thing'), and *die*, ('eaten'). Literally, it means 'a thing' (property), 'eaten' (inheritance). *Adedie*, by implication, therefore means 'a thing that is eaten', 'a property that is inherited', 'property inheritance' or 'inherited property'.

Similarly, the Ewe word for inheritance is *domenyinyi*. The same word can also mean 'property inheritance'. *Nyidome* means inherit something while *domenyinu* refers to 'inherited property' or 'property that is inherited'. This leads to the realisation that the Akan possess more developed concepts of inheritance and property than the Ewe.

Inheritance in the indigenous Ghanaian context is the transfer of property from an original owner to an heir(s) or the family after the property owner is deceased.<sup>8</sup> In this sense, it is a posthumous activity. Property, on the other, stands for any object of legal rights.<sup>9</sup> In law, the term refers to the complexity of jural relationships between and among persons with respect to tangible and intangible things.

Property law then entails principles, policies, and rules by which disputes over property are resolved and by which property transactions are structured. What seems to make property law different from other kinds of law is that it deals with relationships between and among members of a society with respect to tangible or intangible things. It deals with the allocation, use and transfer of wealth and the objects of wealth. Because of this, it may reflect the economy, family structure and politics of the society in which it is found.<sup>10</sup>

Goody's (1962) *Death, Property, and the Ancestors* provides an intimate link between inheritance and social structure. But while this observation

may be true to a great extent, this research supports Moore's argument that what is at stake in this regard is not only the studying of the rules by which the property and statuses of dead persons should be distributed in a particular society in accordance with the expressed local norms. What is even more tedious are the ways these holdings are actually distributed since analytically the study of inheritance can include variation and change as often as stability (Moore 1969: 281).

One other interesting thing is that inheritance seems one way of maintaining social continuities. Amongst the patrilineal Anlo and the matrilineal Asante of Ghana for instance, property inheritance is a way of sustaining the continuity of the lineage. Due to this, inheritance practices in the changing societies are likely to reflect the extent to which continuities are in fact perpetuated by this means, as well as the margin of change or variation accommodated. M.G. Smith (1965a) asked some of these questions in his research. He describes how indigenous Hausa rules, Maliki Moslem law, and colonial Nigerian statutes and ordinances have interwoven to the level that the Hausa now practice many modes of inheritance and succession at the same time. Smith argues that Hausa society is not only in a state of moving equilibrium, but its inheritance laws also appears to reflect the structural condition. Yet according to Moore, taking into consideration elements that might have produced the variations in the past century and over, one may have to say that Hausa inheritance practice seems to reflect the relationship between continuity and change (Moore 1969: 281).

The descriptive definition of property law above implies that all legal systems have their own law of property. In other words, the Anlo or the Asante legal system may not have categories that correspond to property in Western legal systems, but they may have some sort of rules that deal with property relations between persons, and between persons and things or non-human entities such as gods. Moreover, the diversity of the property systems of non-western societies such as Africa may suggest that any concept of property other than the descriptive one is dependent on the cultural context.<sup>11</sup>

According to the Western conception, one may acquire property through 'acquisitive prescription'; that is, by various 'original modes' of acquisition. For instance, 'occupation' may be one means of original acquisition when the thing possessed belongs to no one formally. A thing may also be acquired if someone possesses it for a certain time as if he

were owner. The more common means of acquisition of property is through 'derivative acquisition' by which transfer is made from a previous owner or owners. Most forms of such transfer are voluntary on the part of the previous owner. The voluntary exchange of property for money (sale) is the most common of these. A 'donation' or gift, is another voluntary form.

In Ghana, inheritance of property after the death of a previous owner is a central concept in the property systems among the patrilineal and matrilineal traditional societies like the Anlo and the Asante. This means most properties trace back to a dead member of the family or ancestor. Further, land is regarded as a deity. Because of their ancestral linkage and divine nature, most properties have a spiritual connection. Family heads and chiefs who control such properties are guardians of the properties on behalf of the departed members or ancestors. Because of this spiritual connection, voluntary exchange of property for money (sale) generally is not regarded as a form of inheritance in Ghana. Besides transfer of property after death, the making of a 'traditional' will and gifting are the other acceptable modes of transmission of property amongst the two ethnic groups.

Indigenous inheritance systems appear to give lesser rights of inheritance to females than males as demonstrated in chapters 3 and 4. Whitehead and Tsikata (2003) analysed this apparent discrimination in property inheritance against women. Their research shows that in accessing land in sub-Saharan Africa women are discriminated against (77). More scholars also identified changes in land use, especially in relation to the introduction of new crops and forms of agriculture. This makes men and women contest for access (Carney and Watts 1990; Davison 1988b; Moore and Vaughan 1994). Even though some women maintain their land access in such contestations, 'the weight of evidence' suggests that economic changes have diminished women's access to land (Whitehead & Tsikata 2003: 78).

Apart from the gender discrimination in access to land, women face other problems such as lack of working capital, inputs, and extension access or credit (Whitehead & Tsikata 2003: 79). Moreover, women in sub-Saharan Africa tend to lose land rights any time there is privatisation of it. Women suffer 'systematic disadvantages' not only in the market but also in state-backed systems of property ownership. They attribute this

to lack of economic power to purchase and gender discrimination from local-level authorities (79).

Carney (1988) and Carney and Watts (1990), for example, highlighted gender conflicts over land in Gambia where men relabelled farms that had been privately owned by women, as 'household' land. Through this manipulation, the men managed to wrest control of rice fields from the women for an irrigation project. Thus, such men use the language of custom to dominate a new economically rewarding form of agriculture. These two incapacitating circumstances prevent women from claiming rights, which the law theoretically backs.

In her analysis of the continent-wide evidence for the effects of land privatisation, Lastarria-Cornhiel (1997) also discovered that titling and land registration alone does not bring any transformation into the indigenous tenure to convert it to free holding. She observes that certain changes in agriculture commercialisation and development of a land market are also crucial. She thinks general privatisation and concentration affect women's land and property rights negatively.

According to Karanja, the poor performance of statutory law in promoting gender equality can be attributed not only to discriminatory law, but also ignorance of law; the interplay of indigenous and statutory law, and inequalities in marital relationships. Karanja thinks effective legislation can remove this obstacle (1991: 131-2).

Butegwa throws light on male resistance in the judiciary system and courts where many judges lack appreciation of issues in ancient judicial precedents, and thus instead focus their attention on personal prejudices (1991: 57).

One remarkable thing about Karanja and Butegwa is that even though both make a distinction between the formal and substantive rights in their respective works, they downplay factors such as inequalities in social relations and institutional and cultural biases that prevent women from succeeding in making claims and sustaining them (Whitehead and Tsikata 2003: 93). Because of this missing link in their analyses, they attribute women's inability to enforce or claim their rights to sheer ignorance. An examination of such issues therefore, may warrant considering these missing links further. In other words, the issues at stake demand a broader framework of analysis.

Finally, Knowles also mentions male resistance as a key issue, sustaining that law reform must go beyond land rights and tackle broader gender inequalities in society (1991: 12-13).

### *Types of property*

There are two types of inheritance, according to the Ewe and the Akan tradition and custom. The first one is what is called *Abusua Agyapadee* or *Awugyadae* (family property or ancestral property), which includes stools sacred places (shrines), *abosom* (gods), land and buildings. The second is *Onipa-noa-Agyapadee* (self-acquired property) which includes children, wives or family members or village, television, and cars to name a few. Thus, Akan custom and tradition like that of the Ewe has shown that objects inherited may also include human beings. It may be of interest, therefore to clarify what these two categories of property entail.

### *Family property*

Defining property in the simplest terms means, ‘property to which the paramount title is vested in a family or in which a family holds an interest’ (Kludze 1973: 177). This means that family property is different from property that two or more members of the family acquired either through their own hard work or as a gift, ‘a bequest or a devise made to them jointly and personally’. It is also different from ‘undivided property in which the absolute interest is jointly held by the children and descendants of a deceased man as successors, insofar as such children and descendants do not constitute a family’ (Kludze 1973: 177). Such property is group property only in so much as its interest is not held by a corporate entity known as ‘family’ where family refers to the extended family comprising patrilineal or matrilineal descendants who trace their origin from a male or female progenitor. These family members act as a corporate body or a legal entity and have ‘exclusive entitlement to ancestral property and the right of succession to interests in property and certain hereditary offices’. Consequently, family property can only be validly disposed of with the agreement of the family head and supported by the principal elders of the family.

Apart from land, which they own corporately, the Anlo like the rest of the Ewe groups do not corporately own any other family property in the Asante sense of the word. This is because even though family members in Anlo may severally have what Kludze calls a *spes successionis* in

each other's self-acquired property, the *spes successionis* is in the individual members and not in the family as a unit.

The right to succeed to rights in property derives from membership of the family, but the family itself never succeeds to the property rights of its members. For the family is not an *ultimus heres* in Ewe law. It is individuals who succeed to property and in every case an entitled individual must be found as successor. The principle of succession by an individual, as against the family as an entity, means that there is no reversion in the family. The result is that the circumstances are inconceivable when, through the failure of successors, the property may devolve on the family as an entity. There is, therefore, no creation of or accretion or addition to family property today among the Ewe as a result of intestate succession (Kludze 1973: 178).

This means that Ollennu's definition of ancestral family property as one which was 'the individual self-acquired property of a very remote ancestor' at a specific time, 'and which has become vested in a very wide family, consisting of a number of small families or tribes' does not apply to the Ewe in general (1966: 70).

As indicated, among the Anlo, land is the only property that the family as a legal entity, corporately owns and as such has the power to dispose but only through the family head and the 'principal elders' of the family must support this transaction. Membership in the family alone confers the right of occupation and use of such lands. This means that a member's interest in the family land is a dependent one in that he or she shares it with other members (Kludze 1973: 180-1). It follows therefore, that no individual or group can dispose of or transmit a portion of land that he or she occupies or uses to anybody. A child could continue to use a portion of land that a parent used but would not be allowed to sell it or gift it out. Such land property remains in the patrilineal Anlo family. There are, however, situations when deviant individuals of the family dispose of portions of land. Such actions sow the seeds of prospective land conflict.

### *Self-acquired property*

Self-acquired property is private property earned through one's own effort or exertion. For example, a house, land, car or any other thing that a person has purchased or has gained through his or her individual effort or exertion is self-acquired property. This property may be movable or

immovable. They may also be divisible or indivisible. Self-acquired property is disposable.

## Religion and culture

Religion is a complex, controversial and a multifaceted concept. As such, it defies one universally accepted definition. Accordingly, one may define it to meet a specific research frame of analysis. In *Worlds of Power: Religious Thought and Political Practice in Africa*, for instance, Stephen Ellis and Gerrie ter Haar (2004) depict religion as 'a belief in the existence of an invisible world, distinct but not separate from the visible one, that is home to spiritual beings with effective powers over the material world' (14). This definition seems to reflect the worldview of the indigenous Akan and the Ewe of Ghana because of its recognition of possible communication between the living and the dead and other spiritual entities. The worldview of the Akan and the Ewe is real and is composed of things that are visible and invisible such as ghosts, gods, ancestral spirits, witches and other spiritual or mystical forces. These people experience these invisible realities every day. In other words, both humans and the unseen beings interact and these interactions have effects on other dimensions of life such as the social, economic, political, legal and other aspects (Adewale 1994: 1; Shorter 1977).

The seemingly comprehensive influence of religion on every aspect of an African's life leads John Mbiti to sustain that 'Africans are notoriously religious' (Mbiti 1970: 1). He explains that even before the individual is born, and from birth until his death, and after his death, the African lives in a religious universe. All his activities 'are seen and experienced through a religious understanding and meaning' (19).

Religion is very important to the research because as the authors rightly observed, most Africans and therefore Ghanaians, have a religious approach to life. Among the Anlo and the Asante, for example, judicial actors or authorities in indigenous courts are political and at the same time, religious figures (Quashigah 1989-90). They are religious figures in the sense that they act in the name of ancestral spirits whom they represent in their respective lineages. As such, religion in some ways affects, for example, court procedures and outcomes. Second, religion also affects females' property inheritance, as shown in chapter 4.

However, religion may reflect the type of culture of a particular people. To understand religion and other spectra of social life such as law

may call for the understanding of the people's culture. According to Clifford Geertz, culture is 'a system of inherited conceptions expressed in symbolic forms by means of which people communicate, perpetuate, and develop their knowledge about and attitudes towards life' (1973: 89). Law, for instance, is nothing but a cultural code represented in a system of symbols whose meanings are only obtainable through decoding or explanation of such a code (Geertz 1983). Fred Inglis calls the decoding of such cultural codes 'sorting out the structures of signification' (2000: 113). This is necessary because culture, like religion, has a pervasive influence on societal legal conceptions and practices. For instance, cultural symbols such as the proverbs or metaphors of the Anlo and the Asante people encapsulate indigenous legal, philosophical conceptions. They are symbols, which do not only represent ideals and goals, but they also inform every aspect of community living. According to Harvey J. Sindima, these symbols form 'the organizing logic or principles of life' that give the people purpose, meaning, and direction (1998: 71ff). This shapes and directs the judicial mind of the average Ghanaian. For the indigenous mind, justice is right relations and this 'is about ordering social structures' and not just persons (Sindima 1998: 171). For Geertz then, the role of the anthropologist is to try as much as possible to interpret these guiding symbols.

Finally, religion and culture have a dialectic relationship, each influencing the other. It is important to note that the indigenous metaphysics not only in some ways remarkably influence the social life of the people (especially women), but also to some extent influence legal decision-making. It also implicates circumstances where people, especially those in residual categories such as women, may find themselves 'silenced or unable to negotiate with others in terms of day-to-day social life' (Griffiths 1997: 12); or fail to agitate for or claim their inheritance and property rights in courts for fear of spiritual attacks or deaths as detailed in a section of chapter 4 of the thesis.

## 2.2 Theoretical Approaches to Anthropological Study of Disputes

Evaluation of discourses on law and society beginning from the 19<sup>th</sup> century to the present era has identified some models of dispute analysis.

The first of these approaches embeds its theoretical basis in Western jurisprudence. Research falling into this category dates as far back as



Maine (1861, 1871). Radcliffe-Brown, following this approach, conceives law in terms of politically organised sanctions. He concludes that small-scale societies do not have any law (1933). Similarly, Pospisil sees law as 'principles' that have been abstracted from legal decision. He insists that any legal decision-making should have four essential attributes namely, authority, intention of universal application, obligation and sanction (1971: 39-96). Traces of this category of works on indigenous law in Africa show in Danquah's (1928) *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* and, Shapera's (1938) *A Handbook of Tswana Law and Custom*. Although this approach all but disappears, Allott's pragmatic project of *Restatement of African Law* (1969) brings it back. The project aimed to abstract and systematise the unwritten rules of African indigenous substantive law (Contran 1968-9; Ibik 1970-1; Kludze 1973; Roberts 1972; Rubin 1965; Ubink 2008: 25). Allott's intention was to satisfy the growing demand for a source of reference on indigenous laws in the courts (Allott, 1969 in Moore, 1992: 23). Other scholars such as Hinz (2006) and Osinbayo and Kalu (1991) also undertake the restatements of indigenous law.

The problem one finds with the above kind of studies is that most indigenous societies like those of the Anlo and Asante in Ghana do not reflect the theoretical perspectives the actors employed. This contention corroborates the finding of early research of the absence 'of close linguistic, conceptual and institutional counterparts' to what is now being associated with Western law (Roberts 1976: 665). Moreover, similar problems exist in the cross-cultural use of Western adjudicatory models in the study of agencies of dispute settlement. However, perhaps it is important to be constantly mindful that even though a 'wide range of organizational forms' may be non-existent in 'small-scale societies' (Radcliffe-Brown 1933), it is seen that 'mechanisms for maintaining continuity and settling of disputes tend to be almost universally embedded in everyday life, unsupported by a differentiated legal system' (Roberts 1976: 667).

Malinowski represents (1926) another anthropological approach (1926). This approach derives very little of its impetus from legal theory. It is a response to those early empirical studies, which describe societies lacking any obvious governmental organisation, court-like institutions or agencies capable of carrying out a police function, but which nonetheless managed to survive. Malinowski, however, discovered that even though

the Trobriands communities had no 'courts and constable', they could successfully maintain order (1926). He attributed this success in maintaining order to the 'complex network of reciprocal economic obligations' by which the Islanders owe, and are bound to each other (9-27). Even though what Malinowski identified and emphasised may be considered partial, it seems an important element of social control that may be found in any society. His contribution to the study of legal anthropology lies in his breaking away from the concepts and institutions of Western legal systems. He saw this as vital to adequate understanding of control mechanisms that operate in other types of society (Roberts 1976: 674).

In a later work, Malinowski suggested that in non-western societies, 'law ought to be defined by function and not by form'; that is, there is the need to identify the sort of arrangements, the sociological realities, and the cultural mechanisms that act for the enforcement of law in these societies. The term 'law', as Malinowski used it here seems to be inclusive, embracing all modes of social control. However, according to Roberts, Malinowski was responding to the reality that even though Western legal institutions might not have their direct counterparts in small-scale societies, their functions in maintaining continuity and handling conflict could be identified in the institutions of such societies (1976: 674). Thus, Malinowski thought this idea should define the universal research.

Simon Roberts, in line with the Malinowski tradition also suggests not using Western conceptual and institutional frameworks for research in non-western societies. He thinks it is important to use indigenous or local concepts and categories instead since they are prerequisites for thorough understanding of the unfamiliar institutional arrangements of these places (Roberts 1976: 674). Bohannan (1957) in particular, advises anthropologists not to allow their preconceptions of law in their own society to colour what they write or see in non-western societies. He recommends the need for such descriptions to contain the *ipsisimi verba* (i.e., the way 'members of that society themselves understood and explained what they said and did').<sup>12</sup>

While there may be some criticisms whether there is possibility for any scholar to be completely neutral to what he is investigating, Bohannan's suggestion that anthropologists should be careful of not using their preconceptions in judging other people's worldviews and institutions

may seem hard to dispute, and this is fundamental to the investigation I embarked on.

Many anthropologists view case studies as the best field technique for the investigation of dispute settlement, legal rules and legal concepts. In his study *The Case Method and Field of Law* (1967), for example, A.L. Epstein identifies the universal characteristics of law and legal systems, which he thinks are observable through the study of law cases. He emphasises the merit of using cases rather than informants to discover what these are. Further, he admits dispute as a universal phenomenon in human society. According to him, this phenomenon accompanies procedures by which people air grievances and may find proper resolution to their problems. He suggests three main divisions in the resolution of disputes namely, the inquiry into guilt or responsibility for a particular event, the process of adjudication between conflicting claims and, the modes of redress and enforcement available when a breach has been established or assumed. He suggested that even though the sequence of events called a case may be isolated for certain analytical purposes, it must be considered in its social matrix, if one wants to understand its place in the social process fully. Thus Epstein's 'case method' may be said to oscillate between seeing legal cases (disputes) as one kind of case material to which the extended case method may be applied on the one hand, and on the other, seeing legal cases as one way to study the ideas, values, and basic premises of a society (Epstein 1969: 272). The strength of the approach lies in its inclusion of law in its social context. There is need to consider, for example, litigants' perspectives and other issues in the research context. This necessity of including law in social context corroborates Gluckman's study. In his introduction to *The Craft of Social Anthropology*, (1967), Gluckman prescribes the extended case method as a new tool in social anthropology. He maintains this 'new kind of analysis treats each case as a stage in an on-going process of social relations between specific persons and groups in a social system and culture' (XV).

Llewellyn and Hoebel (1941) critiqued the case law method, which Langdell introduced in teaching law at the American Law School in 1870. The case law method stressed the order and logic in law. Langdell's problem was that he severed the natural relationship that exists between law and everyday life in his teaching (Nader 2002: 89; Ubink 2008: 24-5). This, Llewellyn and Hoebel could not take lightly. For them, 'the safest main road into the discovery of law' is through the study of disputes or

trouble-cases. Both believe that ‘not only the making of new law and effect of old, but the hold and thrust of all other vital aspects of the culture, shine clear in the crucible of conflict’ (Llewellyn and Hoebel 1941: 29). In order to demonstrate that law is not an autonomous entity that can be separated from its cultural matrix (Pospisil 1973: 359), Llewellyn and Hoebel studied the law of the Cheyenne Indians by investigating the available disputes they found. They discovered that the study of trouble-cases ‘offers a possibility of study of a culture at work on and through its people, for which no schematization of “norms” can be substantive’ (1941: 28). They admit that both abstract norms or rules and actual behaviour of members of a society are *sine qua non* to understanding disputes (21).

Reactions to their work was seen in the 1950s and 60s. Scholars at the time advocated the study of indigenous law through an analysis of ‘actual processes of adjudication, mostly restricted to public forums’ (Bohannan 1957; Gluckman 1955; Gulliver 1963; Nader 1969; Pospisil 1958). This stream of studies was a critique of the older anthropological approach that based its investigation on conversation with experts.

On prevention and settlement of dispute, Bohannan (1967) thinks of legal institutions as alternatives to fighting. He dichotomises between societies racked by conflicts and those that solved their conflict through rule of law. What is apparent in his analysis is that there seems to be two basic types of conflict resolution, namely, administered rules and fighting. Negotiation and bargaining, therefore, seem to have no place in Bohannan’s scheme of analysis. He also stresses key concepts such as perception, cognition ‘and ideas as the fundamental basis of law’ (Bohannan 1957, 1965, 1967). This institutional approach and the cognitive dimension seem to be coterminous with Hoebel’s ‘public centralized institutions of law enforcement’ and his notion of ‘jural postulates’ (1954), a duality that is characteristic of American anthropology. This stance seems different from Gluckman’s legal ideas, which are expressions of their contemporary social and historical settings (Moore 1969: 276; Gluckman 1965b). Nonetheless, what interests me about Bohannan is his recognition of law as a solution to social problems or as a tool for peaceful resolution of conflicts of interest and for the maintenance of peace and order in society.

Aubert (1963b) also argued that a legal process entails the transformation of ‘dyadic’ relationships into ‘triadic’ ones. That is, once a dispute

reaches a stage where it cannot be resolved between two parties and others have to come in, the question of which others may have important effects not only on procedure but also on outcome. It may also affect the breadth of significance of the dispute. This means, to the extent that recourse to a particular mode of settlement may involve others, it may also involve the personal interests of those others, or the interests associated with their positions (Moore 1969: 277).

Some scholars also find the case method approach as unduly restrictive in that it thwarts efforts to analyse 'the full range of socio-legal occurrences' (Malinowski 1941-2: 1252; Moore 1970: 270; Nader 2002: 97; Ubink 2008: 25). Holleman (1973), for instance, advocated the need to remove too much attention from situations of dispute to an analysis of ordering in non-dispute situations (see also Ubink 2008: 25; Merry 1988: 890). He explains the difficulty confronting the researcher in trying to abstract rules focused upon single interests or actions from decisions in conflict situations involving a plurality of these. He observes that real life disputes often present a much more complex set of issues than can be covered by a single rule, and that circumstantial factors can play a role leading to an outcome that may not be in accordance with the rules. Furthermore, complicating the rule-finding exercise is the fact that conflict resolution often seeks a feasible compromise rather than the enforcement of a rule of conduct (Holleman 1973: 590; See endnote 16, Ubink 2008: 38). Thus, as mentioned earlier, Holleman propounded that:

In the study of the substantive law and its practice, and in a field of law in which litigation is rare, a fieldworker relying mainly on a case-method focused upon actual trouble-cases may get a skewed idea of the accepted principles and regularities in this particular field.... The trouble-less case then becomes a necessary check on the trouble-case, rather than the other way around (1973: 599).

He advises not only integrating the 'methodological triad', namely normative statements (rules/norms), practice (trouble-less cases) and disputes (trouble-cases) but also equally emphasising it in the anthropological approach (Holleman 1973: 606-7). The 'methodological triad' as seen, is a combination of different methods. By applying this, Holleman believes the researcher may obtain the holistic picture of indigenous rules that is valid in a particular locality at a particular time.

By the 1970s, there was a paradigm shift from the description and analysis of dispute settlement institutions to the description and analysis

of behaviour connected with disputes (Ubink 2008: 26; Just 1992: 373-4). Processual legal anthropologists such as Gulliver (1979), Nader and Todd Jr. (1978), and Star (1978) analysed the entire process of conflicts in their social context. The dominant view was no longer that indigenous rules have the capacity to resolve disputes or determine the outcome of disputes. Rather, they were seen 'as objects of negotiation and a resource to be managed advantageously' (Comaroff and Roberts 1981: 14; Just 1992: 374; Ubink 2008: 26).

The following decade also saw the synthesis of the processual and the rule-centred approaches in the study of dispute by scholars such as Moore (1978, 1986), Comaroff and Roberts (1981). In studying dispute among the Tswana people, Comaroff and Roberts discovered that 'rules governing conflict behaviour were not internally consistent codes of action analogous to Western written law but were instead negotiable and internally contradictory repertoires that were applied with discretion' (Merry 1992: 360). Through these findings, Comaroff and Roberts, like the processualists, dismissed the arguments that maintained the existence of an ascertainable set of valid rules among a certain group of people (Ubink 2008: 26). This conclusion corroborates Chanock's (1989) observation that even 'within each group there will be variations within and conflicts about customary rules, which finds expression both in normative statements of group members and in their actions' (Ubink 2008: 26). Chanock's analysis of customary law, which was applied by colonial officials, further buttressed this assessment. In this study, he identified a political choice of rules from various local versions of indigenous laws. His findings showed that there was no one set of valid rules that were applicable to all categories of groups (Chanock 1998: xi).

Furthermore, the 1980s and 90s anthropological research paid more attention to how legal institutions and their actors can create and transform meanings. There was also a greater concern with the ways law can reflect, construct and even deconstruct power relations (Collier 1988; Merry 1992: 360; Ubink 2008: 26).

From the discussion so far, anthropologists in specific periods are divided over what approach should be used in the study of dispute in society. While some think abstracting law from social life is crucial, others think the study of behaviour connected with dispute is vital to understanding the research object. Yet a greater majority feel since law is only one social phenomena, in studying dispute, other things in the social

context that may throw light on full understanding of a dispute also needs consideration. The thesis employed the latter approach like Holleman's 'methodological triad': an integration of different methods - normative statements (rules/norms), practice (trouble-less cases) and disputes (trouble-cases) in the analysis of the research objects among the Anlo and the Asante in Ghana.

### **2.3 Linking Concepts in Theory**

Analysis of field-data collected on dispute resolution and principles governing property inheritance amongst the Anlo and the Asante of Ghana essentially concerns discourse on law and society. An anthropological approach to research on dispute or law in society entails the widening of the analytical field to cover other issues in the social universe that may throw more light on the research object under investigation. It also suggests using local concepts and categories to understand unfamiliar institutional arrangements in the research units (Roberts 1976: 674).

Following this anthropological approach, I extend the analytic scope of the research to investigate many things, including the normative statements (rules/principles/norms), the actual practices (trouble-less cases), disputes (trouble-cases) of property inheritance among the Anlo and the Asante, the judicial structure of the people, and the litigants' perspectives and motivations. It also investigates the day-to-day life, perceptions, and experiences of ordinary people including the female child, divorced women, women in non-marital relationships and widows who try to come to terms with their social, cultural, economic, political, religious and legal universe (Griffiths 1997: 11).<sup>13</sup>

Given the gendered nature of the social universe, which largely has religio-cultural impacts that seem to influence all sectors of life, including political, economic and legal decision-making at the chiefs' courts under which women (especially female children, widows, divorced women, childless-women and women in non-marital relationships) live in Ghana; the study considers how these categories of women in the two research units experience the indigenous principles of inheritance and how this translates into their day-to-day lives including their legal identification - how this experience has enhanced, prohibited or influenced the selection of arbitration types to defend or claim their rights.

Griffiths (1997), for instance, demonstrates how the social world dictates marital conduct and roles for couples. Married couples have to con-

form to the gendered spousal roles and conduct prescribed by the social world. Societal expectations of marriage partners help create the social basis of these roles. These are 'reenacted in a legal arena and used as central reference points for the handling of disputes' (134). Such references in divorce and similar cases in court may affect females' inheritance and property rights.

The problem is that the social world uses two different discriminatory standards to measure spousal claims of husband and wife. For example, while a husband may report his wife's infidelity at court and claim compensation from his spouse's lover, society expects a wife not to do the same. If she does, society views her conduct as inappropriate. Thus the only claims a wife can make against her husband, is lack of support and neglect (Griffiths 1997: 134-5). The husband's family members take note of what they consider improper action on the part of the wife so that they may use it as a legal point of reference to deny her a share of property should their member die intestate.

Such asymmetry exists because what is regarded as socially acceptable behaviour for spouses varies according to different sets of expectations that arise in relation to the conduct of spouses derived from an ideal model that is embodied in the concepts of the good husband and the good wife. While such a model is often at odds with real life ... it continues to operate as a powerful paradigm in the management of marital disputes (Griffiths 1997: 135).

This gap of issues, if not covered in the analytical field, may cripple accurate conception and delivery of justice in dispute resolution.

Before opting for this approach, the question confronting the research was how, in spite of the 1985 legislative intervention by government to give women and their children substantial amount of their deceased spouses or fathers' property, women continue to suffer. The presumption of the then government was that by such legal arrangements they would be able to control the 'social arrangements' that curtail women's ability to inherit their deceased husbands' estate. Yet such ventures could not materialise because 'it is society that controls law and not the reverse ...' (Cochrane 1971: 93-4).

According to Moore, the interesting thing is that in formulations like this, 'the law' is used as a short term for a very complex aggregation of principles, norms, ideas, rules, practices and the activities of agencies of legislation, administration, adjudication and enforcement, backed by po-



litical power and legitimacy. The complex 'law', thus condensed into one term, is abstracted from the social context in which it exists, and is spoken of as if it were an entity capable of controlling that context' (1973: 719). Moore, therefore, advocated that in anthropological studies on dispute resolution, law and the context in which it is found must be investigated (720). This is necessary because laws or rules are part of the ordinary social life (Bohannan 1965).

Understanding all these different layers of issues that form the context of dispute settlement, may contribute to proper evaluation of the subject matter of dispute resolution. This is where the legal centralist model, which divorces law from social life, may seem less appropriate for the research.

Furthermore, the idea of arbitration types links the discussion with the discourse of legal pluralism where the state courts and the indigenous or local legal decision-making institutions mainly operate, and interact; but also in some small or large measure seem influenced by transnational legal systems. In the past, one would describe this coexistence of indigenous, national and transnational legal systems as legal pluralism. Some critics point out that this past usage portrays 'static analyses of plurality that failed to explore the interactions between the systems or the implications of power inequalities among them' (Merry 1992: 358). Recent scholarship on the subject has however, shown the mutual constitutive nature of these systems rather than their separateness. In addition, definitions of 'the constituent orders' have been widened to include a range of informal ordering systems, sometimes called 'private governance', which are found in societies such as the United States with pervasive state law and in post-colonial nations. Because of this, plurality of legal systems now appears to be a fundamental characteristic of all societies, not only those with colonial histories (Merry 1992). In Ghana, the international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), its Protocol and the Protocol to the African Charter on Human and Peoples' Rights inspired the drawing of the nation's Constitution. For example, the 1992 Constitution of Ghana talks about the equality of both sexes and demands that all persons receive equal treatment before the law. It eschews discrimination against any person on the grounds of sex, race, belief, ethnic origin or socioeconomic status (Art. 17(1) and (2) of the 1992 Constitution of the Republic of Ghana). It defines discrimina-

tion as giving ‘different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed...’ (Art. 17(3) of the 1992 Constitution of the Republic of Ghana). Article 18 of the Constitution also allows that a person can acquire property either as an individual or in association with others. It gives legal protection to acquired property. In article 22, the Constitution treats the rights of a surviving spouse to have ‘a reasonable provision out of the estate’ of a deceased spouse whether the latter made a will over the property or not. It requests parliament to make necessary laws to ‘regulate property rights of spouses’ and makes provision for women to enjoy ‘equal access to property jointly acquired’ within marriage. Moreover, it stipulates that property jointly acquired during marriage should receive equal distribution between the spouses in the event of divorce. Finally, the 1985 intestate succession law (PNDC Law 111), which precedes the Constitution, prescribes that widows and their children be given a substantial share of property of deceased husbands or male parents (Government of Ghana, 1995: i). Besides the international laws affecting state law, the latter in turn influences indigenous court proceedings. For example, this study discovered that the structure of court procedures among the Anlo and the Asante, seems an imitation of that of the formal court.

It is in consideration of the above that concepts such as ‘indigenous law’ or ‘indigenous dispute resolution’ as used in the thesis should not give the impression that national or transnational legal systems do not affect such processes or normative orders. Rather, the study uses these concepts because there is no single universally accepted term to connote their origin and the particular people from whom they emanate..

Due to the dialectic and mutually constitutive relations struck between the state law and indigenous normative orders in Ghana, one can now see their interconnectedness in the social order. Yet one also sees the vulnerability of the local places to these foreign structures of domination. Thus this theoretical position implicates how, to some extent, state law in Ghana attempts to penetrate and restructure the indigenous decision-making institutions, for example, in the domain of intestate succession, and how indigenous legal decision-making institutions resist and circumvent the penetration, or how they even capture and appropriate certain aspects of the legal decision-making process of the state. It also

examines how, in turn, indigenous normative orders affect the state law (see also Merry 1992: 357-9).

The analytical strategy is to discover within this scenario of influences what indigenous principles operate and what role they play in the dispute resolution processes; also how this latter relates with females' inheritance and property rights in the two ethnic groups in Ghana.

It is important to reiterate that the narrative and interpretive form of this thesis has not only been drawn from detailed life experiences, trouble-less and trouble-cases, it as well throws light on the gendered and the spiritual world in which men and women live and how this affects the latter's access to property. Finally, the analysis is based on the way members of the Anlo and Asante ethnic groups themselves understood their practices and explained what they said and did.

## Notes

<sup>1</sup> This reference is taken from footnote 13, page 14 of W.S. Mwenda, 2006. PhD Thesis, University of South Africa.

<sup>2</sup> *Trokosi* is practised in part of southern Ghana. In this practice, girls are detained as penalty in shrines because of an offense a relative may have committed against a deity.

<sup>3</sup> This quote was taken from footnote 6, page 201 of Barbara Oomen (2005).

<sup>4</sup> This is a depiction of the relationship between the Ghanaian husband and wife by Bosman writing in the 1700s and quoted by Akua Kueneyhia (1986-90) in her analysis of 'Women and Family Law in Ghana: An Appraisal of Property Rights of Married Women', *University of Ghana Law Journal*, 17: 72-99.

<sup>5</sup> The Anlo and the Asante in Ghana speak Ewe and Twi languages respectively.

<sup>6</sup> The discussion centres on the chapter 6 of the book, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (2006), (edited by Mark Goodale and Sally Engle Merry).

<sup>7</sup> As quoted in Nyamu-Musembi, 2004: 144.

<sup>8</sup> The analysis on inheritance and property is taken from Encyclopaedia Britannica Online, 15 March 2008: 1-84 based on a selection of articles.

<sup>9</sup> Refer to page 1 of the articles on inheritance and property rights in Encyclopaedia Britannica Online.

<sup>10</sup> Refer to endnote 6 above.

<sup>11</sup> Refer to page 4, Encyclopaedia Britannica Online.

<sup>12</sup> There are questions of whether it is possible to construct a completely neutral analytical system. See for example, Winch, 'Understanding a Primitive Society' in *American Philosophical Quarterly*, 1964; MacIntyre, 'Is Understanding Religion Compatible with Believing it?' In Hick (ed.), *Faith and the Philosophers* (London, 1964).

<sup>13</sup> Anne M.O. Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community*, Chicago & London: The University of Chicago Press, 1997, analyses the similar gendered social universe women found themselves caught in, in Botswana.

### 3

## Laws of Intestate Succession in Ghana

In most African societies, there is a pluralistic legal system that affects inheritance or intestate succession systems. This is typically represented by the relationship between the imported colonial laws, now adopted and added to elements of indigenous law, which is promoted to the status of a national legal system officially referred to as customary law, on the one hand, and the operative indigenous legal systems of particular groups on the other (Manuh 1988: 50). Besides the state law made up of the customary law and the adopted colonial law, Ghana as a state also recognises indigenous law in its different ethnic communities. The Ghanaian population and sub-groups use these indigenous legal systems to regulate their own behaviours and transactions. For example, people inherit property and succeed to ranks either matrilineally or patrilineally outside the official state sanctioned structures and institutions operating within the nation state.

The questions addressed in this chapter are: what Anlo/Asante laws/principles or norms and socio-cultural practices affect females' property inheritance rights and what legislative interventions have the colonial and postcolonial governments of Ghana made to help women inherit their deceased husbands' property? Has the Intestate Succession, PNDC Law 111 introduced by the then Provisional National Defense Council (PNDC) government of Ghana met the standards set by the human rights regimes on females' inheritance rights as reflected in the Constitution of Ghana? In order to answer these questions, the main strategy of this chapter will be first, to expose general principles and actual practices of inheritance in relation to females' inheritance and property rights with specific reference to the patrilineal Anlo and the matrilineal Asante. Second, it discusses efforts of both the colonial and postcolonial governments, especially those of the government of the

Provisional National Defense Council (PNDC) to correct alleged anomalies in the indigenous intestate inheritance systems. The chapter discusses the 1985 PNDC Law 111, the reason for its promulgation and finally, relates Law 111 with the international human rights instruments such as the Protocols to the African Charter on Human and People's Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with regard to females' property inheritance. Before embarking on the above objectives, background perspectives on the research populations may be helpful. Because, apart from informing whom these ethnic people are, it may as well reveal certain differences between them. These differences may explain why each socio-cultural group acts or behaves differently in certain ways. This knowledge may lead to understanding the people's respective 'objectified normative conceptions' such as principles and actual practices, which dictate their property relations, and why they continue to use them in spite of successive governments' attempts to stop the practices over the years.

### 3.1 People of Anlo and Asante

The Anlo and the Asante are located in the Volta and Ashanti regions of Ghana, respectively. The estimated population of the two regions is 1,635,421 and 3,612,950 respectively (Statistical Service Ghana 2006). The population of Anloga, the traditional capital of the Anlo according to a recent census was about 20,000 while that of Kumasi, the traditional capital of the Asante was estimated at 1,400,000 (Ubink 2008: 23).

#### People of Anlo

Anlo is a subset of the Ewe socio-cultural group in the Volta region of Ghana. It occupies an area roughly equivalent to the south-eastern quarter of Ghana and the southern half of the Republic of Togo (Amenumey 1968: 99). Apart from Ghana and Togo, the Ewe live in some parts of Benin. There are two main migration theories associated with the Ewe. The first states that the Ewe migrated from the present day Republic of Benin while the second maintains that they came from the Middle East. Amenumey (1968), a well-known historian who told the first account, states that the Ewe migrated from Ketu, West of the River Niger in the modern Republic of Benin within the West African sub-region to Ghana. Kumassah (2003) traces the origin of the Ewe from Adzatome (Iraq) in

the Middle East to Sudan, Ethiopia, Nigeria, Benin, Togo and finally to Ghana (Kumassah 2003: 14-36). Osei Kwadwo (2004), an Asante historian, maintains that the Akan people of Ghana migrated from ancient Mesopotamia to the West African sub-region (Osei 2004: 102). This account seems to support Kumassah's migration narrative, since according to Anlo oral tradition both the Ewe and the Akan people migrated together. One thing, which Anlo oral tradition uses to buttress this Middle East origin, is that the Ewe people exhibit certain common characteristics with the Jews, one of which is circumcision. One thing that remains certain and backed by the people's own migration account, is that the group was in Ketu and later in Nortse in the present Republic of Togo and then travelled to the Gold Coast (Ghana).

The Ewe presently inhabit a geographical area bounded by the Mono and the Volta rivers extending inland 'to about 75 miles from the Atlantic'. In their settlement, the Ewe did not form one political unit. Instead, they split into sub-groups, 'chiefdoms or paramountcies'. Despite these divisions in political organisation, one essential thing, which binds all the Ewe groups together, is the acknowledgement that they are one people (see also Amenumey 1968). This oneness of the groups seems reinforced and solidified by the common language, tradition and culture.

The Anlo are known as the Southern Ewe. They are, as indicated, a sub-division of the socio-cultural Ewe group. Traditionally, proper Anlo consists of only 36 towns and villages, which are located around the Keta Lagoon. However, greater or expanded Anlo covers the area east of the River Volta to Aflao, and extends inland to the southern boundary of Adaklu, also a sub-group of the Ewe (Amenumey 1968).

According to oral tradition, before their migration around the 15<sup>th</sup> century from Nortse to their present residence, the Southern Ewe were known as Dogboawo. Under Wenya, the main adviser to the then king, Sri I, the Dogboawo as they were then known arrived at their present geographical location. Wenya and Sri I were said to follow separate routes. Wenya and the people he led took the way by the sea. On reaching the present location the king's adviser, an old man, then said that *manlo de afia* (literally, 'I will coil at this place') meaning 'let me lie down here'. Some said Wenya, the king's adviser, died on the way and was actually carried to the present place and that 'to coil' (*nlo*) in the Anlo language figuratively means to die. One thing that is clear is that the people formally called *Dogboawo* before their migration etymologically took a

new name, *Anlo* from an event in which their much revered elder, Wenya, was involved.

The Anlo are seafarers. People obtain their daily living from fishing in the sea and the Keta Lagoon. Because of their seafaring nature, many of the people are scattered all over Ghana—near bodies of water. They are found all around the Atlantic Ocean and other bodies of water in the West African sub-region.

A majority of Anlo towns and villages are near and bordered by the Atlantic Ocean and the Keta Lagoon. Land is therefore very scarce in most of the Anlo towns and villages. In Anloga, the traditional capital, for instance, a large area of land is eroded, in the west by the Atlantic Ocean and in the east by the Keta Lagoon.

Anlo society is patrilineal. Since the concept of patrilineage plays an institutional role in the indigenous law of this people in terms of kin and kith relationships, marriage, domestic authority, legal transactions and proceedings, succession and rights of property generically speaking, it warrants some clarifications.

Patrilineality or agnatic kinship is a system in which one belongs to one's father's lineage. It generally involves the inheritance of property, names or titles through the male line as well (Kirchhoff 1932: 184-5). Similarly, in cultural anthropology, a patrilineage or patri-clan is a consanguine male and female kin group, each of whom descends from the common ancestor through male forebears. The patrilineal society of Anlo therefore comprises extended or wide families made up of both males and females, each of which traces its origin or descent to a remote common ancestor or progenitor. However, only males have the capability of transmitting the patrilineal blood for perpetuation of the lineage (Josiah-Aryeh 2005: 117).

It is of interest to note that in a society where males appear to have more advantages over females, no matter how much contribution or sacrifice a female parent may make, even if, for instance she single-handedly takes up the rearing of a child, tradition and custom assign right of custody to the male parent. The right of the male parent as the legal custodian of the child is exercised on occasions such as death or marriage, where his consent or (in absentia) that of his senior or junior brother (and not that of the female parent) must be sought without which nothing may be done.



Further, as a patrilineal society, men through inheritance mostly own land. Usually, women can inherit land only when it has been parcelled out as a gift to them from their fathers. They can also own land when they buy it for themselves. In the case of such lands, daughters can inherit from their mothers. Still, land is an essential yet scarce commodity among the Anlo, since both the Atlantic Ocean and the Keta Lagoon have submerged vast acres as previously indicated. Because of its scarcity, any fertile plot in Anlo goes to agricultural use. For example, in the traditional capital, Anloga, one sees many long, raised, narrow beds used to grow onions, maize, okra, tomatoes and cassava. The people adopted this type of agriculture to keep their crops above the water table. During the fieldwork, Togbui Kove, a sub-chief of Anyako who lived in Anloga because of his work as a librarian in the Zion Secondary School, showed me the lagoon side and farms destroyed by the June 2006 inundation.

Due to the scarcity of land, many Anlo men and women indulge in fishing and small-scale businesses for their survival. For example, some of the people, a majority of whom are women, are fishmongers while others deal in foodstuff and other items. Some of the Anlo men and women are also self-employed in the fish distribution industry. Some Anloga citizens have large businesses outside the town. These people are relatively wealthier.

From the discussion, it is now clear that the livelihoods of a significant population centre on a scarce commodity in this region, land. Due to its scarcity, many disputes in Anloga and other Anlo towns and villages are land-centred, irrespective of their size. As a judge whose jurisdiction was in the District Court at Anloga and in the Circuit Court at Keta at the period of the research put it, 'it is absurd when on *locus visitation* one discovers that the piece of land under dispute is extremely infinitesimal'. Second, since this patrilineal society places a premium on males to inherit essential properties such as land, houses and other property for transmission to future generations of patrilineal descent, there may be instances of friction and eventual tensions when a woman tries to claim equal rights with her male counterpart in inheritance.

## People of Asante

The Asante belong to a socio-cultural and umbrella group called the Akan. This socio-cultural group comprises the Akwamu, Guan, Fante, Denkyra, Brong, Akyem, Kwahu, Sefwi, Wassa, Akwapim, Assin and

Asante. Geographically, the Akan inhabit the western, central and Ashanti regions and parts of the Brong-Ahafo, Volta, eastern regions of Ghana and the eastern part of the Ivory Coast. The consensus is that, together with the rest of these Akan groups, the Asante have migrated from ancient Mesopotamia to sub-Saharan Africa (Osei 2004: 1-2). Each of the ethnic groups is autonomous but linked by similarity of culture, religion and the Twi language. The Anlo migration tradition, which maintains that the Anlo and the Asante migrated together but confronted a misunderstanding somewhere in their journey that led to the separation of the two socio-cultural groups, corroborates this tradition.

According to Asokore-Mamponghe (paramount chief of Asokore-Mampong) in Ghana, the Asante migrated from the north to Techiman and then drifted to the southern coast in places like Mankesim. Most of the people were hunters and since the coast was not conducive to this kind of life, they decided to move back to the north and settled in Adanse where they learned how to build houses. Thus, the name of this settlement comes from the art of building houses (i.e., *Adansie*). From Adanse, the various Akan groups started drifting further north again toward Bekwai, Asantemanso and Kokofu. Other locations people went to were Dwaben, Mampong, Nsuta, Kumawu, Offinso, and Nkoranza, while still others went to Kwaman, which was the original name for Kumasi.

The obvious question to ask here is, who are these people called the Asante? It is therefore important that in this initial stage we define the name *Asante* (*Asanteni* – an Asante; *Asantefo* – Asante). One may have to start with *Asantefo* as a word and as a linguistic problem. What did the word *Asantefo* originally mean? What is its etymology? Historians and anthropologists continue to discuss this issue and they offered many answers (see Allman 2000; McCaskie 1995; Osei 2001; Wilks 1993).

This thesis addresses three attempts made to arrive at a *Twi*<sup>1</sup> etymology for Asante. These are namely, *Asan-te-fuo* (clay producing group), *Esa-nti-fuo* (because of war group) and *Asanteni-ba* (a child of Asante). All this typifies the kind of reasoning involved.

The Curator of the Kumasi Manhyia Palace, Osei Kwadwo (2001), for example, proposed that:

The Asante got the name from the special commodity they served Denkyira with. All the states were sending commodities like plantain fibre, firewood and gold dust to Denhyira [hene] every Akwasidae. But in addition to these commodities, the Asantes were sending red clay as a special

commodity to Denkyira. The Akan call the red clay “Asan”, therefore the Asante were differentiated from others with the name Asan-tefo i.e. those who dig for clay (Osei 2001: 1).

The Curator’s second theory, which appears somewhat plausible, is that the name Asante is said to emerge as a result of the people’s activity as they prepared for war. This was at the time of Osei Tutu in the 16<sup>th</sup> century when the famous traditional priest, Okomfo Anokye purportedly gathered all the Asante chiefs from the various ‘micro states’ and advised them to form a single, larger confederacy against their warring enemies such as the Denkyra. To cement the union, Okomfo Anokye was said to have commanded a golden stool, which he made to rest on the lap of his friend Osei Tutu, the then chief of Kwaman (old name for Kumasi). He managed to convince the other chiefs to accept the Kwaman chief as their king. The golden stool therefore symbolises the unity of the coming together of all the Asante microstates represented by their chiefs. Moreover, legend says that the stool contains the soul of the Asante nation and thus, belongs to the Asante nation. All the other chiefs pay allegiance to it. As it is, the union was formed as already mentioned, to fight the Denkyera king, Ntim Gyakari. That is, it was ‘because of war’ (*esa nti*) that the union formed. Thus, the people came to be the *Esa-nti* or *Asante*—meaning those who formed a union because of war (Osei 2001). The Curator’s theories derive from the etymology of *Asantefo*. Nevertheless, this derivation does not seem to prove much because it does not give any clue to the meaning of the word.

The third theory that is more ingenious but less convincing is *Asanteni-ba*. This is taken from the Asante observation that an *Asanteni* (sing.) is a child born of an Asante mother and an Asante father. This explanation deals with the biological origin of a person. However, it seems that this alone also may not be enough to make someone an *Asanteni*.

According to Jean Allman (2000), the concept has a fluid history. Ivor Wilks (1993) indicates that the Akan in the 15<sup>th</sup> century were distinguished and defined by their sedentary agriculture, matrilineal and matrilineages, ‘states’ (*aman*) and bonds of ‘language, religion and a common sense of shared identity’ (94). As the Asante emerged at the end of the 17<sup>th</sup> century however, various dynamics of the developing Asante state shaped their identity (Allman 2000: 101). This fluid process continued in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Arhin (1983), in his study of ‘Peasants in Nineteenth Century Asante’, indicated that ‘be(com)ing Asante’ was as-

sociated with being or becoming urban and worldly or being pulled towards the urban life of Kumasi, the traditional capital (Arhin 1983: 475). Thus 'being' Asante was something you 'did over time and across space. It was not something you flatly were or were not' (Allman 2000: 103). 'Asanteness' as a process of 'be(com)ing', according to Allman, historically became evidenced in the annual *odwira* festival where the 'unity of the *Asanteman* was re-enacted; allegiance to the golden stool was affirmed; the centrality of Kumasi was reinforced; and the seamless unity of dead, living and unborn was remembered. Power, moreover, was re-constituted and reaffirmed' (Allman 2000: 103). This symbolic re-enactment of 'Asanteness' through the celebration of the *odwira* lapsed between 1896 and 1985 (McCaskie 1995: 151). Although later reintroduced, its significance was lost. Thus, being an Asante had become an ascribable attribute. Allman concluded that 'Asanteness' was no longer something that had to be performed; it only had to be believed. But the social base, in women's roles as mothers of the lineage, in the values and symbols and rhythms that marked Akan communities, there remained for Asante a 'seamless unity' between an Akan past and an Akan present (Allman 2000: 110).

It seems therefore, that the various etymological attempts are social constructs, which the Asante themselves have made over the years in trying to understand their identity. This understanding is fluid and continues to change according to time. Therefore, it is important not to be restricted to one etymological explanation. Observation on the social life of the Asante; their actions and interactions with themselves and others demonstrate that an *Asanteni* (Plural, *Asantefo*) or an Asante may be someone capable of speaking the *Twi* language, whose parents, especially the mother, is an Asante and more importantly, must be one who owes allegiance to the *Sika Dwa Kofi* or the Golden Stool. This assessment is in line with T.C. McCaskie's explanation that the right of full citizenship in Asante society seems exclusively vested and defined by membership in an *abusua kesse* or the extended family (McCaskie 1995: 88) whose origin in any case comes from an ancestress. This, according to McCaskie, lays the foundational premise of social and cultural order of the Asante. To alter this definition and construction of the jural corporateness in any way, according to McCaskie, may be tantamount to tearing up the charter of Asante society (1995: 88). Anthropologists identified the social convergence of this for the ordinary Asante citizen in the sense that the

severance of lineage ties may be comparable to passing a death sentence over him or her (McCaskie 1995: 89).

Enid Schildkrout also argues that this phenomenon of identifying oneself with a particular ethnic group and seeing others outside that group as strangers or outsiders was a legacy of, and complicated by, British colonial rule. This is because during the colonial period, people whose traditional homelands or states were not known or defined were tagged by the British as 'non-natives'. In moments of political crisis, the 'non-natives' were susceptible to deportation to their places of origin. By this definition, the concept of nationality links with the concept of ethnic origin, since the place of birth alone did not confer the status of native (Schildkrout 1970: 254). Thus, it could be said that it was only by pragmatic considerations that the Asante society gave rights of 'Asanteness' to anyone whom they perceived could bring economic prosperity to their state.

For the Asante, Kumasi was a structure in which the economic, social, and political systems merged intricately, where everyone received his or her due. Within this pattern, the king provided the protection within which trade could flow with limited official interruption. Even though this structure has changed over time, there are traces left behind since the present Asantehene still controls stool lands and benefits that accrue from their resources. The rationale behind such policy is simple. The king's wealth, and indirectly that of the state, is potential rather than real. It relies on the capacity and the readiness of the people to pay all the extraordinary taxes and tributes needed to sustain the state.

There were some other changes. During fieldwork in Kumasi, I observed how powerful traders integrated with the traditional order to obtain political offices in addition to their trading activities. In addition, some of these immigrants to Kumasi remain socially and culturally aloof from Asante society. They retain their status as strangers (Schildkrout 1970: 256). Admittedly, in the presence of foreigners in large numbers and the fact that some powerful traders seem supported by foreigners against some of the traditional rulers, makes the process of integration difficult and leads to what is described here as diffused authority.

The Asante, like the Anlo society, is lineal and thus, divided into clans. There are eight clans in Asante. A person belongs to the clan of his or her mother. This means all extended family members in this society, as earlier indicated, trace their descent from a common ancestress. In

other words, the matrilineal family consists of all persons, whether male or female, who have descended from a common ancestress. The basis of the genealogy is the common blood that feeds and nurtures the child in the mother's womb. The peculiarity involved here is that the matrilineal blood passes only through females. This naturally leads to a system of diagonal succession where the matrilineal blood dies with every male member (Josiah-Aryeh 2005: 116). This means males are only regarded as members of the matri-family during their lifetime. This implies children belong to their mother's family and not to their father's.

According to Peter K. Sarpong (2002: 64-76), there are certain principles governing the matrilineal society namely:

1. The clans or lineal groups are exogamous (i.e., people marry from outside it.)
2. As a matrilineal society, women are more important than men are. Women continue the lineage while the latter ends with men.
3. Ideally, the clan owns possessions, property or wealth. This is to say that all these have collective ownership. They do not belong to individuals but they receive them to use.
4. Succession, inheritance and rank are all determined lineally. This means one succeeds in his or her clan and inherits in his or her clan.
5. The kinship terminology deals with sociological as well as biological factors. That is, your father's brothers are your fathers while your mother's sisters are your mothers. This means these people must treat you as if they are your biological father or mother.

Among the five listed principles, the patrilineal society shares exogamy, lineal determination of succession, ranks, inheritance and the kinship terminologies such as classificatory fathers or mothers.

In the matrilineal kinship and family system, maternal siblings take precedence over the spouse in many spheres of life. This includes investment decisions and the joint acquisition of property (Oppong 1981). Many Akan proverbs encapsulate the importance of this maternal relationship over the paternal. For example, *Enii yento* or 'One can easily get oneself a partner but not a mother'; and *Dabre me mmame awo* or 'provided my mother gives birth and I have a sibling', it does not matter whether there is a father or not (Awusabo-Asare 1990: 15).

Further, a wife and a husband in theory have no right to inherit each other's property. Additionally, children do not inherit from their father. This is because, as indicated, the clan owns the property. In other words, one cannot succeed his or her husband or father because one's clan determines all these things. One succeeds and inherits in his or her own clan. This is why, when there is a dispute over succession or inheritance, a chief tries to find out the clan of the disputing parties.

The matrilineal family members enjoy common ownership of property. Moreover, they are liable to contribute to pay family debts and possess the rights of representation at family meetings. Further, the head of the family holds all property in trust and also manages and controls it on behalf of members (Awusabo-Asare 1990: 117).

In sum then, the main reason for inheritance among the Anlo and the Asante is that ownership of property should remain within the lineages. Before proceeding on analysis of the history of intestate succession in Ghana, it is of analytical importance to have a detailed discussion on the indigenous system of inheritance in Ghana using the patrilineal Anlo and the matrilineal Asante systems as examples.

### 3.2 Anlo and Asante General Principles and Actual Practices of inheritance

This section contains a synopsis of general principles and actual practices of inheritance among the Anlo and Asante, divided into two parts for discussion. The first section talks about stated principles of inheritance and, what actually takes place in the inheritance practices of the two groups. The discussion gives some reasons for the practices.

#### General principles of inheritance of Anlo and Asante

A careful assessment of the inheritance systems of the Anlo and the Asante distinguishes stated principles from what the people actually do in their everyday inheritance practices. It is likely that over the years the two family systems constructed the general principles that govern their property inheritance.

According to Joseph Kwami Dzidzienyo,<sup>2</sup> an elder and a family head, there are two objectified normative conceptions that govern Anlo property inheritance. The first objectified principle is *Dutsua, fofonue wòduna*, which means 'A man inherits his father's property'. The second principle

is *Nyornua, dadanne wòduna*. This means, 'A woman inherits her mother's property'. In accordance with the first objectified normative conception, after the death of a father his estate is inheritable only by his male child. If there is more than one male beneficiary, all of them inherit according to the order of seniority in age. If it is for some reason impossible to share or divide the property, it remains in common for the use of the male siblings. This means that the female child has no right to inherit any property from her father.

The last objectified principle governing property relations among the Anlo maintains that if a woman acquires her own property, it is not the male but her female child who inherits it. In line with the indigenous conceptual framework operative in the last principle, women are not supposed to own substantial properties such as land, fishing boats and nets, houses and similar things. Locally, a woman's property is defined, derogatorily, as 'women things'. These range from cooking utensils, water pots, brooms, coal-pots, mortar and pestle to kitchen rags, and from clothing to jewellery, and similar items that go to make the home. This principle is in accordance with the traditional mentality that the woman's place is the kitchen and that she was created as a beauty for her husband. Thus to keep the tradition going, when a mother dies, her property is inherited by her daughter by way of helping the latter settle properly into womanhood.

One of the objectified principles on inheritance among the Asante is that 'A man inherits a man' and 'A woman inherits a woman'. For example, nephews inherit from their uncles, nieces from their aunts and daughters inherit from their mothers.

The last objectified normative conception on inheritance among the Asante is encapsulated in a proverb, *Nniwa mma nsa, wofase nni adee*, which means, 'If brothers and sisters are there, nephews and nieces do not inherit'. This last proverb appears to merge the first principle that 'A man inherits a man' and 'A woman inherits a woman' as indicated above. This might have evolved with the passage of time. The proverb indicates the people who have inheritance rights, which fall according to the degree of importance in accordance with the matrilineal inheritance general principle. This means that for people of matrilineal descent, a man's own children and wife cannot inherit from him and his brothers and sisters are first in line of inheritance before his nieces and nephews. For example, when a male acquires property but dies intestate, his uterine brothers and



sisters are the first people qualified to inherit it before his nephews and nieces (his sister's children).<sup>3</sup> As indicated above, the inheritance system follows a certain order. First, the senior uterine brother, followed by the other brothers (if any), and then the senior uterine sister, followed by the other sisters. If there is more than one person who qualifies for the inheritance, then criteria such as age and achievements of the prospective candidates factor in (Awusabo-Asare 1990: 7).

In very strong patrilineal societies like the Anlo, the brother and sister relationship is very strong and even continues in adulthood, but when it comes to inheritance, there are likely to be frictions. In Asante, on the other hand, the maternal unit comprising brother, sister, nephew and niece forms an important structure used for inheritance and other purposes. Even though these sibling relationships seem a social construct, they are justified by the same maternal connection that forms the building block of the matrilineage and they are central to understanding their personal and ethnic identities. This explains why the continuing priority of uterine relations constantly underlines the primacy of matriliney in their life experience (Clark 1999: 718).

### *Actual practice of inheritance of Anlo and Asante*

In spite of the objectified normative conceptions on inheritance among the Anlo and the Asante, there are considerations when it comes to actual practice of it.

Among the Anlo, both male and female siblings qualify for inheritance of their father's property since both come from the same father, and for that matter, the same lineage. Therefore, when it comes to sharing of the father's property, a portion of it goes to the female child. In one trouble-less case, for instance, Agala,<sup>4</sup> a key informant, reported that after the death of a man who had married four wives, his property was divided among his children who comprised three males and five females. First, they divided a piece of land, which was a self-acquired property of the deceased, into eight parts according to the number of children. Preference went to the male children to pick the portion of the land they wanted first before the females. The males also picked according to seniority of age; the eldest son of the deceased was asked to make his selection followed by the younger and then youngest male child. When it came to the females turn, the same age seniority determined who picked first and who picked last. After sharing the land estate, they divided the

deceased shallot farm. Two plots went to each of the females while the males received ten each. According to the informant, the deceased left a house behind. However, this property was not shared because it was built on family land. This means the deceased's children can use it but they cannot dispose of it.

Before their deaths, some men will bequeath a portion of their property over to their daughters, in order to avoid discrimination and ensuing quarrels. This typically involves notifying elders who may be family members and outsiders. Culturally, the outsiders are important as necessary witnesses in case family members condone and connive to take the property from the rightful heir after the death of the donor. Normally this process is sealed with a drink (alcoholic beverage).

In polygamous marriages, female children also had equal share with their male siblings when property was distributed according to the number of mothers and not according to the number of children. This was so that the female child and her mother could also have a share in the intestate property.

If a deceased father has no male child but has only a daughter, the latter may by tradition and custom inherit his property. Unlike a son who enjoys a permanent interest, a daughter receives only temporary interest in the property. Her children may be considered to use the estate after her death on moral ground. This means they suffer eviction if their behaviour does not please members of the patrilineal family from which their mother had the temporary right of inheritance. Thus, while a male member's individual share of land or house passes on to his children upon his death under the system, a woman's share reverts to the lineage.

When a man passes away childless and intestate, his brothers and sisters inherit him. Even in this context, brothers often have more inheritance rights than their sisters. All this happens because the patrilineal family system gives more importance to the male and therefore confers more inheritance rights on him. Thus, according to Kludze (1973) and Nukunya (1993), among the Anlo, both sons and daughters are considered when property is distributed, but the sharing is often unequally done. Kludze has further noted that the Anlo increasingly consider the claims of daughters as a privilege only, and not a right that can be enforced before a court of law, particularly in the case of land inheritance.

In the matrilineal family system of Asante, as indicated, children do not inherit their father's property. Fathers are expected to set up their

male children in life through training, giving of gifts, and helping sons to acquire their first wife. In the traditional system, this practice might involve apprenticing the son either to the father himself or to a master artisan, orator or political leader (Awusabo-Asare 1990: 7; DFID, UK, Report no. 19, 1994: 58). Thus, an *Ahenkwa* or state messenger might train his son so that when he grew old, he could replace him at the royal court (Awusabo-Asare 1990: 7). Fathers and paternal aunts used to give daughters gifts in the form of land and other items when the children reached puberty and during their first marriages (Awusabo-Asare 1990; Adjaye 1985; DFID, UK, Report no. 19, 1994: 58; Sarpong 1977). Today, a father who intends on setting up a child in life may have to provide a formal education and/or an apprenticeship (Awusabo-Asare 1990: 7; DFID, UK, Report no. 19, 1994).

It is important to stress that among the Asante, even though in principle, a man can only inherit from a man and a woman from a woman, a uterine sister can inherit her brother's property. The male child can also inherit his mother's property. Similarly, nephews are supposed to inherit their uncles' property but nieces also receive shares from the property. Moreover, even though strictly speaking, nieces inherit their aunts, a boy may serve his aunt or grandmother well and the latter may decide to give part of her estate to him for the services rendered her.

It is of importance to note also that if a father makes a traditional will before his death, his self-acquired estate may be posthumously shared among beneficiaries including his wife and children even though Asante indigenous law does not permit wives and children to have succession interest in their fathers' or husbands' property. On the other hand, a husband can give a portion of his self-acquired property to his wife and children before his death. The husband, just as among the patrilineal Anlo, has to do this in the presence of his family members and others outside the family. In each case, a beneficiary is obliged to present a bottle of rum or an equivalent present to the gathering indicating his or her acceptance of the gift. The present is shared in the gathering. This drink or present and the witnesses are significant in the indigenous transaction of gifting. In other words, the present is a testimony that the particular property has been given to the donee by the donor. The gathering is also witness to the event against prospective litigation on the property. The above procedure in the indigenous inheritance system of Asante, just as among the Anlo, legally seals the transaction of gifting. According to

Sarbah (1904), for the procedure to be valid, the donor must have the intention of giving and passing the item to the donee and that its acceptance must occur in the lifetime of the donor. Moreover, the transaction of giving and receiving 'must be proved and evidenced by such delivery or conveyance as the nature of the gift admits' (Sarbah 1904: 60-1).

Interviews and everyday conversation with people indicate that in the past, widows did not suffer as they do today under Anlo and Asante inheritance and property laws, since husbands usually made provisions in the form of land as a gift to their wives in appreciation of services rendered them. Experiences have shown however that after the death of donors and first recipients, and with the passage of time, family members of the deceased donors often try to retrieve the property given out as gifts. Evidence has shown that such cases can become contentious in law courts. Chapters 4 and 5 contain a discussion of typical examples of these controversies.

Among the Asante, women (nieces) can inherit property from their uncles, but men (nephews) get first consideration. Women and men however, according to indigenous legal prescription, cannot inherit from their male parents. Even here, in spite of the legal prohibition, male parents make special provisions for their male children.

The general feeling among the Anlo and the Asante for not making adequate provision of property for women when it comes to inheriting a man's property is that their husbands will look after and maintain the women well. The mentality is that the woman may not remain in her lineage for long. In other words, she is eventually married off and taken away to a far or near place where she has the opportunity of 'enjoying' the property of her husband. According to this line of thinking, since female children become somehow part of their husbands' families through marriage, there is fear that if they are allowed to inherit a man's property in their lineage, they may end up transferring what they have inherited to their husbands' lineages.

Women who marry within their own lineages however, are more likely to have greater inheritance rights since the property they use remains in the same lineage. They may use land, for example, as long as they are alive and maintain links to their husbands' lineage, but cannot pass these rights on to others outside the lineage. It appears, therefore, that both patrilineal and matrilineal systems of inheritance do not favour, women, especially in exogamous marriages. The discussion will make

clear that the main reason for patrilineal and matrilineal inheritance systems is to maintain, retain and secure the property within the lineages. Since lineage and society give more of such rights to males in both family systems, they tend to dominate property ownership within the inheritance systems.

Added to the reasons why females receive lesser property inheritance rights among the Anlo and Asante is that a woman must not build a house or own an estate. Rather, a man must build one to provide shelter for the woman and her children. When a man does this, he receives respect in society and gains regard as 'matured' and 'responsible'. These societies do not respect a man who lives in his wife's house. He is accorded no reputation. His in-laws may not respect him. Often effeminate insinuations may be cast at him. In some situations, this may even lead to an exchange of words or fights between him and his in-laws.

In one trouble-case in Anloga, a man attacked his sister's husband after numerous complaints in which the brother asked the latter to vacate the home in which he lived with the sister; the home was the paternal house of the sister. The matter went before the District Court at Anloga where the brother-in-law was found guilty and fined. The presiding judge explained that even though traditionally among the Anlo it is disgraceful to live in the house of a wife, the brother-in-law took the law into his own hands and was punished for it.

Because the Anlo do not expect the above to happen, there is a local saying, *Nyonu de mebiāna o* or 'A woman's palm tree does not bear fruit' (see also Fenrich et al. 2001: 259). The proverb intends to discourage such males not to over-depend on their wives or mothers because the Anlo believe socially that males who do so never turn out to be economically viable or successful in life. Concomitant with this belief, as indicated, is that women are not supposed to be as economically productive as men are.

Connected with the explanation that women may not have the same property rights as men, among the Anlo, is the socially accepted phenomenon within the patrilineal system that women do not own children and therefore the economic responsibility of raising them does not rest on their shoulders. As such, the lineage and society think there is no need for a woman to own property such as land, a productive economic source on which food crops may be grown with the primary purpose of feeding children, since she and her children are to be looked after and

maintained by a man. In other words, a man is supposed to take someone else's daughter as a wife and bring her under his own roof where he is expected by all societal standards to properly feed himself, together with his wife and the children he obtains through marriage. As a beneficiary of the estate, the man retains it within the family to pass on to others. By remaining in the lineage, a man not only brings about continuity, but also helps in immortalising it. As a result, men are supposed to own more property, including land, to enable them to raise a family for this immortalisation.

According to Anlo culture, men are not supposed to take pride in their mother's acquired property. Such an act would be effeminate. A man must either acquire his own property through hard work or inherit it from his father. These are generally the manly ways of obtaining property. Joseph Dzidzienyo explains that this practice is based on the tradition of *Mia Eweawoa, miedana de fofo dzi; menyé de dada dzi o*. That is, 'the Ewe is proud of his or her father's lineage, and not on his or her mother's.' This explains why among the Anlo, it is the greatest disgrace for one not to know one's biological father.

Consistent with the legal right of obtaining the larger share of the estate, society places greater responsibility on the male's shoulders. For example, a male child has the responsibility of maintaining and renovating his bereaved father's house. If the father had incurred any debt prior to his death or debt was incurred during his mortuary and funeral celebrations, it is the responsibility of the male child to settle it.

Personal experience and discussions with informants show that not every male child completely fulfils this responsibility. For example, some have lost inherited properties through prodigal or wastefully extravagant living. Many such males never fulfil any of the responsibilities attached to the rights they enjoy. In some cases, the female child takes up the responsibility of maintaining and renovating the bereaved father's estates. Some females also settle debts incurred by their deceased fathers.

According to Ejisuhene (paramount chief of Ejisu), a key informant, a wife may have a share if she helps the husband acquire a property, even though there is no indigenous law binding the husband to give part of his self-acquired property to his wife. Moreover, indigenous law contains no definition of how much she receives. On the other hand, a wife has no share in a stool property, even if she helps in the acquisition of such property, unless the people on the stool consider her and give her some-

thing. Thus in both situations, if any assistance is given to the woman, it is purely on moral ground. The royal informant intimates that law, whether indigenous or formal, is rigorous. That is, it does not respect any person. However, the advantage is that one can always temper indigenous law with mercy and morality. One trouble-case brought to the chief's court may serve as illustration. The case concerned the widow of the late Domebrahene (paramount chief of Domebra). After the death of the chief, a question arose as to whether the widow was entitled to a share of the stool property. In indigenous legal tradition, as indicated, the widow was not entitled to it. However, according to Ejisuhene, he and his council chose the other side of the story; namely, that since the woman served the late chief through whom the stool property was obtained well, they should temper this category of indigenous law with morality. In the final judgment of the case, the widow received a share of the stool property. The Ejisuhene concluded that law is an art. It depends on interpretation.

The above information leads to the importance of good relations in marriage. For, if a husband dies intestate, the deceased's family members may give a portion of the property to the widow depending on the relationship that existed between them, prior to her husband's death. If there was no cordial relationship, the widow may be ejected from the deceased's house soon after her husband's death. The explanation is that, generally in Ghana, marriage does not concern only the bride and bridegroom. It involves the two families of the bride and groom. A wife needs to respect and be nice to her husband's family members; and the husband must do the same to his wife's family. If not, there is always trouble after the death of a partner.

In addition, the way a wife treats her husband, especially in times of infirmity such as blindness, stroke, impotence and other ailments, also determines whether a wife should be considered on moral ground for a share in her deceased husband's estate, even if she had not contributed physically in its acquisition. Kofi Togobo, for example, explains that if the estate is a house, she gets a room to live in. The widow can live there for the rest of her life if she so wishes. However, if she is young, she can marry any of the deceased husband's family members. If she does, she continues to live in the deceased husband's estate. If, however, she decides to marry outside the extended family of the deceased, then she risks her chance of living in her deceased husband's house.

Mr Lawluvi,<sup>5</sup> a retired educator, an elder and a family head, reiterates the points that when a husband dies leaving a wife, a member of the deceased man's family marries the widow. In this levirate marriage, a brother might marry the widow of a deceased man if the latter had no child to continue his line. This brother takes control of the management of the estate until the deceased's children grow up to assume the management of it themselves. The man chosen by the family to control and manage the estate is always deemed responsible. In the traditional sense, arguably the institution of the levirate marriage has some advantages. For example, the brother who marries the deceased's wife may take good care of the widow and her children. Secondly, the widow and her children may not feel the great loss created by the death of their husband and father. This type of marriage has fallen out of favour today, especially among the young.

When a widow decides to marry outside the deceased husband's family, family members may ask her to vacate the deceased's house. Among the Anlo, the house then becomes property of the deceased's children or family if it is on family land. Among the Asante, it becomes the property of the matrilineal family. If, however, the deceased husband's extended family likes the widow, it may allow her to stay in the house despite the fact that she marries outside it. In circumstances like this, the family adequately explains to their ex-in-law's new husband that his wife lives in the house only as a tenant and that she does not own the estate. This avoids prospective controversy over ownership of the estate. Thus, the practice depends on the particular family and varies from place to place. Some families may decide to compensate a widow for her active role in the deceased's life, even if she decides to marry outside their family, while others may refuse to do so. Normally, widows themselves prefer to move from their deceased husbands' homes because of the traditional belief that they may develop certain incurable sicknesses, which may be fatal if they indulge in sexual relationships with men other than family members while still living in the decedent's home. Even though this belief may not be strong in towns and cities in present Ghana, it is important to remember that tradition dies hard, especially in the rural areas.

Awusabo-Asare (1990) indicated the following order of transmission of property of a deceased female in the matrilineal system of inheritance in Asante. The first person to consider is the deceased's mother, if she is still alive. If the mother is not alive, then a uterine sister is the candidate.



If the mother or a uterine sister cannot be found, then ‘a daughter (and in some cases a son) of the deceased becomes the next in line to inherit’ (7).

However, the fieldwork in Kumasi has shown that when a woman, through her own effort, acquired a property and dies intestate, her eldest daughter is allowed to inherit her property while the deceased’s eldest sister is made the caretaker. The procedure is not automatic because the matrilineal family has to approve or select who among the deceased’s children is to inherit. If the decedent’s eldest sister or any woman in the family becomes the caretaker of the property, custom demands that she give thanks in the form of drinks. Comparing Awusabo-Asare’s order of inheritance in 1990 and the situational reality at the time of this fieldwork in 2006-2007, it might be that with time, gradual and sometimes not easily perceivable changes enter the indigenous inheritance system where daughters now insist on inheriting their mothers’ self-acquired property, instead of the decedent’s mother or uterine sisters inheriting it.

Additionally, if on the other hand, a female owns a store and dies intestate leaving a daughter and a son, by Asante custom, the daughter inherits the store even if she is younger than her brother is. If there is no daughter, the deceased’s eldest son inherits but as indicated, the family must select him. At the same time, a woman of the family becomes caretaker so that the son can enjoy the property.

Empirical data from the fieldwork also indicates cases where if a deceased woman has a son and a daughter, and the latter is a deviant or has some psychological or physical problem that incapacitates her mental function, the family will appoint the sister of the deceased woman to take care of the property. The deceased woman’s son can enjoy the property as long as he lives, but his children cannot inherit it. That is, he only has a life interest in his mother’s property. On the other hand, if a mother has made a will for the male child, then her property belongs to him.

If the deceased woman had no children and no uterine sister or brother, the family would appoint a member to take care of the property. In that case, the property goes to the family. If there were no one left in the family, the chief of the town or village would take care of the property. It then becomes a stool property.

It is also allowed that if a woman dies intestate leaving behind a property such as land or a farm and has a brother, a sister and children who

are too young, the sister of the deceased inherits the farm or land to take care of the deceased's children. However, informants explained that in many cases, the sisters use the proceeds from the property they inherited to cater to themselves and their own children to the neglect of the primary beneficiaries. As indicated, the uterine brother can also enjoy this property but only during his lifetime. This means his children cannot inherit this property from him.

The queen mother of Wiaso gave an example of one trouble-case in which her mother's uncle died and left behind two cocoa farms in two separate villages. A senior nephew inherited, but he was not accountable to anyone. He used the money to cater to his own maternal relatives and neglected the informant's maternal relatives. The chief eventually summoned him. The chief ordered that the farms be shared. The smaller portion went to her maternal relatives while the maternal uncle obtained the bigger portion. This occurred partly because, according to the informant, the maternal uncle's mother was the senior sister. In addition, the panel did not want to annoy the uncle who was already using the farms, a thing, which might lead to misunderstanding and could sometimes lead to danger—fear that he might spiritually attack the other beneficiaries.

In one trouble-less case, Charles Coffie, a family head in New Kyerekyere in Kumasi, explained that his grandmother had three children (two females and a male). The elder female was his mother. The informant's mother died leaving the other two siblings. According to Asante custom and tradition, his aunt inherited his deceased mother's property, but in practice, it was his uncle who actually took over and controlled all the possessions including a house, a cocoa farm, other land and assets.

Ideally speaking under the Asante system of inheritance, the informant's aunt was supposed to inherit the property. In practice, his uncle took over all the property and used them to take care of the deceased's children. However, taking care does not necessarily mean giving financial support, but moral support, in times of difficulties. This incident might be an example of several cases where females were unable to contain their male uterine relatives in the access, use and control of property. This is because among the Asante, society frowns on a female who appears to be outspoken or insists on her rights. Derogatory names such as *Akokonini* (a rooster) are given to such women. The implication of this may be that the Asante society, like that of the Anlo, seems to endorse

women's inferiority to men, even though a host of key informants including Peter Sarpong, a well-known Ghanaian anthropologist and a prolific writer, deny this. Such key informants argue that in matters of inheritance, women in the matrilineal system like the Asante are very powerful. Other key informants who pleaded anonymity maintain that not only do women have witchcraft powers to influence decisions, but they also have the sole power to nominate who should inherit or be the caretaker of property. In the latter case, for example, it is the Asantehema or the queen mother of the Asante, who nominates the next king when the incumbent has died. She has three consecutive chances of nomination. Only after exhausting the three consecutive chances can the elders of Kumasi state make their choice. What the critics fail to recognise is the belief that men also have spiritual or mystical powers, such as sorcery, in influencing decisions.

According to Asante oral tradition, women themselves, through some historical incidents, condescended to their present seemingly inferior position in society. Historically, females were said to be the founders and the original heads of the eight clans of Asante: notably, the Oyoko, Bretuo, Agona, Aduana, Asenie, Asona, Ekuona and the Asakyiri. Up until about the 16<sup>th</sup> century, females were said to dominate affairs in the pre-Asante societies. In modern times three successive queen mothers, for instance, were Juaben chiefs. This means that as female chiefs, they also acted in the capacity of male chiefs, which might confirm this assertion.

However, during the inter-tribal and the Asante wars with the Denkyra in the 17<sup>th</sup> century, there was a reversal of power relations from females to males. What precipitated this was that during these wars, Asante needed men to fight and to offer protection or defence. Through this unfortunate circumstance of history, men took over the leadership positions from women in Asante. Nevertheless, as key informants indicated, a vestige of power or dominance of women still hangs on in matters of inheritance or succession.

This condescendence of women seems reflected in proverbs such as 'the hen knows time but it leaves it for the rooster to announce' (*Akokobere nim adekyee, nanso ogyae ma akokonini bo*); and moreover that 'If a woman purchases a gun it is a man who keeps it' (*Obaa to tuo a, etwere barima dan mu*). Thus in this understanding, it has been socially and practically accepted that males are heads, even though in principle females are said to be superior. That is to say, females voluntarily relinquished

their leadership position to their male counterparts. This may also explain the fact that in Asante society, the role of women is generally recognised, but in social and political gatherings and activities men take the forefront. As indicated, the females allowed this male dominance since after all proverbially, the Asante believe 'it is the female sheep which gives birth to the ram'. The ram, a male sheep with horns connotes power for defence or protection. This implies a woman may be rich, influential and old but she may not have the power to defend or protect herself. She needs a man, even if that man happens to be her own son, to defend and protect her.

Thus from the discussion on the females' role in inheritance among the Anlo and Asante, it is seen that under the patrilineal system of inheritance, the wife is not completely considered part of her husband's lineage, which means she does not have the legal right to inherit her deceased husband's property. Similarly, in the matrilineal system of inheritance, a woman and her children do not have the legal rights to inherit the husband's or the father's property. They may only continue living in their father's house subject to good behaviour. This is where most of the injustice appears. The maternal family of the deceased husband enjoys wide discretion with respect to the widow and children's beneficial enjoyment of the intestate estate to the extent that almost invariably, a wife and her children lose any interest in the property. This situation is irrespective of the fact that in the acquisition of a property, it is the wife and children and not the extended family, which play significant roles. Even though indigenous law allows husbands to make provisions in terms of giving part of their self-acquired property to their wives and children before their death, as already noted, it happens that often many do not do it.

Despite certain checks and balances in the Asante system of inheritance, more often than not, men try in their own ways to outwit the females in the control and management of such property. The fact that the lineage heads and stool occupants who control the family and stool properties in Asante are generally men reinforces this notion. Even though it is generally held that the one who succeeds is only holding in trust for the whole family—and that he or she can be called upon to render account to the family or beneficiaries at any time—in practice these mechanisms do not always work. The example given above about the maternal uncle not financially helping the deceased's children, but

instead giving them advice and moral support in times of difficulty is a telling one.

The fieldwork also shows that sometimes, those who hold a property in trust may connive with a few powerful family members by giving them some share of the property while directing the rest to their own wellbeing. An Akan film entitled *Obirie aba* ('Someone's turn has come') clearly epitomises this. In the film, a uterine sister held a property in trust for her senior sister's daughter. This younger sister used the property to look after her own children and neglected the real beneficiary of the estate, even though it is proverbially well known among the Asante that 'the one who owns it, eats it, and not the one who is hungry' (*Dea adee wo no na edie, na enye dea ekom de no*). At the end of the film, the decedent's daughter, the real beneficiary of the intestate property, was homeless and living in abject poverty.

Interviews in Kumasi also indicate that the matrilineal family does not seize a deceased member's property if it had not made any investment in him. The investment is made from family property accumulated over the years. This practice encourages those who have inherited, or have a share of the family property, to travel outside their communities to make cocoa farms or trade. Some also go to school. There is an expectation that anyone who has benefited from the family property should also improve, add/or contribute to it.

The Asante sense of property seems to fit the Maussian model of society of the gift. According to this model, even though an item or something may be given as a gift to someone, such a gift is not a gift that can be alienated by the receiver. He has to pay it back at a point in time because he owes the giver(s). In the Asante sense, a member who receives such assistance by the family (comprising of living and dead members) has to pay back sooner, when he is alive or later, after his death. According to Mauss, the givers and the things they give remain connected. Something of the giver adheres to the gifts and this is what compels reciprocation. Thus nothing, not even a charitable gift, according to Mauss, is free (Mauss 1954; Zeitlyn 2003). In other words, if one receives something, one must know that one is in one way or other indebted to the one who gives the gift. Repayment may not be direct or immediate. This idea seems to distinguish rejection or economic transactions from gift giving. Gift giving and acceptance establish lasting moral relationships between individuals or parties involved (Parry 1986). It is possible to ar-

gue that the reciprocal relationship engendered by gift-giving forms the moral basis of society.

The implication of the Maussian thesis that the giver and the object given cannot be completely separated—that is, an element of the donor's personhood inherent in the gifted object has been used both in the discussion of the 'social life of things' and in the comparative study of social identity or personhood by Marilyn Strathern (1990). In *The Gender of the Gift*, for instance, Strathern indicates that for Melanesians, 'the singular person can be imagined as a social microcosm' (1990: 13). Following Mauss (1954), she argues that persons are made up of kinship and gender relations expressed in production, reproduction and exchange. To produce, reproduce or exchange; or in other words to act, is not to act separate from others, but in relationship to them, if not because of them. The Menelasian concept of socio-economic life as interdependent is similar to life amongst the Anlo and the Asante of Ghana. Amongst these two groups, because their social life is so interdependently woven, once an aspect is disturbed, it affects all other sectors of life.

Strathern's idea of a person as a social microcosm has been further explored in relation to exchange, gendered division of labour (Strathern 1990), and leadership (Lipset 1997; Godelier and Strathern 1991). According to Strathern, any given object produced for exchange carries with it the weight of the labour that went into it, and that 'gift works as the cause of a relation as well as its effect' (Strathern 1990: 221). She maintains that giving of a gift establishes an unequal relationship between the donor and the recipient since the latter acknowledges his indebtedness. One is compelled to pay back in some way (Strathern 1990: 222-4).

There is also an argument that it is important to consider the emotional correlation of giving and receiving (Maschio 1998). Among them, the gift is something corporate, an important part of collective social time, linking the living and the dead. Identity is acquired through a 'narrative of exchange', which involves and evokes memory, emotion, custom and obligation. Others contribute to the individual person, including through gifts; 'persons are created by the gifts of others' (Maschio 1998: 85-6, 96). In Asante terms, a member of the matrilineal family is contributed to, and created by, the gift of investment it made in him. Much of the money spent on a member is accrued from family property generated over the years, and which links the departed family members and those

still living. It is expected that every member contribute to this commonwealth of property. This may explain why the matrilineal family has the tendency to seize a deceased member's property because the family feels the gifts contributed to the wellbeing of the member must be reciprocated. Thus, according to Maschio (1998: 86), participation in these networks of gift giving may also involve, for the individual, counter-feelings of anger and fear of obligation.

### **3.3 History of Intestate Succession**

Until 1884, distribution of intestate self-acquired property happened according to the indigenous law prescriptions of the various socio-cultural groups in Ghana (Ollennu and Woodman 1985: 38). The principal sources of indigenous laws of inheritance are the patrilineal and matrilineal kinship or family systems. Every Ghanaian is born into one of these lineages. When a parent dies in any the family systems, his property devolves primarily to children and individuals in the patrilineage; and to the family in the matrilineage (WiLDAF-Ghana 2005). An important factor, which obliges one to belong to one of these lineages, is that the basis for traditional socio-economic organisation is largely the family. This means that membership to a family largely determines one's socio-economic status in traditional society. Besides, members of the family also influence decisions on marriage and other dimensions of life. For instance, a marriage contracted without the knowledge and consent of members of the family 'can be rejected thus invalidating the marriage and any obligations the family owes to the spouse and children from the marriage' (Awusabo-Asare 1990: 2; Ollennu 1966). Moreover, indigenous inheritance system does not permit spouses to inherit from each other. In matrilineal areas, children have no right to inherit from their male parents. This situation created socio-economic hardship on children and spouses, especially widows in matrilineal communities (Dankwa 1998: 236).

To curtail the influence of the family on socio-economic issues, the British colonial government enacted a marriage law in 1884. The objectives of the law were to create alternative forms of marriage to indigenous marriage, to legalise all solemnised Christian marriages and to make provisions for the distribution of decedents' self-acquired estates. The idea was to vest one-third of the estate in the surviving spouse and two-thirds in the children, in equal shares. The purpose behind this was to alleviate the socio-economic problems widows and their children were

facing (Dankwa 1998: 236). The enactment made monogamy the only legally recognised form of marriage.

Following the enactment, chiefs and their people, especially in Akan areas, protested that the extended family had rights over the self-acquired estate of its deceased member (Awusabo-Asare 1990: 3). Because of the protest, the authorities amended the law in 1902, and intestate self-acquired property devolved with one-third of it going to the extended family while two-thirds to the surviving spouse and children. The amendment also legally recognised polygamy as another form of marriage. This led to a change in the legal landscape on marriage and intestate succession to a plural one. For example, there was a traditional system of inheritance according to indigenous laws of succession of the various socio-cultural groups. In addition, there was a succession under the English law (Yeboa 1992). In 1907, the Marriage of Mohammedans Ordinance (Cap. 129) came into law. This law required the registration of marriages and divorces contracted under Islamic law (Fenrich et al. 2001: 283), which made succession possible in accordance with Islamic law.

In most countries that practice common law, the personal law of the deceased at the time of his or her death, normally governs the succession to the estate of a man or woman. This could be the decedent's indigenous law, a combination of it and English law, or Islamic law (Yeboa 1992: 309). Under indigenous law, specific individuals, such as children within the patrilineage, and not the patrilineal family inherit property apart from land in the case of all Ewe and therefore the Anlo. Among the Asante on the other hand, the matrilineal family as a corporate body principally inherit property (Kludze 1973). If someone married under the Marriage Ordinance or was born out of such a marriage died, then two-thirds of the property fell under the English Statute of Distribution while the remaining one-third in accordance with indigenous law of the deceased (Yeboa 1992: 310). Despite the alternative forms of marriage that gave inheritance rights to the surviving spouse with or without children to inherit, indigenous systems of inheritance continue to dominate the inheritance system in Ghana.

The immediate post-independence government attempted to make some changes in aspects of the indigenous marriage and intestate succession but failed.



## PNDC Law 111

The attempt to make some changes in some aspects of the indigenous marriage and intestate succession was successful under the military government of the Provisional National Defense Council (PNDC) on 14 June 1985 (Awusabo-Asare 1990). The law became known as PNDC Law 111 on intestate succession. The intention of the statute was to determine intestacy and to substitute for indigenous legal practices on inheritance after death in Ghana. It, along with three other laws, namely the Customary Marriage and Divorce (Registration) Law (PNDC Law 112), the Administration of Estate (Amendment) Law (PNDC Law 113) and the Head of Family (Accountability) Law (PNDC Law 114) came about together. Thus, all these laws build upon the earlier enactments by the colonial government in 1884.

## Reasons for PNDC Law 111

It became apparent that efforts by both the colonial and post-independence governments to make changes in traditional inheritance systems failed. From the 1884 enactment until 1985, intestate succession was determined according to the provisions of Sections 10 and 48 respectively of the Mohammedan Marriage Ordinance (Cap. 129) and the Marriage Ordinance (Cap. 127), where applicable. However, the law governing intestate succession in Ghana remains predominantly indigenous law. Under this law, the estate of the intestate continues to devolve to the matri-family or to the children (if any) of the deceased within the patri-family.<sup>6</sup> Thus, indigenous law together with manipulations from some family members apparently bereaves the widow and children of any property; they lose all support, maintenance and security.

Judicial decisions on the aspect of indigenous law show, for example, in the case involving *Quartey v Martey and Anor* in the formal court. In this case, Mr H.A. Martey and Evelynna Quartey were married under customary law. On the death of the husband, the wife issued a writ of summons against the decedent's administrators claiming:

- One-third share of 70 cattle owned by the deceased,
- One-third share of a house at Accra and
- One-third share of cash.

The Ollenu (Judge) dismissed the plaintiff's claim stating:

By customary law, it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, for example, farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father. ... There is no evidence ... that the properties acquired by the late H.A. Martey were the joint property of himself and the wife (Offei 1998: 277).

The judicial decision and other steps taken in courts to help women have not actually helped matters much. If a man wishes to provide security for his spouse and children after his death, he has to make a gift to them while alive. If then a man fails to make the gift while he is alive, or fails to make testamentary disposition to that effect, the wife and children have no guarantee of any benefit of his estate.

The need for realistic and practical reappraisal of a woman's situation became more poignant in the face of concerns shifting from the extended family to a more nuclear family between which there is tension as to the appropriate line of devolution of intestate property. The contribution of the woman and children in the acquisition of property, coupled with new developments in family dynamics, gained so much prominence and significance that it is no longer realistic to deprive women and their children entirely of the benefit of the property. This called for a legislative intervention through the intestate succession law, PNDC Law 111 in 1985. The justification for such legislative intervention appears in the Intestate Succession Law, 1985 Memorandum pages i-iv. The Memorandum, among other things, maintains that:

This Law is aimed at removing the anomalies in the present law relating to intestate succession and to provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted by him or her (Government of Ghana, PNDCL 1985: i).

In doing this, the law theoretically tilted the balance of convenience in favour of the conjugal family by providing adequate protection and security for the surviving spouse and children, and by removing the incongruence between the indigenous laws governing intestate inheritance and modern development in family dynamics.

The relatively new law on intestate succession,<sup>7</sup> known as the 1985 PNDC Law 111, therefore deals with the distribution of the estate of a person who dies without a testamentary disposition of self-acquired property.

### Devolution of intestate property among beneficiaries

Section 3 of Law 111 provides that the surviving spouse and children are entitled absolutely to a house (if any) and household-chattel—where household-chattel includes furniture, implements, books, private cars, jewellery, household livestock, home appliances, simple agricultural tools and all the clothing and things used in the house. If there is more than one house, then the surviving spouse and children choose first. All the properties, less the house and household-chattel, form the remainder.

Having dispensed with the house and household-chattel, the law, under Section 6 distributes the remainder of the estate in specific fractions as shown in the following table.

**Table 3.1**

	All 4 exist	No Parent	No Children	No Child & Parent	No Spouse	No Spouse & Parent	No Spouse, Child, Parent
Spouse	3/16	3/16	1/2	1/2	-	-	-
Children	9/16	9/16	-	-	3/4	3/4	-
Parents	2/16	-	1/4	-	1/8	-	-
Customary Law	2/16	1/4	1/4	1/2	1/8	1/4	1

Source: Government of Ghana, PNDCL 1985.

The table shows how the remainder of the intestate estate devolves among beneficiaries using PNDC Law 111. Thus, the essence of the law, as indicated, is to give the bulk of the estate to the surviving spouse and children. If no parent survives (biological or legal) then 2/16 will be added to the 2/16 of extended family making it 4/16. If there is no child, then 1/2 of the remaining assets go to the surviving spouse. One-quarter goes to the surviving parent(s), if any. The other 1/4 will go to the extended family. If there is no surviving parent, then 1/2 goes to the ex-

tended family. If a child survives (male or female), then the child gets  $\frac{3}{4}$  of the remainder,  $\frac{2}{16}$  goes to the surviving parent and  $\frac{2}{16}$  to the extended family. If there is no parent, the extended family's share becomes  $\frac{4}{16}$ .

Where the survivor is a parent(s), then the parent(s) gets  $\frac{3}{4}$  of the remaining assets and  $\frac{1}{4}$  is distributed to the extended family. If no spouse, child or parents survive the decedent, then it all goes to the extended family. However, where there is no child, no parents and no family, the Republic of Ghana takes the intestate property.

The law renders marriage type irrelevant for the distribution of the estate. It therefore explicitly repeals Sections 48 and 10 of the Marriage Ordinance and Mohammedan Marriage Ordinance respectively.

PNDC Law 264 amended PNDC Law 111 by the inclusion of section 16a and substitution of section 17. The effect of this law is, before the distribution of the estate, no person shall, whether the decedent died intestate or testate, eject a surviving spouse or child from the matrimonial home. The punishment against such an offender is that he or she shall pay between 5 and 50 Ghana cedis or a term of imprisonment not exceeding one year.

As a statute, PNDC Law 111 supersedes and reforms the rules of indigenous law in as much as the latter affects inheritance. As expected, both family systems felt the effects, more especially in the matrilineal system of inheritance.

According to lawyers Elizabeth Ofofu Agyare and Clement Amofa, a majority of Ghanaians do not use PNDC Law 111 because they think it may involve too much cost to take such cases to the formal court. Besides, they do not know anything about legal aid cases. One trouble-less case involving Obedie, an informant from Ejisu may be helpful to illustrate. According to him, his father married his mother and gave birth to five children. The mother served the father well during their marriage until the father's death in 2000. At the time of his father's death, the informant was a student. When he heard the news that his father died he rushed home. By the time he reached home,

My father's aunt had already come to lock the boxes and rooms of my father's self-acquired house. We, the children and mother, became very furious. One of my brothers tried to slash the aunt with a cutlass but he was prevented.

The explanation given by his father's maternal family was that the deceased, during his life, had used part of his property to educate his children. Therefore, 'we should use the dividend of our education to look after ourselves and our mother'.

Asked why he, his siblings and mother did not take the case to any of the courts, his reply was that there was no way they could take the case to a chief for arbitration since Asante custom endorses the aunt's actions. Besides, after thinking about the cost involved and the prolonged nature of cases in the formal court, they decided to keep quiet. Judging from his language it was clear that he was still harbouring ill feelings about the incident.

Furthermore, many are not even aware that PNDC Law 111 exists. This ignorance, according to the legal informants, is especially predominant in rural areas, which form the bulk of population in Ghana. According to lawyers Elizabeth Ofofu Agyare, Clement Amofa and a lawyer at the Kumasi Regional House of Chiefs, there are some people who are aware of Law 111, but are unable to use it to claim their inheritance rights because they fear black magic. Other informants in both Anloga and Kumasi confirm this claim as discussed in chapter 4. The legal informants added that, under the circumstance, lawyers could do nothing.

### **People's conception of PNDC Law 111**

Interviews with a cross-section of informants showed that PNDC Law 111, like the 1884 law, provoked mixed reactions. According to a number of chiefs, including Kokofuhene (paramount chief of Kokofu), a retired educator, and now head of all the paramountcies in the Kokofu traditional area, the new law received no public debate before it passed into law. For them, Ghana comprises several ethnic groups with various patterns of inheritance. It was feasible to select one of these and nationalise it as intestate succession law. The criterion should have been to consider which ethnic group has the broadest inheritance system, but according to the informant, this was not the criterion used. They, therefore, see the law as an imposition on all the socio-cultural groups in Ghana. According to the royal informants, inheritance sometimes links with a stool or chieftaincy. The new law, therefore, according to them is inducing chieftaincy disputes. They base their argument on empirical evidence. For example, in some Akan or Asante areas, if a chief dies and there is no one from the matrilineal family to succeed him or, where a

candidate is too young to succeed, a person may be taken from the paternal line instead of the maternal line to inherit the office of the deceased chief temporarily. However, some capitalised on the new law and wanted to entrench themselves in their positions. Examples of such cases, according to the informants, can be seen in two Asante towns, Offinso and Nkawie. Fortunately, according to them, these cases have been resolved and the chieftaincies reverted to the matrilineage.

In their opinion, as far as stool inheritance and family properties are concerned, the Asante are opposed to Law 111. They also see the new law as redundant. Because, before the introduction of the law, a man who knows very well that when he is dead and gone, his property goes to his matrilineal family makes provisions for his wife and children. Therefore, for the informants, the concept of 'intestacy' associated with the relatively new law makes no sense. All this happened because, according to the royal informants, the promulgators of Law 111 did not know the indigenous legal culture 'as it operates among us', otherwise there would have been no need to enact it. The informants suggested students of law should live with their own people to know their traditions and customs in order to avoid making mistakes such as 'fixing square pegs on round holes'. They think, in any case, the majority still use the old way of inheritance. Only those who do not have any link with stool or family property, use the modern law. The Asante, according to the informants, are not worried about self-acquired property given to someone.

However, Mafia, Rose, Asantewa and some other female informants in Kumasi worried about who would inherit their self-acquired property and indicated preference for their children, especially the females, to inherit their self-acquired property and not outsiders. They think if their children inherit from them, their property will remain in their families.

According to the queen mother of Wiaso, some women are using PNDC Law 111 to claim their rights but the traditional way of inheritance still dominates, despite weakening slightly.

Nana Owusu Efriye, a divisional chief of Pranyse-Jahye on his part, thinks that PNDC Law 111 is not a bad legislation. For him, the law does not prevent anyone from making provisions of his property for anyone or any use. He notes, among other things, that there are various ways for instance in sharing property traditionally. First, one may give it out while one is still alive. Second, one may make a traditional will or leave it intestate for traditional inheritance. Therefore, one may argue

that PNDC Law 111 is not compulsory. For, it does not prevent one from choosing which inheritance option. In addition, the informant thinks, PNDC Law 111 mostly seems to support widows and children. He thinks the then government saw what was happening in the Akan areas and introduced the new law in 1985. Besides, the intent of the new law was to punish family members who want to deny the rights of widows and children. This is because of the number of cases where, as soon as a husband dies the matrilineal family members evict the widow and lock up the decedent's property.

Some lawyers in Kumasi who wished to remain anonymous for security reasons also noted that the Asante traditional system of inheritance was unfair and inequitable, even though it may be lawful. This is because mother and children are pushed out as soon as father or husband is dead by people who care less about the welfare of their deceased family member. Second, they think that the concept that children do not belong to their father's family among the Asante brings about confusion between beneficiary and benefactor; and that because of the concept, fathers treat their children as if they do not belong to them and also children treat their fathers the same way. Therefore, they think the matrilineal socialisation, in particular, has a problem.

For the informants, the best thing about former President Rawlings is PNDC Law 111. However, the law also has certain problems. For example, children who do not respect their fathers also benefit from their fathers' estates. Second, there is nothing regarding illegitimate children. Third, adopted children cannot inherit from the one who adopted them. Moreover, much legality is involved before transferring the property. Finally, the law does not respect a woman who was divorced before the death of the husband, and it is worse when she had no child with the deceased. The legal informants also add that major problems such as poverty, illiteracy, ignorance and fear of black magic hinder women and children from taking advantage of PNDC Law 111. This critique leads us to identify some other apparent weaknesses of Law 111 in relation to international legal provisions on females' inheritance and property rights.

### **3.4 PNDC Law 111 in Relation to International Human Rights Protocols**

The analytical strategy adopted here is to discuss the international instruments first, and then provide a demonstration of PNDC Law 111's

relationship with the international regimes on females' property inheritance as reflected in the 1992 Constitution of Ghana.

### **International human rights protocols on females' inheritance**

Internationally, there is significant shared concern on the issues of females' inheritance and property rights as an important pillar of social justice and equity. Regionally article 66 of the Protocol to the African Charter on Human and Peoples' Rights enshrines the principles of non-discrimination because of gender. Article 18 of the African Charter calls on all state parties to eliminate discrimination against women, and protect the rights of women and children. Thus, the implementation of the provisions by state parties will enable women to enjoy their human rights to the fullest (Limann 2003; Ghana Graphic Corporation 2006; Olowu 2006).

Some of the key provisions of the protocol include article 2, which talks about the elimination of discrimination against women, and calls on state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Importantly, article 2(1)b appears to protect the rights of widows. Article 2(2) seems to reiterate the same point, calling for the elimination of harmful cultural and traditional practices, which give rise to discriminations and biases. Article 3 discusses the right to dignity indicating that women have such an inherent right like men. The article asks for the recognition and protection of this right. The article also enjoins all state parties to take appropriate measures to ensure the protection of women's rights; protecting women from all forms of violence, and respect for their dignity.

Similarly, article 4 talks about the rights to life, integrity and security of person. As such, every woman, like every man, has a right to life, integrity and security of person. Article 7 indicates the need for state parties to enact laws to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. Finally, article 8 talks about access to justice and equal protection before the law. It indicates the fact that women and men are equal and shall have the same rights to equal protection and benefit of the law (Ghana Graphic Corporation 2006; Olowu 2006).

It is significant and refreshing that the Protocol in its first 8 articles made provisions that seem to address specifically different categories of women such as widows, divorced women or women separated from



their husbands, and insists that like men, such categories of women should have equal access to right frameworks and should be treated with respect. Article 20 in particular reiterates how ‘widows are subjected to all sorts of degrading and humiliating treatment by virtue of their status as widows’ (Limann 2003: 16) and insists that they should not be denied custodianship of their children. The article is also against forced marriage of widows as seen in levirate marriages in certain societies in Africa.

Article 21(1) raises the perennial problem of widows’ inability to inherit the estates of their husbands as seen with the Anlo and the Asante of Ghana. The article explicitly maintains that:

A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

What remains unspecified in the Protocol to the African Charter is the position of women in non-marital relationships and female children in relationship to property inheritance.

The core human rights documents, such as the United Nations Charter and the Universal Declaration on Human Rights, explicitly mention discrimination based on sex as a violation of human rights. This idea is also stated in the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, adopted by the U.N. General Assembly in 1966 (Zwingel 2005: 92).

The first generation of rights (as briefly mentioned together with the second and the third generations of rights in chapter 2) underscores freedom of expression and protects the autonomous citizen, including women, against arbitrary governmental action of detention and torture. Nevertheless, it falls short in dealing with specific issues such as widespread forms of physical and mental violence committed against women by non-state actors within the family and by family members, and which might kill many women. Sometimes some of this violence could stem from property-related disputes. Some of the life stories gathered during fieldwork in both Anloga and Kumasi reflect this reality. The failure of the first generation of rights to recognise this creates the impression that the international ‘construction of civil and political rights ... obscures the most consistent harm done to women’ (Charlesworth 1995: 107).

On the other hand, the second generation of rights deals with social, economic and cultural rights. In principle, it considers the situation of

women within the family, their socio-economic status and cultural determinants that affect, define, and limit their lives (Hosken 1981: 3; Zwingel 2005: 93). When it comes to economic rights, the second generation of rights ignores unpaid work of women as seen among the Anlo and the Asante. Moreover, 'the specific economic situation of women, in many cases, their economic dependence on others, particularly in marriage, was not considered' (Charlesworth 1995; Nash 2002; Zwingel 2005: 93).

Similarly, the third generation of rights claims the right to cultural self-determination. It lays emphasis on the rights of groups or collectives and not on the individual. This is why this set of rights may carry potential danger for women in the sense that 'the precedence of group rights over individual rights is likely to make women's subordination within collectives more difficult to challenge' (Nash 2002: 418). This is dangerous because:

cultural self-determination, protected from legal regulation as a private matter, has often been invoked to justify traditional cultural practices that discriminate against women. At the same time, women are not understood as a group to which self-determination would be applied (Zwingel 2005: 94).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) intended to address the inadequacies in the international regimes focusing attention on discrimination as the root cause of most human rights violations against women. The Convention sees discrimination as both explicit and implicit. Thus, according to the CEDAW, discrimination refers to:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civic or any other field (Limann 2003: 10).

By identifying discrimination as not only explicit but also implicit, the CEDAW aims to remove the structural barriers that exist between the sexes that lead to discrimination against women.

In spite of the fact that this international instrument came into force in September 1981, there are still gross violations of women's human

rights. Exacerbating the situation is the fact that many women are ignorant of their rights, let alone the rights frameworks to address their violations. The situation therefore called for an Optional Protocol to the Convention to redress the problems. The United Nations Commission on the Status of Women adopted the Optional Protocol to CEDAW on 11 March 1999. This is a new complaint mechanism, which permits women from the signatory countries to access the CEDAW and the Protocol to complain to the CEDAW Committee when domestic remedies have failed (Limann 2003: 10-11). The Optional Protocol further makes provision for an inquiry procedure. This means the CEDAW Committee is empowered to inquire into serious and systematic abuses of women's human rights in the signatory countries. This procedure supplements the report each signatory country presents to the Committee regularly. Apart from this, NGOs may submit 'shadow reports'. This may supplement or contradict what the state parties submitted. Through triangulation of these strategies, the Committee makes its observations and recommendations in areas where a particular country may be falling short in relation to the Covenant. Thus, it appears evident that the mechanisms are useful. This is because recommendations and concluding observations made by the Committee will supplement the country reports individually submitted to it. Equally important, it makes it possible for women to have direct access to CEDAW.

Apart from the CEDAW and Optional Protocol, other international bodies created by the UN for the advancement of women's rights, also play notable roles by promoting women's issues throughout the UN system. These include the Commission on the Status of Women (CSW), the United Nations Development Fund for Women (UNIFEM) and the International Research and Training Institute for the Advancement of Women (INSTRAW). The Mexico City Conference (Declaration and World Plan of Action for Implementation of the Objectives of International Women's Year), for example, brought about the establishment of INSTRAW and UNIFEM. The two institutions not only provide the institutional framework for research, but also help carry out training and operational activities in relation to women and development (Limann 2003; Olowu 2006: 79).

Perhaps, one of the greatest efforts of the UN occurred in April 2000 when the Commission on Human Rights adopted a resolution on women's equal ownership of, access to and control of land and the equal

rights to own property and to adequate housing (Resolution 2000/13). Another effort took place on 23 April 2001 when the Commission on Human Rights adopted a similar resolution (Resolution 2001/34) on women's equal rights to property. The resolution further invited the Secretary General to encourage all organisations and bodies of the UN system to undertake more initiatives in promoting women's equal ownership of, access to and control over land, and the equal right to own property and adequate housing. It allocates resources for studying and documenting the impact of complex and perilous situations, particularly with respect to women's equal rights to own land, property and adequate housing (Benschop and Lacroux 2003).

The core provisions of the Protocols to CEDAW and of the African Charter are similar. While it may not be appropriate to suggest that the latter is a carbon copy of the other, it is undeniable that it draws on the norms and philosophy of CEDAW (Olowu 2006). The dissimilarity of both instruments lies in their perspective on women's rights in private spheres. For example, while CEDAW is quiet about women's rights in private spheres, the African Charter tries to influence and protect these rights. While CEDAW only wants to secure equality between husband and wife in marriage, the Protocol to the African Charter sees it necessary to change or modify traditional marital practices. Consequently, unlike the CEDAW, which is silent on polygamy, the African Charter requests state parties 'enact appropriate national legislative measures to guarantee that ... monogamy is encouraged as the preferred form of marriage...' (Art. 6(c), Art. 7(c) of Protocol to the African Charter). On the other hand, the Protocol to CEDAW obliges state parties to address 'the particular problems faced by rural women' (Olowu 2006: 97).

Current global population projections demonstrate that the greater percentage of African women live in rural areas (World Population Data Sheet 2003: 3-4). While 33 per cent of the total population live in urban centres, 67 per cent live in rural areas in Africa. In sub-Saharan Africa, an estimated 30 per cent of the population live in urban and 70 per cent in rural areas (Sass and Ashford 2002: 5-7). It is therefore surprising that, the Protocol to the African Charter, which post-dates the Protocol to CEDAW, does not consider this important element since most of the abuses and discrimination against women seem to occur in rural settings. This omission can be overcome when the provisions of the Protocol to the African Charter complements the global framework in CEDAW.

## **PNDC Law 111 and international human rights protocols**

Part of the issues raised in chapter 2 concerned the possibility of a symbiotic relationship between domestic laws and international laws. In any society today, the reality of legal pluralism seems an undisputed phenomenon. In developing African societies in particular, the legal dimension of property inheritance, for example, is a complicated one. This is because different legal traditions, both formal and informal, on inheritance issues, coexist. In Ghana, both the state and indigenous legal institutions operate, and each tries in some ways to influence the effectiveness of the other. For example, the state approves indigenous laws on marriage, land transactions and arbitration on certain matters. Where there appears to be a misunderstanding is when it comes to matters pertaining to indigenous inheritance after death. Ghana, as indicated, promulgated the intestate succession PNDC Law 111 in 1985 as a substitute for indigenous systems of inheritance after death. The question is, to what extent international conventions such as the Protocols to African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) influenced PNDC Law 111 as reflected in the Constitution of Ghana?

PNDC Law 111 has two major limitations. First, as a statute it applies only to property not included in a valid will. For example, should a man die semi-intestate the law applies to only the part of his estate that has not been covered by the individual's will. Thus, an individual might override the provisions of Law 111 by simply making a will (Fenrich et al. 2001), even though this will be unconstitutional. This contradicts the provision in article 22 of the 1992 Constitution of Ghana. The article speaks about property rights of spouses during marriage, divorce and after the death of a spouse as follows.

1. A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
2. Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
3. With a view to achieving the full realisation of the rights referred to in clause (2) of this article -

- a. Spouses shall have equal access to property jointly acquired during marriage;
- b. Assets that are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of marriage.

In accordance with the prescription of article 22(1) in particular, the surviving spouse can claim a reasonable share of the intestate property whether or not she was a beneficiary under the will. Some see this stipulation as not only going beyond the context of intestate succession, but also permitting ‘courts to override a will to provide a reasonable share to a surviving spouse’ (see Fenrich et al. 2001: 286). This means the surviving spouse has a constitutional right to claim her share of the estate even though it is subject to judicial consideration and discretion. This implies the courts are likely to consider factors such as independent means of the surviving spouse, other dependents of the deceased, and the provision the deceased made for the spouse during his life time in determining ‘the reasonable provision’. Some are also of the opinion that the ‘concept of reasonableness’ excludes the application of a formula, which will lead the courts to give the same share to all widows in all cases. This means every case has to be determined on its individual facts or situation.<sup>8</sup>

On the other hand, another major limitation of the PNDC law is that it applies only to intestate self-acquired property excluding family and stool property, controlled and administered by lineage heads and stool occupants, usually men, on behalf of members of the family. This practice seems to be at variance with international regimes such as the CEDAW and the African Charter, which have not circumscribed females’ inheritance and property rights to only self-acquired property. This perspective seems critical because, should a family decide to deny a widow a share of a member’s estate, the only thing to do would be to classify such an estate as family or stool property.

Article 22(2) of the Constitution has requested Parliament enact necessary legislation to address the property rights of spouses. This is significant because the legislation is supposed to define the method of distribution for estates. However, Parliament has failed in carrying out this constitutional request. Some think a spouse can rely on article 22 to claim her substantive rights directly provided for in article 22(3) without the help of new legislation, but so far, no case received this treatment (Fenrich et al. 2001: 286). It has also been suggested that the concept of equitable used in article 22(3) (b) seems to leave the distribution of prop-

erty at the discretion of the court, which might not yield the expected result (WiLDAF-Ghana 2005: 12; Kuenyehia 1990).

On the other hand, although Law 111 in some way may have substantially addressed the injustices meted to surviving spouses and children by indigenous law by allotting a substantial amount of the intestate to them, it has created other difficulties. It confers absolute right of succession to fractions of the estate to individuals. This strikes at the very root of the matrilineal and sometimes, the patrilineal concept of property whereby the property is communal. Typically, a house included in such estate remains as a memorial to the deceased and it is supposed to be available to other members of the family including those yet unborn. The statute destroys this practice affecting the roots of the local tradition.

The statute creates another difficulty, previously hinted at above, in its definition of children. A child of a deceased includes all issues of the deceased, without regard to the type of union out of which the child is born. This implies children of the deceased, even if they are illegitimate, are entitled to portions of the property.

Since PNDC law 111 provides that the surviving spouse and children are entitled to one house, it means the wife may be compelled to inherit and use the property together with the children. If one considers the possibility that she may be meeting these children for the first time and may have to live in the same bedroom with these children, some of whom are not her own, then the situation may become not only unrealistic, but may create tension and eventual polarisation among the inhabitants. Thus, it appears the law presumed the surviving children would necessarily be the children of the surviving wife, which might not always be the case.

The other area to examine is the age limit and circumstances of children who may inherit a portion. Law 111, like indigenous law, does not place any age limit for children that may qualify. Neither does it make room for the special circumstances of any of the children under which they may qualify to benefit from the property. Thus according to the law, a child of 40 years, married and gainfully employed, is entitled to equal share with the ten-year-old child simply by the fact that both are children of the deceased. This seems unfair to the younger child. The Will Act of 1971 (Act 360), Section 13(1), under which a person is under no obligation to make a disposition to an adult child may help avoid such situa-

tions. Law 111, however, does not make any provision for a cut off age and circumstances.

Moreover, Law 111 refers to spouse in the singular. While the law appears to target spouses in monogamous marriages, it also recognises the practice of polygamy—a feature accepted in indigenous law in Ghana. Thus the new law, like indigenous law, falls short of the provisions and expectations of the Protocol to the African Charter on Human and Peoples' Rights that state parties must 'enact appropriate national legislative measures to guarantee that ... monogamy is encouraged as the preferred form of marriage ...' (Art. 6(c), Art. 7(c) of Protocol to African Charter). The 2006 shadow report submitted to the CEDAW Committee by Ghana's branch of Women in Law and Development in Africa confirmed that a majority of marriages in Ghana are polygamous, 'customary law' marriages and that polygamy continues to be a source of discrimination against women (WiLDAF-Ghana 2006:1).

Law 111 directs that only one house, the matrimonial house, be apportioned to the spouse and the children. This suggests that even if there are four or more wives, they are all to share in the one house by cohabitating together with their children or, some similar arrangement. This is regardless of the fact that the deceased might have died possessing four or five houses. The more practical thing for each wife would have been to have one house. Under the law, they are all to take one. In doing so, it appears that the law presumes that all the rivals will understand each other and will peacefully coexist. This may be far from reality as far as rivals are concerned. It seems unthinkable how the law may expect such rivals to live under the same roof without tension, quarrels and litigation. For instance, it is not clear as to how the law expects four or more wives to share one refrigerator along with all the children of the deceased.

In view of the above problems, apparently the only solution lies in liquidating the property and sharing the monetary proceeds. Thus, the law seems unintentionally designed to require the compulsory sale of such property. This too has its own difficulties. There is the possibility of the rich buying out the poor, thereby concentrating the property in the hands of the few rich. Moreover, the monetary proceeds shared may be too insignificant to support each of the beneficiaries individually. Within a short time, perhaps the money is gone leaving the spouse and children



destitute. One would think this is precisely the problem the law seeks to avert.

The situation is different with a man in a polygamous marriage. Whereas such a husband is entitled to the spouse's portion in each deceased's wife estate, all his wives share in a single portion of his intestate property. In other words, if a husband survives all of his four or more wives each of whom had a house, he will end up having more houses. Conversely, if the polygamous husband dies before all the wives, all of them would have to share only one house, even if the man died possessing several houses. In comparative terms, therefore, between the polygamous husband and wives, the former is better disposed to benefiting from the marriages than the wives. Thus, according to the shadow report to the CEDAW Committee, women do not have the same rights and responsibilities during marriage or at its dissolution (WiLDAF- Ghana 2006). Such a seed for discriminatory treatment between husband and wives in polygamous marriages seems to contravene the spirit of the CEDAW, which eschews any form of discrimination against women. It also appears inconsistent with the equality clauses as reflected in the Constitution of Ghana.

Another difficulty that exists from the application of the law has to deal with the mathematical computation of the fractions. It is not easy to determine the fractional distributions of the estate. What for instance is  $\frac{3}{16}$  of a cocoa farm? Yet more complex forms of property compound this problem further. It can be frustrating trying to determine with precision and satisfaction the portion of the estate that falls for distribution as provided by the statute.

Further, under Section 17 of PNDC Law 111, it is an offence to unlawfully interfere with or deprive the entitled person the use of that portion of the property to which he or she is entitled. The punishment for such offence is a fine of 50 Ghana cedis (about 50 dollars)<sup>9</sup> or imprisonment not exceeding 12 months. This fine appears insignificant to deter any such unlawful interference.

Law 111 intended to amend certain principles in indigenous law that discriminates against widows and children. However, the law did not go far enough. For example, like indigenous law, the new law has no provisions for divorced women and women in non-marital relationships. Neither has it dealt with the problem of primogeniture. Because of the above weaknesses of Law 111, some do not see much difference be-

tween it and patrilineal law on property inheritance. Because of the weaknesses, PNDC Law 111 does not fully meet the standards set by the international human rights regimes on females' inheritance.

### Present status of PNDC Law 111 among the Anlo and the Asante

Benneh et al. after extensive survey on inheritance in peri-urban Kumasi in 1997 concluded that the matrilineal inheritance system had come to stay (100). Similar research recently conducted in Ghana by Fenrich et al. (2001) and Runger (2006) confirm that indigenous inheritance practices are still predominant; especially in rural areas and that many including women are ignorant of PNDC Law 111.

To find out people's patronage of traditional inheritance among the Anlo and the Asante, I conducted a survey among 150 respondents, both men and women, in Kumasi. According to the survey, 39.6 per cent and 34 per cent of females and males respectively admitted inheriting property from a deceased parent or family member. In addition, while 16.7 per cent of males indicated they inherited their property through their fathers, 34.1 per cent of females maintained they inherited the property maternally. Without making any distinction between genders, it appeared that respondents who inherited their property through their fathers (patrilineally) totalled 18 while those who received theirs matrilineally totalled 37, forming 12 per cent and 24.7 per cent respectively, of the total number surveyed. The rest had not inherited property from anyone. This suggests that the matrilineal system of inheritance is still dominant among the people of Asante, even though not as strong as it used to be.

An earlier survey in Kumasi supported the above findings. This survey was in the form of brief group interviews with 243 respondents at Sepe-Timpom, Manhyia Palace, Adum and Bantuma during fieldwork in Kumasi. The idea was to find out which mode of inheritance was predominant in Kumasi. The survey showed that 90 (37 per cent) of the respondents preferred the matrilineal indigenous inheritance. This was followed by the making of a will, which attracted 61 (25 per cent) of respondents. Further, 53 (22 per cent) of the respondents preferred PNDC Law 111 while 39 (16 per cent) respondents favoured gift giving. Thus, as seen, the survey showed that even though the traditional way of inheritance is decreasing, it is still the most popular, while PNDC Law 111 is the third most popular choice.

I conducted similar surveys in Anloga. The first survey comprised 150 respondents. In the survey, 44 per cent of male respondents admitted they inherited their property from their fathers while 22 per cent of females confirmed their inheritance from their fathers. The rest of the respondents either purchased their own property or did not have any. Another survey, conducted at the same period among 243 respondents in Anloga to learn which modes of property inheritance was predominant, showed that the traditional transmission of property after death of the owner was more popular and attracted 182 (75 per cent) of the respondents. This was followed by 27 (11 per cent) respondents who indicated they favoured gift giving. Seventeen (7 per cent) respondents preferred making a will. In spite of the fact that many indicated their awareness of the existence of PNDC Law 111 on intestate succession, only 15 (6 per cent) respondents reported that they preferred it. Thus, at the time of the research, the patrilineal traditional inheritance of property was still the most preferred among the modes of transmission.

It appears from a comparison of the popularity of matrilineal inheritance with the patrilineal system of inheritance in Anloga, that the Anloga people use the latter more than the matrilineal system of inheritance in Kumasi. For instance, as indicated, out of 243 respondents in each research area, Anloga had 182 (75 per cent) respondents in favour of the traditional way of inheritance against 90 (37 per cent) respondents in Kumasi. On the other hand, Kumasi showed more confidence in other modes of inheritance such as the making of a will, PNDC Law 111 on intestate successions, and gift giving than the Anloga. That is, while 39 (16 per cent) respondents in Kumasi showed interest in gift giving only, 27 (11 per cent) respondents in Anloga favoured it. Similarly, while 61 (25 per cent) respondents in Kumasi showed more interest in the making of a will, 17 (7 per cent) respondents in Anloga preferred it. In addition, whereas 53 (22 per cent) respondents of Kumasi were attracted to PNDC Law 111, only 15 (6 per cent) respondents in Anloga showed interest in the new law of intestate succession (see Appendices on modes of inheritance among the Asante and the Anlo).

The types of economy and the traditional societies examined may explain the differences in the modes of inheritance practice. First, Kumasi is a cosmopolitan city and exposed to more shades of influence from modern social and economic life than Anloga. Kumasi seems to have moved from a predominantly subsistent economy to a more diversified

economy, which has provided relatively better employment opportunities to its citizens. Anloga's economy, on the other hand, appears more or less subsistent, with fewer chances of employment from the modern economy. In this provincial or parochial status of Anloga, which has less economic opportunities, people may compete for any conceivable economic resource. Thus, in the patrilineal Anloga, where the traditional social and economic arrangements tend to favour men, such institutions seem to continue to be sustained.

Kofi Togobo, Anlo oral historian, corroborates that:

Today it becomes crystal clear that as there is increase in population, the size of Anlo cultivable land is not increasing. It is rather decreasing by the powerful effects of both the sea and the Keta Lagoon. The Ghanaian economy is also not performing well. The economic situation makes people protect what they have already had or reap what they have not sown.

This situation, according to the informant, may be a contributory factor that complicates females' property inheritance. It might also explain why Anlo society still insists on the indigenous system of inheritance, which favours men at the expense of women.

Even though the number of respondents involved in the surveys might not be large enough to be representative, their results could be a reverberation of what pertains in other parts of Asante and Anlo. This comes in view of the osmotic influence of Kumasi (Arhin 1983: 475) and Anloga as traditional capitals on towns and villages in Asante and Anlo.

Even where it appears people have accepted Law 111, they make their own interpretation and application of it. For example, Professor Teky-iwa<sup>10</sup> of the University of Ghana indicated that instead of allocating a full house to the widow and her children as PNDC Law 111 indicates when a husband dies, people give only a room in the house to them.

It appears, therefore, that the different cultural groups are unwilling to surrender their legal heritages for the new law. As one paramount chief of Asante puts it:

One does not change cultural imperatives by law. After all, every system has its own flaws or weaknesses. There is no need to replace the old system with a new one, which in any way, has also its own weaknesses and flaws; instead of improving upon or correcting the anomaly in the old system of inheritance.

According to Peter Kwasi Sarpong,<sup>11</sup> it is true nowadays that people may not necessarily inherit in their clans or lineage. This is because what he or she has is self-acquired. This is not like in the past, when they used property like family land to farm on. This is why a wife with children may say she helps her husband to acquire a property. Therefore, a wife and children may insist on their rights that such a property belongs to the husband or the father, and therefore they should have their due share. Family members may also contest that such a property belongs to their family member. This creates disputes. If money from the clan or lineage pays to set up a business or to educate, there may be problems there. If such a clan sponsored educated male parent or 'businessman' acquires a property, then his wife and children cannot claim it as their own. Such a male parent, therefore, cannot deny the clan or the maternal family in the distribution of his property. If he is a chief, there are no ways his children or wife can succeed him. The next chief has to come from his own clan.

These last observations are very significant and seem to suggest that mere legislative intervention in the form of PNDC Law 111 might not be effective without also taking other factors in the social universe, as indicated, into consideration. According to Glynn Cochrane (1971), legal arrangements alone cannot control social arrangements since law is a subset of the social universe and that society controls the law and not the other way around (93-4). For Sally Falk Moore (1973), legal interventions like PNDC Law 111 are abstractions, which fail to take into consideration realities in the social context, and for this reason cannot control the context it is abstracted from (719). Thus, it would have been in place if the legislative intervention had dealt with the contextual realities in the social universe. This is more so because, as Bohannan puts it, laws are part of the ordinary social life (Bohannan 1965).

### **3.5 Conclusion**

This chapter essentially dealt with intestate succession in Ghana. Within this framework, it analysed both Anlo/Asante general principles and actual practices of inheritance. Even though in principle, among the patrilineal Anlo and the matrilineal Asante, men inherit from men and women from women, there are considerations in the actual practices of inheritance. Women have fewer rights than men do when it comes to inheriting a man's property. The chapter also analysed legislative inter-

ventions by both colonial and postcolonial governments in relation to females' inheritance rights. The analysis shows that intestate succession or property inheritance after the death of the owner, as in the past, continues to go through a chequered history in Ghana. The people, especially chiefs in Akan areas, opposed efforts by both the colonial and the immediate post-independence governments to remedy the situation, and so did not bring about very significant success since indigenous systems of inheritance continue to dominate. PNDC Law 111 is also experiencing similar opposition. It may be that the law to some extent addressed the injustices and hardships faced by widows and children under indigenous intestate inheritance rules by guaranteeing them portions of the intestate property. However, many are not aware of its existence. Even those who are aware of its existence do not comply with the law. Only a few make use of the law.

The comparative predominance of indigenous systems of inheritance in the two traditional societies may mean that widows, divorced women and women in non-marital relationships remain underprivileged since the majority of them may remain 'propertyless' and therefore poor. Not only will these women continue to suffer from impoverishment, so will their children. This is serious because, as indicated, traditionally in Ghana, widows, divorced women and women in non-marital relationships do not have the right to inherit property from their husbands or partners, even if the property was acquired during marriage or in relationships.

## Notes

<sup>1</sup> Twi is the language spoken by the Asante and other Akan groups.

<sup>2</sup> Mr Kwami Dzidzienyo was one of my key informants during my fieldwork at Anloga, the traditional capital of Anlo.

<sup>3</sup> Other key informants during fieldwork include Asokore-Manponghe (paramount chief of Asokore-Mampong), Owusu Ansah (town planning officer at Land Department) Manhyia, Kokofuhene (head of Kokofu paramountcies), Dr Charles Coffie (anthropologist and family head), Ejisuhene (paramount chief of Ejusu, Social Administrator and a Lawyer), Osei Kwadwo (Manhyia historian in charge of Manhyia Archives), and Patricia Kwakye Manu (queen mother of Wiaso (a teacher by profession).

<sup>4</sup> Agala was a family head who discussed some of the principles governing property inheritance among the Anlo with me during fieldwork in Anloga.

<sup>5</sup> Mr Lawluvi was one of my key informants at Anloga. He was a retired educator, an elder and family head.

<sup>6</sup> Some of the data on PNDC Law 111 used in the discussion partly came from interviews with, and unstructured research of Clement Amofah, a lawyer at Trinity Chambers, Adum, Kumasi. I am grateful for his permission to use this data.

<sup>7</sup> The PNDC Law 111 on intestate succession was promulgated in 1985 by the then Provisional National Defense Council (PNDC), chaired by Jerry John Rawlings, Head of State of Ghana. Even though the law is described as new, it has been in existence since 1985.

<sup>8</sup> See footnote 146 in Fenrich et al., 2001: 286.

<sup>9</sup> At the time of data collection for this thesis the exchange rate was 1US dollar = 0.98 Ghana cedis

<sup>10</sup> Same as endnote 8.

<sup>11</sup> Rev. Peter Sarpong is the Catholic bishop of Kumasi. As an Asante, he understands the way of life of his people. He has done extensive research on the culture and traditions of the Asante. I am grateful to him for allowing me to interview him on the Asante traditional inheritance and the intestate succession, PNDC Law 111.

## 4

## Females' Inheritance after Law 111

Chapter 3 discussed general principles and actual practices of traditional inheritance among the Anlo and the Asante and the history of intestate succession, including the application of PNDC Law 111 in Ghana. It has become clear that not only the principles, but also the actual practices, of the kinship systems greatly encouraged men to have more inheritance rights than women. In a situation like this, the question is what is the position of women in both Anlo and Asante societies with specific reference to property inheritance after government's legislative intervention with intestate succession, PNDC Law 111? Has the position of females changed for the better; and if not, do females use arbitration types such as the formal and indigenous courts to defend or claim their property inheritance rights; and how do they perceive these arbitration types as rights frameworks for defending or claiming their rights?

Whitehead, in her analysis of women's property relations vis-à-vis those of men in small-scale societies, cited kinship or family structures as the settings for legal and ideological practices, which tend to 'construct men's and women's ability to act as fully independent subjects in relation to property quite differently' (1984: 177).

The observation seems contextually valid for Ghana where the patrilineal and matrilineal family systems constitute the principal sources of indigenous laws and socio-cultural practices that govern inheritance and therefore, property relations. Thus, these kinship systems, which every Ghanaian is born into, continue to determine the legal and socio-economic status, and rights to inherit property of individual members (see chapter 3).

Goody also pointed out that the different family systems in Africa and Eurasia, and that transmission of wealth at marriage of the different people, affected the stratification systems of both areas (Goody 1969;



Vellenga 1986). In other words, Goody links the economy with stratification and indicates that this linkage is the result of the 'system of inheritance which organises the transmission of property from generation to generation, at death, at marriage or at some other point in the life cycle' (Goody 1969: 65).

Among patrilineal and matrilineal societies such as the Anlo and Asante in Ghana, indigenous law and kinship socio-cultural practices, as noted, tend to give more inheritance, and therefore property rights, to men than to women. This practice stratifies society, where men tend to have economic dominance over women. If one considers that Ghana's economy is still largely subsistent and is propelled by a technological base that remains predominantly less developed, then Goody's assertion that the technological basis is the most important aspect of an economy, sounds plausible; but aspects such as ownership, command and control of material resources, as stressed by Whitehead (1984) are indispensable.

Studies of property relations in all sorts of economic systems, productive or exchange related, (Benneh et al. 1997; Duncan 1997; Kludze 1973; Nukunya 1969; Tsikata 1997; Vellenga 1986; Whitehead 1984) suggest 'women's capacity to act as fully acting subjects in relation to objects (property), or the aspects of persons which may be treated as objects (rights in people), is always more circumscribed than that of men' (Whitehead 1984: 180). Whitehead indicated that the kinship or the family system serves to construct women as unable to act fully as subjects, while their male counterparts are able.

Collaterally, even though the significance of property is basic in class analysis and in a materialist interpretation of social phenomena, not much systematic analysis seems to have been done on how women's social image defines their position in society and how this in turn can influence their property relations vis-à-vis that of men. This omission is even more crucial in view of Engels' thesis that 'women's subordination developed through the private ownership of property together with monogamous marriage' (cf. Engels 1972: 120-1; Hirschon 1984: 1).

While this thesis does not intend to present an historical synopsis of women's subordination, the focus in this chapter is to analyse specifically how different categories of Anlo and Asante women experience indigenous principles located within their kinship structures in relation to property inheritance after the promulgation of intestate succession, PNDC Law 111 in Ghana. These indigenous principles and actual prac-

tices, which leave women with little or no economic resources, have been the construct of the gendered social universe of the people. Further, this chapter explores how the experience of property relations engendered by the kinship or family legal and socio-cultural practices influence women's selection of arbitration types for defending or claiming their rights.

Verschuren and Doorewaard recommended small numbers in strategic sampling when conducting qualitative research instead of a random sample as in a survey (1999: 164). Therefore, I first selected a small number of women (40) from both research units and strategically sampled for both individual and group interviews with the help of locals acquainted with the women. These women were denied rights to benefits from their deceased male parent or husband's property. The interviewees ranged in age from the late teens to early 70s. Apart from the few informants who were still married, most had lost or divorced their husbands. The rest were single. While some of them did not have any formal education, others had completed their elementary education. Some had either a diploma or a bachelor's degree in education. Economically, some of the women operate very small-scale commercial enterprises and farms, which afford them bare subsistence. Others were teachers. Most of the women were ordinary citizens in their communities. The rest were female chiefs in their localities.

For analytic reasons and to understand women's property relations within their family systems, the next section explains how Ghanaian society conceives of women and, secondly, of property as a valued resource. This consideration is significant because the societal conception defines women's position in society, which in turn affects their property relations vis-à-vis that of men.

#### 4.1 Women's Position in Society

As indicated in chapter 2, everyday language and metaphors used by both sexes lay thought systems that epitomise women's position in the Ghanaian society, bare. Indigenous proverbs and metaphors such as 'the palm tree does not bear fruit in a woman's farm' or that 'If a woman buys a gun, it is a man who keeps it' encapsulate some of these thought systems. All this indicates that women are not supposed to be as economically productive as men are, and even if they are, men control their resources. Men are supposed to maintain, and provide, the economic

support for their wives and children domestically. This explains why Ghanaian society seems to invest more inheritance rights on men than women (refer to full discussion in chapter 2).

This social construct gives men greater access to control and use of property and relegates women to dependency, to the extent that it has become part of the social conscience of the people that when a man is not physically, politically or economically strong, as indicated, he is described as being a woman.

These socio-cultural practices succeeded in influencing both indigenous law and formal law (customary law) in conceiving a wife as part of the husband's economic unit. This means that a wife's claim to her husband's property is limited or nonexistent (Rünger 2006).

The socio-cultural practices also influenced both colonial and post-colonial government policies, which discriminatorily provided opportunities for the socio-economic development of men at the expense of women, thus decreasing both the image and position of women in traditional society (Awumbila 2001; Mikell 1989; Vellenga 1986). For example, Boserup indicated how the colonial administrators overlooked women agriculturalists and 'promoted the productivity of male labour' (Boserup 1970: 54). According to Salie Westwood,

This discrimination was repeated in the cities, where jobs in the urban sector, as the outcome of bargains on the labour-market, fell to men and not to women. This legacy survives today and is reinforced through the unequal chances between the sexes in relation to education (Westwood 1984: 140).

Mariama Awumbila (2001) also attributed women's economic position and status in both colonial and postcolonial society to unequal access to productive resources. She defines resources as jobs, wages, land, labour, power as well as education, training and other useful skills. While men were formally educated and trained to meet requirements in the labour markets in agriculture, trade and mining, women were trained for home-keeping (Awumbila 2001: 34). Thus, the socio-economic practices of both colonial and postcolonial periods seemed not only to endorse, but also contributed to the entrenchment of women's position in society. Awumbila also mentions the Economic Recovery/Structural Adjustment Programme (SAP) in the 1980s and 90s, which culminated in measures to increase tax rates complicating the bizarre social positioning of women contemporaneously in Ghana. The SAP also negatively affected

workers in the informal sector and a majority were women (Awumbila 2001: 35). Additionally, the restructuring of state enterprises and resultant job losses also affected women-dominated sectors such as the service sector. The retrenchment of many from the public sector happened at a time when there was also a decline in real wages. This has not only had an immediate impact on the formal sector, but also a 'knock-on' effect on the informal sector through an influx of numerous 're-deployees'. This reduced earnings from the informal sector (Awumbila 2001: 35; Clark and Manuh 1991). Thus for Awumbila, access to resources affects women's position and status directly or indirectly in society (Awumbila 2001: 34).

The above culminated in creating a lasting stratification of economic dominance of men over women. Inheritance and property relations reflect this fact.

## 4.2 Inheritance and Property

The concept of inheritance among the Akan and the Ewe as described in chapter 2 refers to the transfer of property from an original owner to an heir or heirs after the property owner is deceased. The donor may also gift the property during his/her lifetime. Property on the other hand, refers to any object of legal rights (refer to full discussion on subject matter in chapter 2). Sometimes the thing (property) could be a deity or an activity. For example, amongst the Anlo and the Asante of Ghana, someone can say that fishing or farming is his or her property, in the sense that either occupation is his or her regular source of income.

In conventional Western usage, however, 'property is not an activity or a thing, but the rights that people hold over things' (Hann 1998: 4). In his anthropological conceptualisation of property, E.A. Hoebel maintains that,

The essential nature of property is to be found in social relations rather than in any inherent attributes of the thing or object that we call *property*. Property, in other words, is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things (1966: 424).

This may mean that property relations essentially are social relations between people. John Davids argues that from an anthropological point of view, a boundary dispute cannot be construed as if it is a dispute with a

boundary. In other words, one 'cannot sue an acre' of land as if it were a person. That is why, according to him, 'the study of property rules in general, and of land tenure in particular, is the study of relations between people' (Davids 1973a: 157).

The definition suggests that the object of legal rights (property) is essentially less important than the social relation it generates between individuals or groups of people. This stance cannot overrule the significance of property as a thing in itself. This is because social relations are not done in a vacuum. They cannot occur without the object over which individuals or groups have legal rights. Thus, one can understand that the anthropological definition implied the culturally variable ways in which individuals or groups of Anlo or Asante, for example, relate over property as things or an activity, and which constitute their social relations. In other words, the anthropological conceptual framework appears to encompass property not only as a set of social relations, but also somehow, property as a thing in whatever form it is found and which generates the social relations. The next section discusses various cases in which family legal and socio-cultural practices of property inheritance hampered different categories of females.

### 4.3 Females and Property

Interviews with women in Anloga and Kumasi show that a majority suffer from poor social image or the conception that women need little or no property. This affects the legal and socio-cultural practices of the patrilineal and the matrilineal family systems. The categories of women affected are female children, widows, divorced women and women living in non-marital relationships and this section will treat them in that order.

#### Female child

It appears that even though in principle both sexes qualify to inherit in the patrilineal kinship system, the female child has fewer rights to her deceased male parent's property than the male child does. In other words, although women may legally inherit lineage lands, families very often give priority to men. One trouble-less case illustrates this well. Demawu, a fishmonger in Anloga lamented in interviews that after the death of her father, her male siblings received the majority of the property. For example, while each female child received two coconut trees, each male child got five trees. Upon division of the decedent's farmland,

each female child received only one plot, while each male child received five plots.

Robertson (1984) in his study of the patrilineal Ga in central Accra identified similar parallels that despite tracing lineage patrilineally, inheritance rights do not flow unilaterally. He indicates that some properties pass from mothers to daughters, while certain transmissions are from fathers to sons. There are also certain things passed on cognatically, without gender discrimination (Robertson 1984: 45-67).

In a different case, Gladys<sup>1</sup> explained how her nine female children were denied the cash their deceased male parent had saved at a bank. Asked why only the male children benefited from the money, Gladys and her sister maintained that females do not inherit from their fathers among the Anlo. Both added that the female child could only inherit if her male parent had made a traditional will or a gift for them before his death. Both informants noted that among the Anlo, land as a property is the greatest problem when it comes to inheritance since the people's livelihood largely depends on it. The reason why society allows men to have more rights than women to inherit land, as mentioned earlier, is that men are supposed to cultivate the land and use its proceeds to support and maintain their wives and children. As a result, women are not supposed to inherit land.

Similarly, a house as an estate passes to the male child when the father dies. The female child may reside in the house but leaves as soon as she is married. Sometimes, a male child may give some portion of an estate to his sister, but often his wife will object since the latter expects her own male children to inherit the estate.

In a similar instance, Kafui, a petty trader in Anloga held that she and her husband had been married for 19 years. The husband died in 2005. They had three daughters together. Two of the girls were in junior secondary school while the youngest was in primary school. According to her, she did not benefit from the man's property. She mentioned that the deceased had children with other wives. If shared according to the number of mothers, as used to be the custom with estates, then the female child can also obtain a share. But her husband's farms were shared according to the number of male children. She and her children received no share of the decedent's estate. A number of key informants including *mamaga* (head female chief), Togbe Avevor (regent of Avadada)<sup>2</sup> and the well known Anlo traditional oral historian, Kofi Togobo attributed the

change in the rule of sharing intestate property among mothers to distributing it according to the number of children to the present economic hardship people are going through. This causes male children to neglect their female siblings when sharing their father's estates.

In Kafui's case, the elder son and his uncle (instead of showing some consideration as some families do) seemed callous in interpreting the indigenous law on inheritance and denied the female children and their mother any share in the intestate property. In addition, the male children in Gladys' case did not consider the female siblings when they shared the money left by their deceased father. Thus, as indicated earlier, the Anlo consider the claims of daughters to their deceased father's land as only a privilege and not a right. Although daughters may inherit a property, sons generally receive preference (Kludze 1973). The examples above demonstrate how even within the same community, inheritance practices may vary.

Dorothy Dee Vellenga investigated inheritance patterns in patrilineal and matrilineal areas and identified significant differences in inheritance between women of both areas. For example, in matrilineal areas such as Kumasi, women inherit from different types of persons, such as mother, uncle, brother, grandparent and child. Some may even inherit from husbands and fathers, whereas in the patrilineal areas, 'the father is by far the most important source of inherited resources, with mothers and husbands far behind' (Vellenga 1986: 72). Vellenga, however, confirms that women own less property than men do in these areas.

Benneh et al., however think that women in a matrilineal system of inheritance have more property rights than men do (1997: 63). Dzodzi Tsikata also sustains that the study presented by Benneh et al., seems to confuse matrilineal inheritance with inheritance by women since in the system it is the lineage, and not individual women such as wives, which has the corporate interest in property. In other words, both men and women comprise the matrilineal family, but men seem to own more property than women since, as lineage heads and occupants of stools, as many are, they control much of the property. Tsikata emphasises these are important indicators that are *sine qua non* to any valid analysis of property inheritance in the matrilineage (1997). The present research in Kumasi shows that as far as self-acquired property of female parents is concerned, women individually have more inheritance rights than men do. Tsikata's argument therefore may hold in the case of family or stool

property. In any case, among the Asante, self-acquired property converts, in time, to family property. Thus, it appears that in both family systems men tend to have more inheritance rights than women do.

Furthermore, in spite of the matrilineal legal prohibition of children inheriting from their fathers among the Asante, male parents have been making their own arrangements for inheritance of their property. As one of the elders told me and as confirmed by others in a group interview at the Manhyia Palace, 'I do not see the reason why my children, especially my sons, can stay with me and help me in the acquisition of my property and I will fail to give them a share of it'. The elders admitted that the indigenous system of inheritance is still working but not as it used to do. They maintained that even before the introduction of PNDC Law 111 on intestate succession in 1985, many Asante men had been privately giving a portion of their estate to their children; especially to their sons. This is reminiscent of, and confirms, Franz von Benda-Beckmann's observation in his anthropological study of property relations among the Mnangkabau people in Indonesia that in spite of societal objectified normative conceptions on property claims, people actually went about doing their own arrangements as to who should inherit their property (von Benda-Beckmann 1979: 382). This incident may be an indication that to some extent, through time, the actual behaviour of members of the Asante society is, or might have always been, contrary to the system of objectified normative conceptions regarding inheritance in their society. Study informants mentioned that many Asante still use traditional inheritance, but that making a will was gaining ascendancy among the people.

### **Widows**

Research indicates that even within the present dispensation of PNDC Law 111, many women are either completely denied shares of their husbands' property or inadequately compensated for the number of years they spent with their spouses. In some cases, a woman might have spent most of her lifetime with her husband. A typical example is the case of Nosi, a 75-year-old peasant farmer in Anloga. She was the sixth and surviving wife of her polygamous husband. Both were in their 30th year of marriage before her husband's sudden death in 2003. All the wives, except her, had children with the man. She explained that even though she did not have a child with him, she helped a lot in his farms. She held that



soon after the man's death, some elders of his family came to his house to lock up the doors to the rooms. On the 40<sup>th</sup> day, the decedent's properties, including the rooms of his house, were shared among his children:

They asked me to quit the room where my husband and I used to live until his death. So I asked them: how can you sack me from a room I have been living in with my husband before his death? The question did not stop them from allotting the room to one of the deceased's children. Fortunately for me, this child works in Accra and so he does not live in this room. Thus, in the interim, I am allowed to live in it.

Nosi explained that later the elders of the deceased family gave her 10 Ghana cedis and two small farming plots of which she has only a life interest as compensation for her 30 years of service. Like Nosi, even though many women have not materially contributed in the acquisition of property in marriage, they have been indirectly assisting by working on the men's farms or running the family business. Some of the women also ran their own small-scale businesses and used the proceeds to supplement 'chop-money' for the family.

In her analysis of 'Mothering, Work, and Gender in Urban Asante Ideology and Practice' in Ghana, Gracia Clark highlighted the breadwinner role of women and showed that the economic situation compels a mother not only to work, but also to drain away the income she needs to save in order to accumulate capital (Clark 1999: 717). Even though Clark's assessment may be overstated, it contains an element of truth. Women in Kumasi or Anloga, as well as other parts of the country, become sole breadwinners in instances when they are either single parents, divorcees, or when they lose their husbands. According to Ghanaian custom and social practice, men are generally the breadwinners in the immediate family. However, most wives complement the often-insufficient 'chop-money' provided by their men. The ability of wives to complement or manage the insufficient resource of their husbands, to look after the immediate family or keep the home running, is what makes them win the popular saying in Ghana that 'women are magicians when it comes to home management'.

The breadwinner role may make some women exhaust the little income they have. This indirectly enables their husbands to save towards acquisition of property. Since most women are unable to contribute directly and materially to the property acquired by their husbands during

marriage, they may have great difficulty in establishing a claim to ownership in case of divorce or the husband's death.

A peculiar feature of marriage under indigenous law compounds the situation. This has to do with the concept of the couple's separateness of identity and with its corresponding effect on property acquisition. As a result, marriage has no effect on the property of spouses (Rünger 2006: 6). This is why women like Nosi cannot lay any claim to their husbands' property even when they assisted in making improvements or used their resources in feeding the immediate family unless they can prove either form of assistance with evidence in a formal court. Thus by indigenous law, women cannot inherit their husbands' property. This also explains why women like Nosi cannot go to a chief's court to claim rights of inheritance of their deceased husbands' property. Under this circumstance, many women may be financially insecure in the unfortunate circumstance of losing their husbands. What complicates their situation, according to interviews, is that many widows solely assume the burden of looking after their children, since deceased husbands' family members often do not care about them. Thus, according to Geti, a peasant farmer in Anloga, 'even my deceased husband's family members neither help me nor my children'.

Other widows face similar difficulties. For example, Adzoga had ten children with her husband but only three male children and a female child survived. Even though life was difficult for them, it was relatively better when her husband was still alive, because both of them were able to look after the children through farming. Unfortunately, she lost her husband in 2002. Now, she ekes out her living together with her children through the sale of *kenkey*, a Ghanaian local meal prepared from fermented maize flour. She buys the maize for the *kenkey* from a dealer on credit and settles the amount after sales.

Some of the widows complained of threats from the decedent's family members to seize their deceased husbands' property. For example, according to Kafui, the very day her husband died, his treasures were locked up and the keys taken away by the deceased husband's eldest son. She mentioned that his paternal uncle supported the son in the locking up of the property. Having considered that the disgruntled family members might not respect his summons, an elder advised her to seek the help of the Commission on Human Rights and Administrative Justice (CHRAJ) to claim her property right. Yet, since she did not want to

waste time, coupled with the fact that she did not have enough money to pursue the case, she decided not to go.

Similarly, Asantewa, a teacher in one of the senior secondary schools in Kumasi explained that,

My husband and I were married for 12 years when he died in 2002. As soon as he died, members of his maternal family came with their elders to seize his property. But I threatened to take the case to the formal court if they dared touch anything. Afraid of the threat, the family members retreated and never came back.

The informant admitted that many of these maternal family members were educated and aware of the relatively new law on intestate succession but they still used the traditional mode of property succession. For her, the traditional way of inheritance benefited the maternal family but not the widow and her children. Because of this benefit, many continue to use the old system of inheritance.

Asantewa attributed women's inability to negotiate their rights or work within existing legal frameworks to claim their due to factors such as illiteracy, fear that family members may spiritually hurt them, and ignorance of PNDC Law 111 on intestate succession. Asantewa was one of the few females who questioned the authority of matrilineal family inheritance, or the *abusua*, of its role in seizure of deceased members' property. Nevertheless, the social consequences for her action are great. In times of critical social events such as sickness or death of a child, the family members may withhold their assistance and may even refuse to be involved in burial ceremonies. According to De Witte,

... in most areas of life the nuclear family is gaining control, but as regards death and funerals, and other social activities the *abusua* seems too strong to conquer. And it is exactly this contradiction that frequently gives rise to tensions at funerals. Such conflicts between the *abusua* and the nuclear family are mostly a matter of control, of family politics (2001: 73).

The question is what do these changes mean for women? As indicated, many people in both villages and towns are not aware of their rights. Some of the women interviewed at Sepe Timpo in Kumasi and in Anloga, for instance, were not aware they could use PNDC Law 111 to claim their property rights. Mechthild Runger attributes people's unawareness of the law to lack of enforcement, ineffectiveness of the law in many places, and inadequacy in legal provisions (2006: 1).

Even where women are aware of the law or where women are highly rights-conscious, sometimes they remain silent lest they face spiritual reprisals from the *abusua* (the family). This is because the suggestion that a husband and wife may share rights in property is, as we have seen, completely alien to the traditional Anlo and Asante system of inheritance (refer to chapter 3). When cases involve *abusua*, there is a reluctance to assert rights. The fundamental Asante kinship unit, the *abusua*, comprises the adult descendants of one grandmother, her children, her daughters' children, and her granddaughters' children. These minimal lineage units link mothers with children and uterine brothers. Traditionally, one must not take the *abusua* to court. According to Gracia Clark (1999), the absolute priority that urban as well as rural Asante give to their matrilineal kin is a strongly held moral value across class lines. Because of this, many women are not willing to report wrongs they suffer from the family to law enforcement agencies. They think this may be equivalent to betraying the family or washing the family linen in public, which society frowns on. Some informants indicated since they were very much aware of the tradition and custom surrounding intestate inheritance they did not want to protest legally.

The social pressure from the family and from communities sometimes leads to ostracism or boycotting of women who insist on their rights. Justice Lartey-Young confirmed that because of the fear of social ostracism and boycott, many women would not challenge or take the family to court, and that most cases involving intestate succession are handled traditionally.<sup>3</sup> Supreme Court Justice Joice Bamford Addo equally maintained that the 'majority of people do not go to court because their Chiefs are so powerful that they dare not go over their heads' (Fenrich et al. 2001: 334).

The implication of boycott has serious consequences. For example, marriage among the ethnic groups in Ghana is an alliance between the two families of the bride and the groom. It means the bride is both the wife of an individual and, truly, the wife of the husband's lineage. Similarly, the children obtained from the marriage do not only belong to their individual parents but also to the lineage. Michael C. Kirwen explains that because of this social practice,

the obligations and relationships entwining a wife and her children with her husband's lineage do not cease automatically after the man's death. In-

stead the woman continues in the lineage as a functioning wife ... (Kirwen 1979: 10).

For Asantewa's in-laws to refuse their assistance means they have decided not only to divorce her but also to disown her children. Thus, because of the fear of boycott or ostracism, many women unlike Asantewa fail to use rights-frameworks to claim their rights of inheritance.

Not only are there threats, but also actual seizure of the deceased husbands' property, which bereaves the widow and her children of resources to live on. Adzoga, as mentioned earlier, for example, indicated that soon after her husband's death his family members seized the only land he left behind. The family members argued that the deceased was not a family member. His mother brought him as a child when she came to marry a member of their family. As a result, the land the deceased used when he was alive belonged to the family.

Report No. 19 of the *Bridge Development – Gender*, analysed gender issues in Ghana and indicated among other things that, even though technically speaking, a wife under the family systems has rights of maintenance and residence through her husband or his successors; 'it is not uncommon for her to be driven out of the home' (DFID, UK, Report no. 19, 1994: 59; Awusabo-Asare 1990). Moreover, one particular thing that creates considerable insecurity for women is, under indigenous law of the various family or lineage systems, their property rights are often not established until after the death of their husbands. The way their families treated informants Nosi and Adzoga and other widows in both Anloga and Kumasi typify this situation. Most of this research took place in the 1990s but the findings remain valid among the Anlo and Asante.

Rose, a petty trader in Kumasi, said that both of her parents died. According to her, before his death, 'my father gifted portions of his cocoa farm to his six children and his wife'. This shows that although in Asante tradition and custom, wives and children do not inherit from male parents or husbands, indigenous law is not against making provisions for them by gifts or wills. Still, the argument is not so simple because a husband or a male parent may be sensitive enough to make such provisions. Yet, soon after death, his maternal family may come and seize what he gave as gift. This was the case with Rose's mother.

The expectation placed on the traditional inheritance systems is that either the matriline or patriline will take care of everyone. Indigenous law does not make any provisions for divorcees or widows. As such, like

in Rose's case, a man can only bequeath part of his self-acquired property to his wife and children as a gift or through a written or oral will (*nsamansin*). However, it is possible for the family, with an intestate death, to bequeath part of the self-acquired estate to the wife and children of the deceased. Bosman (1967), however, explains that 'on the death of either the man or the wife the respective relatives come and immediately sweep away all (property), not leaving the widow or widower the least part thereof' (102). It is even possible to challenge the transfer of property to the wife or children if no witnesses testify that the host provided drinks to acknowledge the transfer. Mikell (1984) says that nearly every time, people who mill around will remember the ceremony, the witnesses, the kinds of items and amount presented. However, Vellenga (1983) reports instances of challenges or even repudiations to oral wills, leaving the widow and/or children destitute.

There appear certain differences in the socio-economic relations between widows in the two research areas. While some of the widows in Kumasi indicated that they still receive financial help from their deceased husbands' family members, this is not the case with the widows in Anloga. For example, Akua and her husband in Kumasi had been married for 10 years. Her deceased husband was a dealer in *kente* (traditional cloth), while she was selling the cloth in a store built by the proceeds accrued from the husband's trade. This was the only property left behind by the husband when he died in 2005. Even though it is a small store, the maternal family of the late husband asked her to use the sales in it to look after the two boys and one girl she and her husband had in the marriage. Akua and some other widows in Kumasi further admitted that their brothers-in-law paid them for the upkeep of themselves and their children even though sometimes, the money remitted was insufficient. In a different interview, Ayeyi, a female petty trader in Kumasi explained she lost her husband nine years ago. She disclosed that the husband made a will for her and her children. None of the Anloga widows had a similar treatment from their husbands or deceased husband's family members. This situation seems to confirm Dorothy Dee Vellenga's observation that 'among matrilineal women . . ., the husband and the lineage are both important sources of inherited resources while patrilineal women only have primarily their fathers as sources of inherited resource' (1986: 76). Thus, even though the lineages are weakening, it appears that

widows in Kumasi still enjoy much more social security engendered by the matrilineal support system than those in the patrilineal Anloga.

One other reason why there are no provisions made for widows in their husbands' property among the Anlo in particular is the thought that their children will care for them. Underlying this thinking is the presumption that widows who have children within the patrilineal system may be somewhat better off than matrilineal widows. This is because under the indigenous law governing many patrilineal communities in Ghana, it is children and not the family, who inherit property from the deceased man's estate (Kludze 1973). According to Anlo oral historian, Kofi Togobo, when children inherit from their deceased fathers, they may use the property to care for their mothers. For example, if the property left behind is land, the children looking after their mothers may use its produce. Thus if children look after their mothers well, the mothers may not complain of anything. Benneh et al., (1997) maintained that women's leaders and representatives were satisfied with this latter inheritance system, both because they were more concerned about their children's security than their own and because they expected to be looked after by their children.

Lisa Cliggett (2001) analysed similar survival strategies of the elderly Gwembe Tonga in Zambia. She noticed how, for security reasons, older men try to marry younger women who together with their children can support the men when incapacitated by age. The more wives and children, the more secure the men think they are (Cliggett 2001: 319). Thus, fathers who disown their children or do not take care of them when the children were young, face old age with little reciprocation (van der Geest 1997). Men and women who lose husbands or wives by either death or divorce also move to live with or near their brothers, sisters, grandsons or granddaughters. The vulnerability of old men and women alike appears when there is no kin, including 'classificatory' fathers, nearby or in the community. Thus through kin networks the Gwembe Tonga somehow tries to give security to his or her life in old age (Cliggett 2001: 319-21).

These observations may be largely true. Because generally speaking, in Ghana and in specific terms among the Anlo and the Asante, parents who attain old age have no one except their children to turn to. This thought of who will care for one in old age or infirmity is one of the cardinal reasons why the average Ghanaian will want to have a child. As a

Ghanaian proverb puts it, 'when parents help a child to grow teeth, it is that child's turn to help the parents lose theirs'. This is significant because unlike the developed countries, which have well defined social structures, developing countries like Ghana scarcely have these active welfare systems. Thus, children are social capital or security for their parents.

Some female informants indicate that some children do care for their parents in Anloga. For example, Gladys, who used to deal in provisions such as bread and toiletries but is now incapacitated by sickness, relates that she solely depended on her children for her upkeep and livelihood. According to Afiwa, another informant, 'My children once in a while send me remittance although this is not sufficient'. She explained that sometimes the children's own responsibilities prevent them from helping their mothers. This is understandable if the salary structure for the average Ghanaian worker is considered. Salaries are low and meant for one person yet there is a disproportionate pressure or demand coming from the family. In some cases, the insufficiency of salary to care for one's wife and her relatives, one's own children, parents, grandparents, brothers and sisters, nieces and nephews and others, is comparable to the social practice Chinua Achebe critiqued in *Things Fall Apart* that the effort of the Ibo man, Okwoko, to look after his huge family, is like 'pouring grains of corn into a bag full of holes' (1988: 16).

Some widows in Anloga explained that not all children have access to their father's property. For instance, according to Mana, a *kenkey* seller, she and her husband were married for 24 years. The husband died in 1991 after a motor accident. The decedent's family members claimed the insurance without giving anything to her and her children. In addition, the man's elder sons from other wives monopolised the deceased's property. Worst of all, the family asked her and her children to leave the house.

Additionally, interviews uncovered that not every man has property to bequeath his children. Thus, not every child inherits a portion of the father's estate through which he or she can look after his or her mother. There are also situations where wives do not encourage their husbands to look after their mothers. Demawu,<sup>4</sup> one such informant admits that there are occasions when sons eject their mothers from their houses with the excuse that they interfere with their marital affairs. Few children adequately take care of their mothers.



However, this does not take away from the situation where financially capable children may refuse to take care of their parents. For example, in one interview, a female informant indicated that her own sister refused to look after her mother even though that sister was capable of doing so. Thus, the questions remain if children's interests will always be coterminous with those of their mothers; furthermore, what if a woman has no children of her own to look after her.

Connected with the inheritance issues of widows are the situations where divorced women and women in non-marital relationships do not qualify under indigenous law to inherit their partners' property, even if they had contributed in acquiring it. A case for consideration is that of Mafia. Mafia is a middle-aged woman in a suburb of Kumasi called New Kyerekyere. She is a petty trader in provisions at the central market popularly known as Kejetia in Kumasi. She is also a woman organiser in her community. Mafia has only an elementary education. She has four children from her marriage (two boys and two girls). She and her husband divorced in 2000.

On property inheritance, she noted that she and the husband contributed to building a house. She contributed financially to the purchase of blocks and roofing sheets. Yet after the divorce, her ex-husband refused to give her a share of the house. Mafia did not litigate because her grandfather advised her to forgo the claim. A court of law in present day Ghana will only consider the informant if she can produce evidence of her contribution towards the joint project. However, as is usually the case, many women are not able to do this. Mafia's situation might be just the start of the numerous incidents of widows, divorced women and women living in non-marital relationships that contributed, together with their husbands or partners, in the acquisition of property but are denied benefits. Outside the physical evidence of financial contribution, there is no other accounting of help a woman gives her husband no matter how significant this help may be. Thus, Fenrich et al. argue that a wife's labour in Ghana is merely seen as a contribution to satisfy 'her preexisting marital obligation and does not give her an ownership stake' (2001: 276).

This dimension is thought provoking, especially given the greater definition of the division of labour in Ghana. According to Dzodzi Tsikata, men and women perform multiple roles in reproductive and productive work, in community management activities, and in politics. While men have more time to engage in local politics and also effectively carry

out economic activities, women have less time to be involved in them since most often they are preoccupied with the reproductive and household activities that tradition has assigned to them (1997). Like Roslado and Lamphere (1974) and other feminist writers, Dzodzi Tsikata makes a distinction between 'public' and 'private' domains in her analysis. The work of Edholm, Harris and Young (1977), Beechey (1979) and Barrett (1980: 19-29) discuss the problem of reproduction. Like Hirschon (1984) and Beechey (1979), I think the analytical separation of production and reproduction is wrong since both domains are interrelated and therefore need not be separated.

According to Akua Dunkan, tradition obliges the average Ghanaian woman to assist her husband in his farm work. These tasks are often carried out in addition to their own farming activities, which are either performed on their husbands' plots or on separate plots of land that have been allocated to them (1997). This may further increase a women's work schedule and may therefore restrict the amount of time they use on their own farming activities. Thus, women's time for economic activities is very limited when compared with that of their male counterparts.

One other interesting interview, already briefly mentioned, was with a divorced woman named Rose. The interview took place in her drinking bar at Sepe Tinpom in Kumasi. She married but divorced in the fifth year of marriage. According to her, maternal family members of her husband masterminded the divorce because they did not agree to the marriage. She had two girls from the marriage. The ex-husband died in 2005. The story of Rose demonstrates the huge influence of the family over the affairs of its members. Even though, at the beginning, neither couple minded the family's objection to the marriage, they finally had to succumb to its pressure and this led to divorce. The woman could not have any share of the ex-husband's property because indigenous law does not make any provision for a wife or husband to inherit each other's property in the event of divorce.

As mentioned in chapter 3, article 22 of the 1992 Constitution of Ghana stipulates the property rights of spouses whether in marriage, divorce or after death. It specifically indicates in paragraph 3(b) that 'Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution'.

This stipulation in the Constitution is similar to that of the African Charter. The Constitution enjoins parliament to make appropriate legis-

lation towards the full realisation of divorced women's property rights. This is important because 'Ghana operates a dualist system where parliament must pass law that makes international instruments part of national law' (WiLDAF-Ghana, Shadow Report 2006: 1). Since parliament has not carried out the constitutional request, it follows that those international human rights laws on females' inheritance cannot become part of national law. This may explain why PNDC Law 111 on intestate succession has not met the constitutional requirement for divorced females' inheritance rights since 1985.

According to a 2006 shadow report submitted to the CEDAW Committee on Women's Property Rights in Ghana, women continue not to have the same rights and responsibilities whether in marriage or divorce. The report sustains that women do not have access to, control, use of land, or family income. In addition, women suffer marginalisation in decision-making. The report indicates that 'women are therefore, worse off at the dissolution of marriage or at death of a partner' (WiLDAF- Ghana, Shadow Report 2006: 3).

As illustrated by informant Rose, Asante women are caretakers of property while their male counterpart control and use it. She explained that even though women choose men to control property, men use it to enrich themselves. Yaa Asebia, who teaches in a teacher training college at Bantama in Kumasi, also thinks that in Asante, men work harder than women do. Men, according to her, purchase land and own it. They make cocoa farms that bring in much money, and through this, they are able to invest in other businesses. Thus, they are richer than women are. The teacher also indicated that the majority of women suffer because they over-depend on their husbands, and are financially insecure in the events of divorce or death of the man. As a graduate teacher, she did not depend on her husband and did not even ask for any share of her deceased husband's property. According to her, she has enough to care of herself and children. Benneh et al. (1997) attribute this economic disparity between the genders to the fact that a majority of women lack the necessary capital inputs and labour requirements and, as a result, few of them are engaged in the production of cocoa, the major cash crop in Ghana.

The women interviewed identify that the fact that the family heads in their communities are invariably men reinforces their difficulty in securing land. The role of the family head is strategically important because he controls the family's economic resources including lands. This position

gives men an added economic advantage over women since they have access, use and control of property meant for both sexes in the lineage. Moreover, in cases where women are entitled to lineage land, marriage residence and marital responsibilities prevent many of them from taking advantage of their rights (Tsikata 1997).

In Ghana, where many women traditionally do not inherit their husbands' property, men can only make provisions for their wives. This means divorced women or women who ended the relationship with their partners may not have access to farming land unless their lineages can provide them with some; or they may have to purchase it themselves. The latter may seem a less promising alternative since the majority of women, especially those in rural areas, are poor. It may mean that such women may find it difficult to take any economic venture when it comes to farming.

#### 4.4 Mystical Forces and Females' Property Inheritance

Fieldwork among the Anlo and the Asante, in Anloga and Kumasi respectively brought out repeated complaints from informants who attributed their inability to use a rights framework to contest their claims over property for fear of spiritual reprisals from family members and other disputing parties. The foundation of this is a belief that certain individuals have access to certain mystical or spiritual powers, which they can manipulate for destructive purposes.

For example, in Kumasi, Asantewa, the teacher mentioned earlier, attributed the paralysis of her two sons to spiritual attacks from her deceased husband's family members when she prevented them from ejecting her and taking the deceased husband's property away. Another woman called Mefia, in a suburb of Kumasi known as New Kyerekyere, reported that she and her husband constructed a house. She contributed cement for the moulding of blocks and helped buy roofing sheets for construction. When they divorced, the husband refused to give her a part of the house. Her grandfather dissuaded her from using any rights framework to claim her due, explaining, that the life of her children might be at stake if she insisted. The grandfather maintained that she should concentrate her attention on raising her children and that when the children grew up, they would build their own houses. Thus, he asked her to think first of the security of her children, since litigation could involve deaths. According to the informant, she heeded the advice of her

grandfather because of the traditional notion that children are more important than property and people build houses.

Further, in Anloga, the 75-year-old woman Nosi, whose story we have partly shared, indicated that she decided not to contest her right of a share in her deceased spouse's estate because:

There can be danger there since some family members may take the issue personally and may use spiritual or physical means to terminate my life. This is why I prefer to live in peace with the family members.

In Anloga, another woman had won a disputed land case over her brother in the District Court (formal court), and soon after died. The rumour was that the sudden death resulted from a spell cast on her. The belief that supernatural means are a viable means for causing death is not limited to the traditional societies under study. In Ghana, the belief is widespread. For example, in an editorial entitled 'It's Obsolete Custom', the *Daily Guide*, a daily newspaper in Ghana, inferred that women in the Upper West region refused to claim their deceased husbands' social security benefits lest the spirits of the deceased 'would strike them dead if they did so'. According to their culture, only family members inherit the estates. The paper lamented, instead of the widows and their children, the family members of deceased husbands enjoy such social security benefits. It described the practice as obsolete but one that continues to be observed (*Daily Guide*, 31 October 2006: 4).

Similarly, on the last page of the *Weekend Crusading Guide*,<sup>5</sup> it said that a traditional ruler had initiated a campaign against the invocation of gods. This action followed a challenge thrown to the then President John Kufuor by an opposition member of the National Democratic Congress (NDC) Party in Sunyani. The challenge called for the President to swear to *Antoa Nyama*, a river goddess very much feared in the area, that he was not corrupt. The opposition member sustained, among other things that Kufuor should stop persecuting the wife of the former President, Jerry John Rawlings and other members of the NDC if he knew he himself was not clean. According to the paper, 'following the infamous ... challenge thrown by a well-known opposition National Democratic Congress (NDC) serial caller, "Dr" Asemfoforo to the President,' it appears the phenomenon of invocation of gods has become rampant in Amansie West district of Ashanti.

According to Dale Massiasta, a writer and secretary to Adzima shrine<sup>6</sup> at Klikor in the Volta region of Ghana, 'in our culture a lot of things

happen before one may resort to the invocation of a god'. This is to say that one must explore all avenues of settling cases first. Thus, invoking a god to make judgment on a case has an appellate judicial implication. It is a very dangerous venture and so it is not traditionally encouraged.

Many believe that if an invocation is made, the god invoked normally gives its verdict in the form of either killing or afflicting the guilty party with mysterious illnesses. For example, when in the Adzima shrine at Klikor, one of the Anlo villages seeking some clarification on the subject matter, I saw a young woman of about 24 years of age brought by four men and a woman to see the priest of the shrine. She looked very ill and emaciated. From the way she looked, it appeared she might not survive for long. She was made to confess what she had done. According to her own narration, she stole 30 Ghana cedis from her boyfriend. She later broke off her relationship with the man and married another man. The boyfriend had asked her if she had taken the money but she denied it. The man then went to the shrine and invoked the Adzima god to find the one who stole the money. It is believed the god gave its verdict in the form of the illness the young woman was experiencing. After the ill woman had confessed the theft, the elders at the shrine asked the priest to pour a libation and to intercede with the god on her behalf.

All this shows how pervasive and entrenched the belief that invocation of spirits, or the use of them, can cause harm to people in the Ghanaian society. This belief prevents many people, including women, from using a rights framework to defend or claim their property inheritance rights since they fear spiritual attack, even death.

#### 4.5 Rights Consciousness and Ineffectiveness of Law

Article 22(1) of the 1992 Constitution of Ghana stipulates that 'a spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will'.

Second, the Memorandum, which accompanied the 1985 PNDC Law 111, states that 'a surviving spouse should be compensated for his or her services to the deceased spouse ...' (Government of Ghana, 1985: i-iv).

However, most women especially those with little or no formal education, lack legal consciousness. Asked for an example of why Nosi could not use PNDC Law 111 to claim a share of her husband's intestate property, she explained she was not aware of the existence of such a law. Gladys in Anloga said it did not occur to her that she could use Law 111

to claim her inheritance rights. The 2006 shadow report to the CEDAW Committee mentioned a number of laws Ghana amended to conform to international standards. These include amendment of Criminal Codes to criminalise certain customary practices that infringe on women's rights, the Intestate Succession Act and amendments, and Marriage and Divorce Registration Law. The shadow report confirms the lack of legal consciousness among women. It notes that in spite of the criminalisation of the customary practices, few cases appear before the courts for prosecution (WiLDAF-Ghana, Shadow Report 2006: 1). The report also indicates that in spite of gender sensitive provisions in the Constitution of Ghana, there are still social structures in the country that enable men to dominate women. In addition, it states that despite recent gains in some areas, gender inequalities continue to constrain women's ability to participate in and contribute to the economy.

A number of scholars including Fenrich et al. (2001) and Runger (2006) confirmed the widespread legal ignorance or lack of right consciousness, especially in the rural areas of Ghana. They maintained that where people appeared aware of PNDC Law 111 on intestate succession, they completely misunderstood its provisions. They also indicate that in certain parts of the country, the law is not working at all. In Muslim communities, for instance, opinion leaders including chiefs insist that Islamic principles govern intestate property distribution. Alhaj Hamza Umar, the Regional Chief Imam of the Volta region mentioned, among other things, that Muslims continue to use Islamic prescriptions and that any Muslim woman who wants 'to enforce her rights under Law 111' faces stronger sanction from the community than a woman who does not profess the Islamic faith (Fenrich et al. 2001). According to Jessica Hindman, the Qu'ran reflects the patriarchal social system in which it has evolved and thus it does not give equal inheritance rights to the sexes. For example, if a wife dies without any child, her husband, according to the Qu'ranic prescription, inherits 1/2 of her property. However, if a husband dies without a child, the widow inherits only 1/4 of the deceased husband's property (Hindman 2002: 2). With Law 111, on the other hand, widows receive more property from their deceased husband's estate. As a result, the all male Muslim leaders refuse to allow Muslim women to invoke the law.

In other parts of the country, according to Fentrich et al. (2001) and Runger (2006), most people virtually ignore Law 111 and indigenous law prescriptions continue to govern intestate property distribution.

One other significant issue that came to light during fieldwork is that some women such as Nosi, fear their legal action might provoke the decedent's family members to throw them out of their deceased member's house since the government court would not provide them (the women) with an alternative accommodation. Others, such as Kafui, who were legally conscious of their rights failed to litigate to claim the rights lest the cost involved be too high. Besides, they did not want to wash the family linen in public.

However, there are situations when rights-conscious women such as Asantewa withstood threats of the family, insisting she might use the formal court to claim her property rights. Others also fought to ascertain their property rights in the formal court, as seen in a land dispute between Akolatse (male/plaintiff) and Afiwa (female/defendant) in the Anloga District Court.

In the trouble-case, the plaintiff's deceased grandfather, who is also the defendant's grandfather, had four wives, including the mother of the defendant's grandmother. The grandfather shared his land according to the number of wives before his death, so that their children could respectively have shares in the property. This implies the defendant's mother came from the same patrilineage as the plaintiff but with different mothers. The defendant's mother married her own brother's son, which happened to be the plaintiff's father. Because of the marriage, the defendant could inherit from both maternal and paternal lines. In judging the case, a Circuit Court judge sitting as an additional magistrate, dismissed the plaintiff's argument that in accordance with Anlo customary law, females do not have a share in their father's immovable property such as land; and that inheritance among the Anlo is always patrilineal. According to the judge, he took the decision because the plaintiff himself had admitted in court that their grandfather had shared his property among his wives and witnesses confirmed the same. Because of this, he (plaintiff) cannot say that women cannot inherit land in Anlo. The Judge sustained that:

In the face of the provisions of the 1992 Constitution of Ghana as well as the provisions of the African Charter on Human and Peoples' Rights of which Ghana is a signatory, coupled with the provisions of PNDC Law



111 (The Intestate Succession law), such a plea has no place in modern Ghana. On preponderance of probabilities, I find that the plaintiff has failed to reach the standard required under Section 11(4) of NRCDC 323 and therefore his claim fails.

He concluded that apart from the fact that the defendant can inherit from both paternal and maternal sides since it was a family marriage, there is copious evidence on record that she and her sister lived on the land since they were born.

Interviews with the main defendant show that she was satisfied with the verdict. Nevertheless, she indicated that the plaintiff refused to pay the fine imposed on him by the court. She also noted that the case first appeared in a chief's court but the plaintiff had rejected the verdict. He later filed a complaint in the District Court thinking he might win the case in this forum. Efforts to reach the plaintiff to obtain his view on the judgment proved futile since he was not living in Anloga.

A similar trouble-case, involving Ami and her sisters (plaintiffs), and their brother, Kale (defendant) arbitrated in the District Court of Anloga, wherein both disputants were from Anloga. The trial began on 25 February 1994 and was completed on 6 February 1996.

In the suit, the main plaintiff and her sisters wanted equitable interest and share in the estate or properties of two building plots and two farm plots left behind by the deceased father, Abalu. The defendant, brother to the plaintiffs, wanted to succeed to the property alone.

The main plaintiff argued for sharing both building and farming land equitably among the children of the deceased according to the law of equity or Anlo indigenous law. In addition, an order of proper account should be made in respect of the defendant's exclusive use of the aforementioned properties, which would be to the financial disadvantage of the plaintiff and her sisters. Finally, the plaintiff asked for an order from the court declaring title of ownership, possession and occupation of a portion of land given to them (the female children) by the deceased as a gift in 1958.

After going through the case and the evidence as a whole, the sitting magistrate, ruled in favour of the plaintiffs.

The younger sister related that her sister died soon after the verdict, a death she could not explain.

In view of the alleged discrimination of indigenous law against the women, the next step in this research is to find out the extent to which

this experience may influence women's selection of arbitration types for defending or claiming their rights.

## 4.6 Women's Perception of Arbitration Types

On the aspects of indigenous law and the formal courts, the interviews induced a variety of responses from informants in the two socio-cultural study groups concerning why they like or do not like a particular arbitration type. While some women preferred to settle their disputes only in a formal court, some wanted them resolved by a religious leader; others wanted their disputes settled in indigenous court. At the same time, the same groups of people selectively used the official legal system and structures in those areas of their lives they felt fall within the official system. For example, for theft and rape cases or anything that threatened their lives, women preferred to go to the formal court for protection and to ensure the criminal receives adequate punishment. However, a majority preferred to take land and family cases to chiefs' or family courts since they believed that actors there might know the boundaries of the disputed lands and the character of disputants better as they are from the same communities.

### Formal courts

Those informants, who preferred the formal court option, give a number of reasons why. For example, they maintain that the court does not make disputants pay what they called 'unnecessary things', which is a reference to payment of drinks (alcoholic beverages) in indigenous courts. They also appreciate the situation where the loser pays all the costs of the litigation. They think the court will be impartial to women and that it is capable of enforcing its sanctions. In addition, the court, they believe, has the ability to give necessary protection to those who need it. These perspectives on the formal courts were represented, for example, in Adzoga's<sup>7</sup> conception of the courts. She does not like chiefs' court since the main intention of the elders of the court is to maintain or re-establish existing or preexisting relationships between disputants, and because of that, do not necessarily stress the rightness of the case that is brought to them. She also does not like the equal fine (sitting allowance) that both plaintiff and defendant have to pay to chiefs and elders. Thus, even if one wins a case, one has to pay the fine just like the loser. For her, this fine should be borne by the guilty disputant. For this reason, she prefers

the procedure in the formal courts where the loser of the case pays all the bills involved in a trial. She also likes the formal court for its prompt judgment and disposal of certain cases, like petty quarrels and misunderstandings. However, she does not like issues that involve land and family tried in court. Her reason is that such cases normally involve a waste of time and money. Besides, the adversarial approach of the formal court may tear a family apart. For her, chiefs and elders may do better here since they may know the boundaries of disputed lands and since they are witnesses to whatever may be happening in their localities. They may also know disputants' character better. Kafui, whose story of property inheritance in Anloga appears above, also prefers the formal courts because she feels chiefs' courts seem partial in their judgment of cases. Moreover, she thinks verdicts obtained in chiefs' courts may not be effectively enforced.

Asked in which court she may like to have her problems solved, Sewa, a resident in Kumasi also maintains that she prefers the formal court. This is because she thinks a chief's court may not properly handle a case since a chief is bribable. She thinks things may be clearer in a formal court than in a chief's court. She maintains that even though personnel in both chiefs' courts and formal courts may receive bribes, she prefers formal court for solving a problem since personnel there may be more educated. Besides, she thinks a formal court seems more orderly than a chief's court. She also thinks that fees charged in chiefs' courts are more moderate than the formal ones. She mentioned other weaknesses of the formal court such as bribery and corruption of some lawyers and prolonged trials. Asked if she could substantiate the allegation, she said 'oh people always say so'.

Other women also thought only rich people take their cases to the formal court due to its high service cost. For example, in the words of one of the informants, 'I am told one must have money before one can take a case to a formal court'. They mention, for example, the cost of employing the service of a lawyer. They do not like some of the lawyers because 'they know the truth but twist it once they receive bribes'. The women reiterated their complaint of bribery and corruption, the difficult formalities and the use of foreign language in the procedures of the court. Sometimes the interpreter, according to them, may not exactly convey what one has said, which could have serious consequences on verdicts since in law, mistake or ignorance is not an excuse. In addition,

they complained of the congestion and the protracted nature of trials in the court. Because of these conceptions, many people especially those in the rural areas including men, prefer to summon their cases before their family heads, village or town chiefs and elders for arbitration.

### Indigenous courts

In his analysis of indigenous institutions on dispute resolution, Kofi Quashigah describes Western societies as characterised by 'simplex relationships', while he attributes 'multiplex relationships' to developing societies such as Ghana. In the latter, social life is so interdependently woven that once one aspect of it is disturbed, it affects other dimensions, such as political or legal, and others (1989-1990; Damren 2002). This is why in traditional Ghana, people's preoccupation in life, whether in economic activity or marriage, seems directed to healing broken relationships so that life may continue undisturbed. It is this perspective on life that characterises the indigenous legal decision-making and legal culture in Ghana.

This attitude to life seems to influence many, including women, in their legal decision-making. For many women in Ghana, marriage appears the most valuable thing in life. This is even more so when they have children in the marriage. Since most Ghanaian women want to stay with their children, they often seem willing to endure whatever ill-treatment they may receive from their husbands. This happens even if there is no prospect that apart from the children they will receive any other benefit from the marriage. According to Benneh et al. (1997: 62), women behave this way because they are 'more concerned about their children's security than their own' (see also Tsikata 1997: 5). These considerations make some women appreciate the indigenous courts and their restorative and reparative elements. They also like the advice that judges give to disputants. For example, Sename, a petty trader and a farmer, captured the feelings of some of the women in both socio-cultural groups saying 'If I take my husband to a government court and he pays a fine, this may not help our marriage'. According to her, she never visited any formal court but she had been to a chief's court. This visit concerned a marital problem between her and her late husband. She was satisfied with the verdict. The outcome of the arbitration was that the elders reunited them and peace returned to their home. She did not want to take the husband to the District Court (formal court) in Anloga

because of the cost that might be involved. She thinks she likes the chief's court because of the way actors handle cases. For example, the elders paid equal attention to her and her husband to pour out their grievances. Above all, the elders prevailed over her husband to change his attitude towards her, which reunited them and improved their marital relationship.

Asked which courts she liked to resolve her problems, Bibiani, a petty trader in one of the suburbs in Kumasi also mentioned that she preferred to go to an indigenous court. She noted that she does not like the formal court because of what she describes as a *ko na bra, ko na bra* (go, come, go, come) system, referring to the protracted nature of its procedures. She thinks that chiefs and elders do not take bribes as lawyers do in the formal courts. However, her husband, who interrupted the interview at this point, interjected 'oh chiefs also take bribes'. Asked if he could substantiate his allegation, he noted that he came from an Asante village, where his brother and another person were fighting for a stool. Chiefs who were dealing with the case took a bribe from his brother before they accepted him on the stool. He continues that bribery is a human issue. It occurs in both indigenous and formal courts.

Some of the women also appreciate the low service cost and the prompt treatment of cases in chiefs' courts. Moreover, they laud the relevant and easily understandable procedures, since the courts' sessions are conducted in local languages and therefore do not warrant interpreters. Abena, a subsistent farmer in Ayeduase in Kumasi for instance, said 'I don't understand formalities in the formal court. However, since I am an Asante and trained in my custom, I understand the procedures in chiefs' courts better and feel very comfortable with them'. She also thinks their chiefs are respected and have a high sense of humour. This makes one feel comfortable when one is before them. Moreover, she thinks decisions arrived at by chiefs among the Asante 'are biased-free, unlike those of the formal courts'. Some female traditional leaders represented by *mamaga* in Anloga believe that a chief's court in general is good as the first place to arbitrate or judge a case before it becomes necessary to forward it to a formal court. They reiterate the idea that indigenous courts are better for the treatment of land and family cases. They mention fast judgments as one of the credits of chiefs' courts. Moreover, they think that the display of ancestral stools and other ancestral and chiefly paraphernalia in indigenous courtrooms create an awesome reli-

gious atmosphere, which may predispose disputing parties to tell the truth in their statements and testimonies, for fear they may die if they tell lies.

The female traditional leaders do not like the disrespect shown by some disputants to traditional authorities. Some such disputants refuse to comply with summons. Asked how they handled such situations, they explained they reported them to the police for arrest; and that this most of the time worked.

Finally, the women often feel discriminated against in the male chiefs' courts because they lack representation in the panel of legal decision-making.

### Selective choice of arbitration types

Many of the women are also selective as to which arbitration type they should choose depending on what kind of case confronts them. For example, on the question as to which court (formal or indigenous) she may like to resolve her disputes, Asantewa said that the choice depends on the nature of the case at hand. If, for instance, the matter concerns a threat to her life or her children's life, then she may like to go to the formal court for protection. She is of the view that the formal court appears to be good 'but there are some lawyers there whom people say are good and others corrupt'. She thinks lawyers manipulate cases and take bribes. Asked how she learned this since she had never been to any courts, the answer was that 'it is a general talk in town and some daily papers also comment on this'. She likes chiefs' courts because they advise and settle cases fast. Yet sometimes, it appears, they do not deal with the case, as it ought to be and therefore seem unfair. She thinks chiefs are subject to corruption as well. Chiefs are custodians of stool lands. Some of them sell the same land to two or more people, leading to land disputes. Asked if she could give a concrete example of people and places where this happened, she maintained that it happened in Kumasi but refused to mention names. She does not think that this practice will stop. She thinks, however, that if chiefs can be fair in all their dealings it may bring credibility to their courts.

Another woman, Akua who lives in Kumasi, has never been to court in her life. She, however, says she would prefer to go to a traditional family court if she has a marital or a family problem. According to her, she cannot take such family problems to the formal court because it may

amount to exposing or disgracing the family. That is why she prefers to go to a family head in the event of a misunderstanding cropping up between her and any family member. Nevertheless, if she had a case outside the family, such as theft, then she might like to go to the formal court to resolve it. In a case like that, she might not like to go to a chief's court because they could pardon the culprit and not mete out commensurable punishment. A chief's court may fine the culprit in terms of drinks. They do this in order to restore relationships between disputants. She also thinks that sometimes, fines apportioned in chiefs' courts are so minimal that they may not serve as a deterrent of the offence committed. As a result, some may not fear the chiefs or elders' courts since they know that the only penalty they will pay will be drinks. On the other hand, people tend to fear the formal court because they know if found guilty, they may be imprisoned, pay some huge amount or undergo both penalties. She therefore thinks that an indigenous court should be the first place to go to for settlement of cases before proceeding to the formal court if one is not satisfied with the verdict.

According to the same informant, chiefs and elders who are part of the community know the disputing parties and their character well. Thus, they may be more capable of giving appropriate advice to disputing marital couples. They also at times give warning to the offending party. Therefore, an offending party may fear that the next time his or her case appears there, he or she may receive a bigger sanction and therefore may try to comport him or herself better.

#### 4.7 Gender Dynamics in Access to Arbitration Types

In order to understand the gender dynamics in access to both indigenous and formal courts in the socio-cultural groups qualitatively, I studied court-records of property-related cases in both Anloga and Kumasi in the Volta and Ashanti regions of Ghana. In Anloga, for instance, I studied the *Avadada*<sup>8</sup> indigenous court record dating from 2001-2006, as well as in the Anloga District Court. A similar study was done at Asante king's or the *Asantebene*'s indigenous court records from 1994-2000 and 2005; and in the Adum Circuit Court in Kumasi from 1998-2006.

One of the limitations of the present research is lack of statistical data preservation in both indigenous and formal courts. As illustrated above, it is very difficult to obtain data for the same range of study periods.

There appears to be better record keeping on disputes during the colonial periods and in the 1960s.

The study evaluated the general attendance in both formal and indigenous courts. The intention was to know the female to male ratio of cases sent to these courts. The aim was to find out what arbitration types women access in view of the unfavourable experiences of traditional institutions on property inheritance. Second, the exercise is to find out whether indigenous courts really play any significant role in the settlement of cases in fieldwork locations to ease legal congestion of cases in the formal courts.

### Avadada's indigenous court, Anloga

The record shows that in 2001, men did not register any cases while women recorded five cases. In 2002, while males brought five cases, females registered four cases in the court. In 2003, both males and females respectively registered 16 cases. Similarly in 2004, both males and females recorded 18 cases. The table below illustrates the number of cases registered at the Avadada's indigenous court at Anloga during the study period.

**Table 4.1**  
*Avadada's indigenous court*

Study period	No. of cases by males	No. of cases by females
2001	0	5
2002	5	4
2003	16	16
2004	18	18
2005	13	2
2006	6	5
Total cases	58	50

Out of the 108 cases resolved at the Avadada's indigenous court under the study period (2001-2006), females recorded 50 cases while males registered 58 cases. The records show that males in Anloga are a little ahead of females in the number of cases, but this is not statistically significant enough to say that they like the indigenous court more than females do.



### District Court, Anloga

In order to know the gender dynamics that operate in accessing the formal court in the same research area, records of cases, as indicated, were studied from the same period from 2001-2006 in the Anloga District Court.

Data collected from Anloga District Court indicated that the only period males dominated in the number of cases brought to the court was in 2004. In 2001 and 2005, females made more appearances with cases in the court. Surprisingly, 2003 and 2006 had a proportionate male to female ratio of cases reported in the court. Within the study period, females registered 44 cases, while males sent 32 cases out of a total of 76 cases tried in the court. Table 4.2 illustrates the number of cases sent by both genders to the District Court in Anloga.

**Table 4.2**  
*District Court, Anloga*

Study period	No. of cases by males	No. of cases by females
2001	4	8
2002	0	0
2003	7	7
2004	8	5
2005	9	20
2006	4	4
Total cases	32	44

Analysis of the findings from both the Avadada's indigenous court and the District Court shows that we cannot quantitatively tell much about the differences in court access by both sexes. This is because the differences in the records in both courts as illustrated in the graphs (Tables 4.1 and 4.2) seem too small to show a significant male-female gap. For example, in table 4.2, there are only two periods out of the six where women used the District Court more than men did. In other words, quantitatively, the difference in the record of cases is not large enough to show a clear preference by women to go to these courts. Any explanation of the difference may only appear qualitatively. As indicated in chapter 3, land, on which the people's livelihood largely depends in Anloga

and other Anlo towns and villages, is a scarce commodity. This situation makes people compete for the scarce land. Because of this, most disputes are land-centred and the size of the land does not seem to matter. Owing to the scarcity of land, many Anlo men and women indulge in fishing for their survival. Key informants, such as the *mamaga* (female chief of Anloga), Togbe Avevor (regent of Avadada), and also the oral historian of Anlo, Kofi Togobo explain that when there is enough rain and abundance of fish in the sea and the Keta Lagoon, there are fewer disputes because people obtain their livelihood from fishing. Thus, there seems a correlation between the rise and fall in disputes and bad or good weather (drought or rainy period) in Anloga. According to Kofi Togobo, during bad weather with its attendant bad economic situation, 'people protect what they already had or reap what they have not sown' and this leads to conflicts.

The next exercise is to determine the dynamics of court access in both indigenous and formal courts in Kumasi.

### Asantehene's indigenous court

As illustrated in table 4.3, some case records were studied in Asantehene's indigenous court at the Menhyia palace in Kumasi in the period beginning from 1994-2000 and 2005. According to the study, in 1994, females brought 181 cases while males recorded 526 cases at the court. In 1995, females recorded 78, while males reported 160 cases. In 1996, while males brought 60 cases, females registered 24. In 1997, females sent 53 cases while males reported 218 cases in the court. In 1998, females registered 69 cases while males recorded 230 cases.

Further, in 1999, females resolved 175 disputes in the court while their male counterparts registered 300 disputes. Females recorded only 16 cases in the year 2000 while males registered 52 cases. In 2005, males registered 55 cases and females, only 16 cases. Altogether the males registered 1546 cases within the study periods from 1994-2000 while their female counterparts settled 596 cases. The study indicated that males in Kumasi took more cases to the indigenous court. Table 4.3 shows the number of cases brought by both genders to the court during the study period.

**Table 4.3**  
*Asantehene's indigenous court*

Study period	No. cases by males	No. of cases by females
1994	526	181
1995	160	78
1996	60	24
1997	218	53
1998	230	69
1999	300	175
2000	52	16
2005	55	16
Total cases	1601	612

The question one may ask is why the low turnout of women to the court? The low turnout of women might be because of the possibility that husbands represented their wives in some of the cases in court. For example, in the matrilineal inheritance system of the Asante, where nephews and nieces inherit from their uncles, or where both female and male siblings can inherit from their female parent, a husband may decide to represent his wife in a dispute settlement that concerns inheritance. The issue of representation arises in consideration of the fact that traditionally in Ghana, men tend to yield more influence over their wives' decision-making.

Second, since the present research has shown that women have more inheritance rights than men in so far as self-acquired properties of female parents are concerned in the matrilineal inheritance system, men may try through legal means in the male dominated institution to factor in their inclusion if other avenues seem futile. A controversy between a sister and her eight male siblings, analysed in chapter 5 seems to epitomise this last consideration. Still, it is also possible that women were not attracted to the male chief's court where there is virtually no female representation on the panel of judges.

### Adum Circuit Court, Kumasi

Like the preceding exercise, a similar study took place at Adum Circuit Court in Kumasi from 1998-2006. In 1998, males dominated with 125 cases as opposed to 92 cases from females. For 1999, no data available. As indicated, this might be due to poor record keeping. However, in 2000, female patronage in the court increased as reflected in 51 cases

registered against 29 for the males. Subsequently, 2001, 2003, 2004 and 2006 were years that saw more cases reported by males while 2002 and 2005 had more females reporting cases, although the ratio was not massive. Out of the total 1002 cases registered, males reported 590 cases while females recorded 412 of the cases. Table 4.4 illustrates male and female's access to the court.

**Table 4.4**  
*Adum Circuit Court, Kumasi*

Study period	No. of cases by males	No. of cases by females
1998	125	92
1999	0	0
2000	29	51
2001	41	15
2002	28	43
2003	116	60
2004	110	45
2005	72	74
2006	69	32
Total cases	590	412

This research indicated earlier that some of the women interviewed in both Anloga and Kumasi felt the formal court was often too expensive. In Ghana, men are usually financially stronger than women are. This financial weakness on the part of women may contribute to their low turnout compared with men's access to the formal court. R nger (2006) also argued that a number of factors hamper women's ability to enforce their inheritance rights at court. Among them, high levels of illiteracy and ignorance of the law, high service cost, lack of enforcement of the law (8), interference by, and fear of the extended family and limitations in respect of access to justice.

## 4.8 Analysis

In his article entitled 'Access to Justice and Land Disputes in Ghana's State Courts: the Litigants' Perspective', Richard C. Crook (2004) confirmed the arguments presented in chapters 1 and 5 of this thesis; that

the formal courts in Ghana are congested with cases. He based his findings on case studies conducted on a magistrate court at Goaso, a district capital, and a cash crop (cocoa) growing area noted for migrant population; a High Court at Kumasi, a regional capital; and a High Court of Wa, another regional capital—all in the Brong Ahafo, Ashanti and Upper West regions of Ghana. Samples of his respondents were as follows: Goaso Magistrate Court (47), Kumasi High Court (186), Wa High Court (10).

Crook argued that Ghanaians access the formal court more than any other legal forum and that a person's economic status, power in society and educational background are irrelevant (Crook 2004: 10). He maintained that in Goaso and Wa, respondents are much more likely to use indigenous forums such as chiefs or elders' courts first, before accessing the formal courts because of the more rural character of the areas. This stance appears to nullify his earlier position that Ghanaians do not only use the formal arbitration type as a first resort forum, but also access it more than any other legal forum. He suggested that men are more likely to access the formal court than women are on behalf of family groups, rather than for themselves. He did not explain the reason for this legal behaviour.

Crook further indicated that the sample he used for the analysis on Wa was very small (ten respondents) because only a few cases were found there. This may not be an indication that the region is conflict free since the northern region of which the Upper West is a subset, is one of the hot spots of land conflicts in Ghana (see Schmid 2001: 21).

It is important to note that the entire northern region of Ghana, including Upper West, with a population of about 3.3 million has only five high courts (Commonwealth Human Rights Initiative, Africa Office 2008: 3). If we accept Crook's statement that Ghanaians access the formal court more than any other forum, it might mean that the few formal courts in this region have high case congestion. However, this is not the case. It is therefore highly probable that apart from the few people who access the formal courts in this region, a majority of people in their communities resolve most of their disputes traditionally. Thus, the argument that Ghanaians access the formal courts more than other legal forums is context-specific. Moreover, the data Crook collected from Wa, Kumasi and Goaso, appear not to be quantitatively representative enough to generate nationalised findings.

Crook also denies the difficulty a majority of Ghanaians might face in affording the lawyer and service fees at the formal court. As indicated, in sub-Saharan African countries, like Ghana, while about 30 per cent of the population live in towns and cities, 70 per cent live in rural areas (Sass and Ashford 2002: 5-7). As illustrated in the northern region case, there are few formal courts in rural areas in Ghana. Since a majority of rural people are poor, it is hard to think that they can afford the cost of travelling long distances, often on deplorable roads, to the regional or district capitals (unless the nature of the case warrants it) to use a formal court. Moreover, this travel to court may not only be once, since cases in the formal courts are often protracted.

The basis for Crook's analysis is places with relatively better economic conditions for litigants because government sector employment or cash crop agriculture helps people afford legal fees and social ties seem less strong. Goaso, for example has a large migrant population. This suggests that litigation in the 'large migrant communities' might be between migrants themselves or migrants versus natives. In this situation, it is hard if factors such as social ties or kinship considerations, family and community pressure might affect a litigant's choice of arbitration type. In other words, Crook's research findings appear to reflect the legal behaviour of migrant settlers who think, as strangers in their new places, the formal courts may favour them more than indigenous courts. This seems reflected in some of the interview responses:

Court is time wasting and high cost implication but I still prefer the court to arbitration since as a stranger farmer, chiefs will be partial (Crook 2004: 14).

In his analysis of legal behaviour in Ghana, it appears Crook also largely depended on annual legal reports, usually predicated on the lawyer's interests and selections. These reports might not reflect reality. In brief, Crook appears to ignore the anthropological findings since dispute resolution of the early 1980s that 'most civil cases don't go to trial' in the formal court, and that now 'we conceptualize law as more plural, not located entirely in the state. And we see the "effects" of law in far broader, post-Foucauldian terms' (Merry 1995:12).

In many native communities in Ghana, most expect that a dispute must first go to the local leader or chief before it becomes necessary to use an alternative forum such as the formal court. A community or 'family member who violates this rule receives severe sanctions, ranging from

stiff fines to a conditional period of ostracism' (Uwazie 2000: 19).<sup>9</sup> Thus, it may be possible to explain the differentials in the court attendance ratio between the formal and indigenous courts by the reality that, even where knowledge of law is possible, or where people are highly rights-conscious, have the resources and *like* or *prefer* to access the formal arbitration type in pursuance of their rights; there is reluctance for assertion of rights mainly because women 'often face significant social pressure from their families and communities not to seek legal recourse and instead to resolve the cases outside the judicial system' (Fenrich et al. 2001: 334). The literature on dispute resolution or conflict management suggests variables such as the nature of relationships, the nature of the dispute, the disputant's past experiences, and his or her socio-economic status, as explanations for selection of a particular arbitration type (see Gibbs 1963; Howell 1954; Merry 1982; Moore 1978).

Thus, this analysis can consider the possibility that in a context of legal pluralism, disputants' choice of an arbitration type may depend on the type of relationship between the parties (Uwazie 2000: 16). According to Black (1976: 3-4), parties resort to dispute methods that are isomorphic or relative to what their social environment provides or encourages them to use. Moreover, whether disputants will choose a penal, compensatory, therapeutic or conciliatory type of court, also 'depends on the rank relations between the disputants and their degree of intimacy or relationship' (see Uwazie 2000: 16). According to Merry,

Mediation is most likely to succeed between disputants whose various residential and kinship ties require them to deal with one another in the future. In other words, it is a phenomenon of communities. When social relationships are enduring, disputants need to find a settlement to continue to live together amicably (1989b: 82).

From the above, Merry appears to suggest that the future of the disputants' relationship is a more deciding factor than its past in the choice of a particular arbitration type. Participation in everyday life and field interviews in Anloga and Kumasi, have shown that people's past relationships and the thought of continuing or discontinuing that relationship, determines their selection of an arbitration type.

In this consideration, court procedures generally strive to end in reconciliation so that life can continue. In the family systems of Anlo and Asante, life is interdependent and kinship relationships are serious. Any time a relationship is broken, frantic efforts are made to look for means

of mending it. Thus, because of the need to keep the communal life in its right equilibrium, most disputants may first try every conceivable means to resolve intrafamily disputes to avoid 'washing the family linen in public'.

Traditionally, among the Anlo and the Asante, airing family disputes in public casts stains on the image of the family. If an attempt to resolve a dispute within the family fails, it may be taken to an elder or a chief's court. Most disputants prefer to solve their cases in these traditional settings where the procedure seems less adversarial. The use of family, elders or chiefs' courts for the resolution of intrafamily or any other dispute ensures that a dispute is not allowed to jeopardise the ongoing relationships or undermine the group's unity and solidarity (Uwazie 2000: 19; Quashigah 1989-1990). It is only when these possibilities of resolving misunderstandings in the indigenous forums prove unsuccessful that disputants may decide to access formal arbitration (Acquah 2007).

Further, near ubiquitous availability enhances the popularity of the indigenous court. This fact makes it plausible to maintain that the kind of arbitration type that disputants access may be determined by the possibilities of legal forums that their social environment provides or encourages them to use. This may explain the reason why attendance at the Asantehene's indigenous court has more recorded cases than the formal court. If one realises that the cases reported in the indigenous court are only cases tried in a male chief's court and do not count unrecorded cases tried in other traditional forums, this number becomes significant.

One thing that shows in the assessment is that disputants often sacrifice their social relationship when the matter involves physical threat to life, rape or theft and where available indigenous options are socially or legally unattractive. Thus, in dispute, when disputants become emotionally charged, 'their moves and reactions ... intensify and escalate' (Merry 1979: 908); and in that mood, they may resort to any measure whether legal or illegal for redress.

Some argue that selection of arbitration type may also be relative or isomorphic to disputants' social status or power. That is, disputants' sex, educational, and income levels (see Merry 1982; Nader 1969; Uwazie 2000). Merry (1982) corroborates this view when she indicates that mediation in small-scale societies is beneficial or fair only when the disputants are equal. The implication is that legal structures seem to affect the distribution of power (Uwazie 2000) and vice-versa. For example, it is



believed that the formal legal system is a litigious arena dominated by disputants with higher income and education (Cappelletti, 1978; Goldberg et al. 1985). This perspective suggests that those within the lower education and income brackets may use fora other than the formal court to resolve their disputes. This means those with higher incomes can access the formal court because they have the means to pay the legal expenses involved. Similarly, higher education may also help such disputants understand the formal court procedures, proceedings and technicalities. This presupposes that the formal or state law minimises the degree of inequality that may exist between disputants (Uwazie 2000: 26; Nader and Todd 1978).

In her critique of why victims of discriminatory institutions in Sekhukhune, South Africa support such traditional institutions, Barbara Oomen raises similar questions by correlating educational levels and income status of people with the degree of support they lend to traditional institutions. Oomen, among other things, concludes that 'at the individual level, the older people are more supportive than the youth, women slightly more so than men and those with less income or education more so than people with a higher socio-economic status' (Oomen 2005: 188-92). Similarly, Miranda Greenstreet suggests that as more and more women become educated, together with the rapid socio-economic changes taking place in Ghana, Ghanaian women may become emancipated from harmful traditional institutions and practices (1972: 355).

The observations of Oomen and Greenstreet and those of other scholars mentioned seem plausible since education and good economic attainment may not only open people's eyes to see life-promoting or life-negating realities around them, but also inform them of the better choice to make. It may as well empower such educated people to access the formal legal system in their fight against choices they do not like imposed on them. This stance does not explain why more men, who are relatively more educated and wealthier, access indigenous courts more than women in Anlo and Asante do.

According to the Ghana 2003 Core Welfare Indicators Questionnaire (CWIQII) Survey Report (2005: 34-7) on the highest level of education completed by both genders, in Keta administrative district within which Anloga is located, out of 495 men sampled, 11.5 per cent had completed senior secondary school, while out of 417 women, 8.5 per cent had completed senior secondary school. Furthermore, 4.7 per cent of men

and 1.5 per cent of women respectively had tertiary education. In the Kumasi metropolis, it was documented that out of 2,671 men, 18.2 per cent completed senior secondary school, while 12.8 per cent of women had the same education, out of 2,670 women sampled. Similarly, 4.9 per cent of men and 3.4 per cent of women had tertiary education in the Kumasi metropolis. The Ghana Living Standards Survey in 2000 (GLSS 4)<sup>10</sup> admitted significant differences between men and women in education. According to the survey, 44.1 per cent of women and 21.1 per cent of men in Ghana had no formal education. The survey states that since 'formal sector employment now requires secondary or higher levels of education, it follows that only 5.7 per cent of women compared to 15.8 per cent of men can work in the sector' (WiLDAF/FeDDAF – West Africa 2003/2004: 1). Moreover, according to the survey, since the majority of women do not have higher education or marketable skills, they are not able to secure jobs with high salaries in the formal sector.

Given the comparative low levels of education and income status it is likely women, according to the above correlation theory, may not only increase their support for the traditional institutions of dispute resolution in their communities in Anlo and Asante but may as well limit their access to the formal court that demands higher financial commitment. While the correlation in the level of education and income status correspond with their level of support for traditional institutions, it is difficult to explain with the same theory why men in Anlo and Asante, with relatively higher education and wealth than their women counterparts, continue to give more support to traditional institutions in their localities in Ghana.

Support for traditional institutions by wealthy, educated people in the context of Anlo and Asante, might stem from their respect for custom and tradition, which have been part of their socialisation since childhood. Moreover, the research identified that Anlo and the Asante individuals and families benefit from application of the traditional systems of inheritance, and this may explain their continuous support and use of the systems. In addition, among the Asante in particular, people receive financial help through family property to establish themselves. Because of this practice, people lend support to an indigenous institution that allows the family to inherit from its members. Thus, in the contexts of the Anlo and the Asante, in spite of some valuable roles education and income levels may play, they do not single-handedly dictate people's choice of

what arbitration type to access. Other factors, including the nature of the case at hand, the relationships between disputants, disputants' experiences and the arbitration type their environment provides or encourages them to use, determine disputants' choice of arbitration type. In short, I contend that a combination of factors affects a disputant's decision in his or her choice of a particular arbitration type to use.

#### 4.9 Conclusion

The discussion in this chapter centres on property as a social construction of resources; and this is seen as an integral aspect of both domestic-group organisation, such as the patrilineal or the matrilineal family systems within which husband and wife, including their children are located, and forces in the wider sphere of social life such as law and politics. The social image that women need little or no property affects women's position in society and their property inheritance. This social construct does not only influence indigenous law, but also the formal law (customary law) in conceiving a wife as part of the husband's economic unit. Thus, a wife's claim to her husband's property is very limited or non-existent. In addition, the social image appears to influence both colonial and post-colonial governments' socio-economic policies, which disadvantaged women. This economically stratifies society with men having more wealth than women do. The family systems of Asante and Anlo, even after the promulgation of Law 111, continue to give more inheritance rights and therefore property to men than women, while relegating the latter to the dependency level. This means the position of a majority of women in these societies has not changed much in terms of traditional property inheritance. Those who experienced some changes in their lives are the few women who defied family social pressure and other cultural practices to access rights frameworks to defend and claim their inheritance rights. Among this group are comparatively educated women, women fed up with the pressure from family, society and other cultural practices; women who challenge the *status quo* or the social arrangement that discriminate against them, in a court of law.

The determining power of the matrilineages, in particular, seems to be weakening. The findings in Kumasi show that instead of uterine sisters, brothers or mothers having inheritance rights, most women now prefer their own children, especially daughters, to inherit from them. Some Asante men also make arrangements for their children, especially sons to

inherit from them even though indigenous law does not permit this. This means in Kumasi, there is a gradual shift by many parents from unilateral inheritance to bilateral inheritance as happens in the patrilineal communities like Anloga where children of both genders inherit from both parents. Some parents are also making wills, and parting with their property through gift giving. This is a strategy adopted by some to avoid PNDC Law 111's prescription that a substantial portion of intestate property should be given to the surviving spouse and children.

Among the Anlo, the tendency now is to share the property of a male parent among his children instead of the number of mothers as it used to be in polygamous marriages. This procedure often does not benefit the female child since most of the time the male children share the property among themselves. In addition, the childless widow remains largely neglected. The practice often leads to disputes among children of different mothers and involves challenges to the widow's portion of the estate.

In both societies, the traditional systems of inheritance, even though not as strong as they used to be, are still popular. The popularity of traditional inheritance is reinforced by the fact that many people, especially rural dwellers, most of whom are women, are either ignorant of or have virtually refused to use PNDC Law 111 on intestate succession. In addition, poverty, high service fees, fear of spiritual reprisals from the family, family, community pressure and the strong moral sense not to air family issues in public pressure many women, including divorced women, female children and widows not to take their deceased husbands' family members to formal court when the latter infringe on their inheritance rights.

The present research corroborates the findings of scholars' that women's ignorance of the law, the inequalities in marital relationships, and low level of education of women are some of the factors that prohibit many women from accessing formal courts. Others such as legal complexity, cost and time, poverty and inequalities in social relationships, coupled with institutional and cultural biases, are added factors.

## Notes

<sup>1</sup> Gladys and her sister were two of my key informants during fieldwork in Anloga on 10 June 2006.

<sup>2</sup> Avadada is the next in command after the Anlo king in the judicial structure of Anlo.

<sup>3</sup> Jeanmarie Fenrich and Tracy E. Higgins in a special report, 'Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana', (2001) conducted a number of interviews. Among the interviewees were Justice, Joice Bamford Addo at Supreme Court in Accra and Justice, Isaac Lartey-Young at Circuit Court in Tarkwa (6 June 2001). The interviews showed that social pressure from kinship or family systems inhibits women from using legal rights in relation to their property rights.

<sup>4</sup> Demawu was a key informant who does not agree with some of the traditional practices in Anloga. She thinks that sometimes women themselves contribute to the maltreatment of their fellow women. For example, a wife can restrain her husband to remit his mother or compel him to eject his mother from his house.

<sup>5</sup> The *Weekend Crusade Guide*, the 7-15 March 2007 Issue, vol. 4, no. 9 tells the story of the rampant nature of invocation of deities to induce people to prove they are innocent of allegations.

<sup>6</sup> This is a traditional shrine, which hosts Adzima god, believed powerful by the Anlo. The shrine is located at Klikor in the Volta region of Ghana.

<sup>7</sup> Adzoga was one of my key informants during the fieldwork in Anloga.

<sup>8</sup> Avadada is next to the Anlo king in terms of political and judicial power.

<sup>9</sup> The traditional sanctions described by Uwazie (2000) are similar to what happens among the Anlo and the Asante in Ghana.

<sup>10</sup> Reference as recorded in WILDAF/FeDDAF-West Africa (2003/2004:1). Found at [http://www.wildaf-ao.org/eng/article.php3?id\\_article=43](http://www.wildaf-ao.org/eng/article.php3?id_article=43). Accessed 20 June 2007.

## 5

## Dispute Resolution

The previous chapter discussed the effects on women wrought not only by indigenous laws and actual practices, but also by threat of spiritual or mystical forces in relation to their property inheritance within the patrilineal and matrilineal family systems. It further showed how contrary to expectation, these experiences did not significantly influence their choice of arbitration types.

The present chapter, however, discusses actual dispute resolution in chiefs' courts in Ghana. Analysis of procedures and proceedings in chiefs' courts is crucial in view of allegations of gender bias in the institution, and that the court's norms or principles violate females' property inheritance rights. Therefore, they infringe on the equality clauses in international regimes such as the Protocols to the African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This leads to a question about the dynamics between norms/principles or laws of society and those of indigenous courts among the Anlo and the Asante, on the one hand, and the standard set by the international human rights in the case of females' property inheritance, on the other. Are the court norms different from or the same as the norms in society? Do they run counter to international human rights regimes because they are gender discriminatory? These questions are central to the research in view of recent debates in Ghana as to whether indigenous courts could help decongest the formal courts (see chapter 1).

The objective of the study in this chapter is to identify what sorts of principles or norms govern dispute resolution processes in chiefs' courts among the patrilineal Anlo and the matrilineal Asante. In order to attain the aim of the research, it is first necessary to give a brief account of the history of the Ghana legal system. Then, to expose the present judicial

structure of the Anlo and the Asante as a way of introducing the main actors who oversee dispute resolution processes in their indigenous courts. Finally, the study examines two cases. One of the cases came from the Asantehemaa's indigenous court in Kumasi while the other, from Avadada's indigenous court in Anloga.

It is important to study disputes in specific cases because it reveals not only the kinds of law, but also the culture of the particular people in dispute. Llewellyn and Hoebel in this regard, think 'the safest main road into the discovery of law' is through the study of disputes or 'trouble-cases'. This is because 'not only the making of new law and the effect of old, but the hold and thrust of all other vital aspects of the culture, shine clear in the crucible of conflict' (1941: 29). Analysis of the cases will help identify what court norms or principles are in operation during the dispute resolution, and whether the norms or principles are different from the societal norms or principles of inheritance among the Anlo and the Asante as discussed in chapter 3. The case study section contains pre-courts procedures, and two cases for examination, called case 1 and case 2, respectively. Under each case, there is a presentation of verdict, followed by reparatory and restorative procedures and then analysis of both cases. The material for investigation comes from both primary and secondary data. The primary data consist of interviews, recorded court cases and observation of a number of arbitrations (48) in both Avadada's and Asantehemaa's indigenous courts at Anloga and Kumasi in the Volta and Ashanti regions of Ghana. Last, the end of the discussion will reveal that indigenous court norms or principles are no different from societal ones that govern property inheritance among the Anlo or the Asante.

## 5.1 History of the Formal Court System in Ghana

The emergence of the formal court of Ghana has been documented by a number of scholars including Bennion (1962: 3-13, 17-25), Boahen (1975: 34-62), Harvey (1962) and Yeboa (1998).<sup>1</sup> According to Yeboa, the formal courts in Ghana started out of desire of the British colonial power to protect its gains and its merchants in the lucrative trade in the then Gold Coast. As in so many other colonies, the British saw the courts as the appropriate way of dealing with cases associated with trade and 'with the growing resentment of local people at the sharp deals of merchants' (Yeboa 1998: 311). With this trade motive, the British colo-

nial government decided to assume a broader and more lasting political control in the trading posts.

With the arrival of Sir Charles McCarthy as governor of the Gold Coast in 1822, the British set in motion their programme of establishing law courts in the colony. McCarthy began his programme by establishing petty debt courts, which were restricted only to the workers in the British forts. With time, the jurisdiction of the courts extended to cover the immediate vicinity of the forts. The British Settlement Act in the early 1840s empowered the Queen of England to create her own institutions, ordinances, laws and courts to determine matters and to make rules or regulations for the administration of justice in the Gold Coast. Consequently, a judicial assessor's court was established and Governor George Maclean became the judicial assessor whose task was to sit with and to act as adviser to the court of Amanhene (Yeboa 1998: 313). Technically speaking, this court was neither a British nor an indigenous court but its very existence depicted a useful liaison between the two court systems.

From the above, it is clear that the suppression of indigenous courts with the British courts started as a gradual but premeditated process. This is revealed in Governor Pine's confidential letter of 31 August 1857 to Labouchere advocating, 'If the country were directly subject to the Crown, and British magistrates were scattered over it, the sooner the native authority (were) destroyed, the better' (Yeboa 1998: 314). Accordingly, in 1853, the first British Supreme Court began in Cape Coast.

On 4 April 1856, the Crown issued an order-in-Council under the Settlements on Coast of Africa and Falklands Act 1843 that made it possible for the British to extend their rule to other areas where the Queen wanted to exercise jurisdiction without cooperation of any native chief or authority. In 1865, on recommendation from the Select Committee, the four British West African colonies consolidated under one supreme government in Sierra Leone. The British government, therefore, abolished the Gold Coast Supreme Court and replaced it with a chief magistrate's court, presided over by a chief magistrate as the highest judicial officer of the British courts (Acquah 2006). At the end of the Sagrenti War of 1875 with the removal of the Asante threat, the way was cleared for a more meaningful and fruitful involvement in the administration of the country. In 1876, therefore, the Supreme Court Ordinance passed. The Ordinance led to the establishment of a Supreme Court for the Gold Coast Colony (Bennion 1962; Yeboa 1998: 315-16). The Supreme Court com-



prised: a) a Court of Appeal or Full Court, which could be duly constituted by any two of the judges of the Supreme Court, one of whom must either be the Chief Justice or a person for the time being discharging the functions of the Chief Justice, b) the Divisional Court, which might be constituted by any one of the judges of the Supreme Court, authorised under section 6, for exercising the original jurisdiction, civil or criminal, of the Supreme Court. Now the colony stood divided into three judicial parts namely the Eastern, Central and Western Provinces and a divisional court opened in each provincial capital, according to the provisions in sections 23 and 24 of the ordinance.

Even though the Gold Coast administration joined with that of Sierra Leone in 1866, the courts of the judicial assessor and magistrates continued to operate until 1876. The Supreme Court Ordinance of 1876 removed this anomaly and transferred the powers of these courts to the new Supreme Court. With the power transfer, new magistrate courts opened and with most of their personnel district commissioners, who exercised judicial powers, became regarded as *ex officio* commissioners of the Supreme Court (Acquah 2006). This situation severed the links indigenous courts had with the British ones. By the beginning of 1877, there appeared a rigid dichotomy between the British and indigenous courts even though chiefs played an advisory role in the British courts whenever the former needed their advice on questions touching on indigenous law. The British court system needed a large measure of cooperation from the natives and their rulers. Moreover, in spite of the fact that the British justice system was becoming popular, there were all sorts of cases or disputes that natives might prefer local rulers and not the white man to handle disputes for them (Yeboa 1998: 316-19). Because of the above considerations, it was necessary for the colonial government to recognise indigenous courts. The proper administration of the country demanded they work out some sort of legal and administrative relationship.

The Native Jurisdiction Ordinance passed in 1878 with the purpose of facilitating and regulating judicial powers of chiefs within the protected territories. The ordinance relapsed between 1879 and 1882 due to opposition by the chiefs, but in 1883, it was re-passed. By 1910, under the ordinance, approximately 39 paramount chiefs formed into local legislative councils and judicial tribunals (Acquah 2006). Having legislative capacity, the chiefs' council enacted by-laws to promote peace, welfare

and law and order within their respective areas. There were also sanctions for breach of peace and order. In their tribunals, the chiefs heard and determined cases based on violations of the by-laws. Beyond the by-laws, the tribunals enjoyed an extensive civil jurisdiction including hearing and deciding all personal cases in which the debt, damage or demand did not exceed 25 pounds and others that were fixed under the rules governing the exercise of jurisdiction. Generally, many of these suits related to the ownership and possession of land according to customary law as well as 'suits and matters relating to the succession to the goods of any deceased person where the whole value of the good ... does not exceed ... fifty pounds' (Yeboa 1998: 319). Nevertheless, the native courts had no jurisdiction in suits relating to land succession of deceased natives. Additionally, personal suits and suits relating to succession of goods of deceased natives were not expressly limited to suits involving customary law.

Thus, the ordinances of 1873 and 1883 created few statutory customary courts while the vast majority of the non-statutory indigenous courts in the country could not function. The personnel in the statutory customary courts were mainly native chiefs and rulers. These few customary courts constituted a separate system and were subordinated to the British courts system and controlled by the Secretary for Native Affairs and the superior courts of the British system.

Owing to constitutional differences between the Colony and Asante, a different system existed there. However, after the political amalgamation of the various sectors of the country in 1935, the pattern of courts in the colony extended over the whole country including the northern territories.

It is important to emphasise here that interference of the judicial power of the chiefs by the British began as far back as 1844, and passage of the Native Administration Ordinance (No. 23) in 1927 considerably curtailed it. From this time onwards 'aboriginal judicial tribunals ceased to exist, and every tribunal that should exercise judicial functions as distinct from arbitral functions, had to be one which derived its jurisdiction from enactment' (Acquah 2006: 67).

Passage of the Local Courts Act (No. 23 of 1958) finally ended the judicial powers of the chief under colonial rule, and subsequently by section 66 of the Chieftaincy Act (No. 370 of 1971). The Local Courts Acts (No. 23 of 1958) stripped chiefs of their customary courts. In 1958, the

local courts later absorbed into the British and therefore, the national courts system as district courts grade II replaced the customary courts. Since then, chiefs have lost all statutory powers to adjudicate on civil and criminal matters except disputes that concern the chieftaincy institution in Ghana (Acquah 2006: 68-9).

Today, with the problem of congestion of cases and other challenges facing the formal courts system, there is debate whether to reinstate the judicial power of indigenous courts to solve some of the challenges. Basic to this discussion is the fact that with the increase in Ghana's population from 6,726,815 in 1960 to 18,912,079 in 2000, and with a growth rate of 2.7 per cent (Ghana Statistical Service 2006: 5-6), the existing number of formal courts in the country can scarcely cope with the ever-growing demands of litigation. Because of financial demands made by other sectors of the economy, it is very hard for the government of Ghana to build additional new courts. According to Commonwealth Human Rights Initiative, Africa Office (2008: 3), 'currently, there are insufficient judicial structures to administer justice throughout Ghana. This is especially critical in the rural areas'.

It states that the whole of the northern region of Ghana with a cumulative population of 3.3 million, for example, has only five high courts. Moreover, according to the report, District Courts suffer from chronic shortages of magistrates. For instance, there were 131 District Courts in Ghana in 2006, but with only 50 appointed magistrates. According to the Judicial Service Report 2005/2006, 50 per cent of magistrate courts in Ghana had vacancies (Commonwealth Human Rights Initiative, Africa Office 2008: 3). The report added that the legal aid system lacks both human capital and financial resources to enable it to meet its objective of securing adequate legal representation for vulnerable citizens of Ghana.

Furthermore, there is the financial challenge to maintain existing courts with provisions for human resource training and adequate facilities. The few formal courts and judges, in relation to the rise in volume of litigation, coupled with inadequate facilities in the courts, contribute to legal congestion of cases. Second, the formal court system also has certain cultural problems in terms of legal concepts and their technicalities, which leaves the many Ghanaians who are still either semi-literate or illiterate unable to understand legal proceedings. For example, legal concepts such as 'jurisprudence', 'plaintiff', 'the prosecution', to name a few, may be incomprehensible to such people. This could have serious con-

sequences on verdicts. In addition, the average Ghanaian may find it extremely difficult to afford the cost in the conventional system of litigation since the minimum wage paid to a civil servant in Ghana today is about two US dollars while the minimum consultation fee of a lawyer, according to field-research, is more than 200 US dollars. The unaffordability of legal fees in the formal courts may even be more serious with peasant or subsistent farmers, the urban poor and the unemployed who live below the poverty line and who form the bulk of Ghana's population (see discussion on women's perception of arbitration types in chapter 4).

The above challenges in the formal courts, as mentioned, led to a sense of 'law nostalgia'; that is, a call for a rediscovery and adaptation of indigenous dispute resolution systems (see Uwazie 1991, 2000; Comaroff and Roberts 1981). Thus, Atwood (1990), Bruce et al. (1994) and Platteau (1996) suggest a 'more effective enforceability' of indigenous law for the reduction of disputes, which would help the farmers and the urban poor (Crook 2004: 2). Similarly, the Attorney General and Minister of Justice, Mr Ayikoi Otoo, as mentioned earlier, confirmed the above suggestion and proposed the incorporation of indigenous dispute settlement procedures to alleviate workload in the formal courts in Ghana.<sup>2</sup>

Studies on indigenous African legal-anthropology on dispute resolution tend to focus attention on 'differentiating between custom and law' (Bohannan 1957; Gibbs 1963; Gluckman 1955; Uwazie 2000). The lack of written codes or statutes to govern dispute resolution institutions was a major defining characteristic of customs in indigenous societies (Uwazie 2000: 15; Bohannan 1957). Societies such as Anlo and Asante have time-honoured integrated traditions for maintaining peace and order and these distinguish them from modern states with law.

## 5.2 Traditional Judicial Structure

As implied in the discussion above, before the colonial experience in Ghana, there were various traditional states. Examples of these are the Anlo and the Asante. Each of these states contained satellite or confederate states. A traditional state 'had a well organised system of governance constituted by a chief and his council of elders' (Acquah 2006: 66). The organised system of governance was hierarchical. For example, a village chief had less judicial power than a senior or divisional chief whose power was also less than that of a paramount chief or king. In

every village or community, therefore, there was a judicial structure composed of a chief and his council of elders through which disputes were resolved for the maintenance of peace. According to Acquah (2006),

Generally, there were, in each traditional state or paramountcy, three rungs in the ladder of courts. They included (a) a village court, which had original jurisdiction in petty civil and criminal offences originating within the geographical limits of the village either between citizens or strangers; (b) courts of divisional chiefs whose political domain comprised a number of villages or towns. Hence, apart from original jurisdiction in cases of some significance, a divisional chief's court exercised appellate powers in cases decided in and appealed from village or town courts and (c) the paramount or king's courts (66).

Modified by the passage of time, these indigenous legal practices were embedded in the institution of chieftaincy and utilised alongside the Western ones by a significant number of Ghanaians. The Constitution of Ghana also recognises indigenous law and the courts of the chiefs and queen mothers or *mamagawo* as features of chieftaincy (see Chapter 22 of the abridged 1992 Constitution of the Republic of Ghana). In spite of the lack of the statutory power to adjudicate on civil and criminal cases, chiefs still have 'customary authority to arbitrate in disputes'. According to Justice Acquah, 'there are many instances where societal conflicts are referred, first and foremost, to the chief for arbitration' (2006: 70). He also indicated that most of the time, only when disputants are not satisfied with judgments in the chiefs' courts do they go to the formal court.

### Actors in judicial structure of Anlo and Asante

For analytical relevance, only the two main judicial actors in indigenous courts, which form the basis for the case studies, appear in this thesis. These judicial actors are *Asantehemaa* and *Avadada*.

#### Asantehemaa and Avadada

Asantehemaa (queen mother of Asante) is an important actor in the Asante judicial structure. The queen mother has her council of elders. She also belongs to the council of elders that advises the Asante king who is also paramount chief of Kumasi. Rattray (1929) thinks that the significance of the queen mother may depend on her personality and influence

and that this is politically important. Apart from her advisory role to the king, she also has her own court and with the help of her council of elders, presides over cases. Her court is comparable to that of the Asante king. The king's court is most of the time occupied with major matters such as those on chieftaincy, land and oath cases. Because of this, the queen mother's court handles domestic cases involving marriage, rivalry, sibling fights, and others dealing with invectives, assault, libel, slander, gossips, imprecation and violation of Asantehemaa's oath or *ntam*<sup>3</sup> (see Agyekum 1996, 2004). In this court, the Asantehemaa is supposed to be the main judge. She may also appoint someone to deputise for her. Other arbitrators are queen mothers and female elders from surrounding towns and villages within the Kumasi traditional council. Male chiefs and elders from areas that fall within the Asantehemaa's jurisdiction may also be present. The chief spokesperson at the Asantehemaa's indigenous court sessions is a man known as Nana Osei, but the queen mother holds the supreme authority over all that transpires in the court (Agyekum 2006).

Among the Anlo, apart from the king (Awoamefia), Avadada is the next most important actor in the indigenous judicial structure. Avadada literally means 'War Mother' depicting that among the three traditional military commanders of Anlo, he was the most senior. Avadada, although not a chief of any town, has a special role in chieftaincy. Because of his importance in traditional politics and governance, he lives in the traditional capital, the seat of the king, to facilitate easy communication with him. He has more access to the king than anyone does. For this reason, people see him more in matters that concern dispute than the king himself.

His court is the second highest in Anlo. In the absence of the king, Avadada acts in the capacity of a king and his court acts as the supreme court of the Anlo traditional society until the installation of a new king. For this reason, most of the judges in Avadada's court are also those in Awoamefia's court. According to key informants, Kumassah and Kofi Togobo, because of the important judicial role of Avadada's indigenous court, much care goes in to choosing judges.

There are three main military divisions within the Anlo traditional state, all of which find themselves incorporated into the political and judicial governance of the state organisation; accordingly, judges come from each of the three main divisions. In addition, judges come from

each Anlo clan with the intention that decisions taken in court are objective and reflect the voice of the people. Similarly, fines in Avadada's court are triple-fines unlike those in other indigenous courts, and imposed for the benefit of the three main political divisions. Disputes from the central division (Avadada's division) appear in Avadada's indigenous court. Disputes from the left and right divisions that are referral cases, are also resolved in this court.

The 1992 Constitution of Ghana allows any form of arbitration when both disputing parties agree to refer the issue at stake to traditional arbitration. Thus, the Constitution empowers the actors in the judicial structure that their rules bind. However, as implied, both disputing parties must agree that the trial be done by particular chiefs or actors if they so wish.

One could argue that by the nature of their installation, which involves taking of an oath to tell the truth in all situations, all chiefs are supposed to be impartial especially when they are dealing with court cases; otherwise, they may be removed from office. As such, panel members must be persons of good repute. This is necessary if their decisions are to be respected. Such a fair selection of a panel may forestall any challenge in dispute processing.

### 5.3 Case Studies

I observed 48 arbitration cases at Avadada's and Asantehenemaa's indigenous courts during 12 months of fieldwork in Anloga and in Kumasi. I also studied a number of cases previously tried and recorded in the court. Literature review on dispute resolution and conflict management supplemented both data sources. However, it seemed prudent to select two for analysis. The choice of the two came via strategic selection to meet the requirement of the achieved research domain dealing with property cases involving women. The aim is to see how a female's property inheritance rights fair in indigenous court since the general impression created was that traditional fora do not accommodate women's rights. The case studies also illustrate that indigenous courts do not only arbitrate but also judge cases.

According to Epstein (1967), dispute is a universal phenomenon appearing in any given society. However, wherever it occurs, there is a corresponding procedure to resolve it. He suggests that the sequence of events known as a case may be isolated for analytical purposes, but this

must be considered vis-à-vis its social matrix if one is to understand fully its place in the social process. Consequently, this thesis regards each case study as a sequence of events leading to resolution.

### Pre-court procedures

Among the Anlo, a plaintiff normally initiates proceedings by reporting a case to an elder or sub-chief against another individual. He therefore wants Avadada to summon the person so that he may explain the reason for his actions. The elder informs Avadada about it after he hears the case, considers it and determines if it warrants further actions. The latter also considers the case and instructs the elder or the sub-chief to schedule a date for settlement of the case. Upon this instruction, the elder or the sub-chief receives a fee from the plaintiff.

Among the Asante, a plaintiff reports his complaint to a sub-chief in his community and after the latter has seen the seriousness of the issue receives a plaintiff fee and summons on behalf of the queen mother.

The gravity of the case determines the sum of money paid. This may also be in the form of alcoholic beverages such as local or foreign gin. Normally, the chief and his council of elders share this money or drink. The chief takes half of the money or drink while the elders share the rest. Among the Anlo, the plaintiff also pays a fee known as *atsikplobo* (staff fee). The *Okyeame's* or *Tsiami's staff*,<sup>4</sup> is the symbol of the chief's authority. When used to convey a message, it shows the power and the urgency of the summons.

After this initial arrangement, a messenger conveys the summons to the other disputing party (defendant) at the expense of the plaintiff. Expenses normally include provision for the messenger's transportation, food and sometimes lodgings depending on the distance he may have to cover.

Among the Anlo, a disputing party who receives a summons conveyed with Tsiami's staff is supposed to touch it. This signifies he or she acknowledges the authority behind the message. Refusal to touch the staff is a sign of disrespect for the stool, which the chief occupies, and refusal to honour the summons. That is why normally, even if an Anlo man or woman does not want his case tried by a particular chief, he or she honours the summons but may later raise his or her objections.

In both socio-cultural groups, usually the one who makes the notification of arbitration specifies the date, time and venue. Often the party



that is sued responds to the summons. He comes to the chief and listens to the charges levelled against him. In the chief's house, a defendant has the following options:

- 1) Accept the arbitration on the specified date or ask that the date be postponed if he finds it inconvenient.
- 2) If a chief and a defendant agreed on a date, they announce it to the elders (judges) and the plaintiff.
- 3) The defendant can plead with the chief through his spokesperson to 'lower the case'. In this case, he admits the allegations the plaintiff made against him. When this happens, the chief and his elders arbitrate the case with leniency and the procedure does not follow the normal course since the defendant admitted his mistakes. It is important to remember that the defendant does not pay the expenses involved in reporting and summoning until the trial takes place and the verdict given. If the defendant loses the case, then he must pay all the expenses.

The defendant has the right to tell the chief to remove the case from court and allow the parties to resolve the dispute at home. In this situation, the defendant pays all expenses involved.

The defendant has the right to declare to the chief that he is not ready or will not accept arbitration in that particular court. When this happens, the chief informs the plaintiff to take the case to an alternative forum. In that case, the defendant does not pay any expenses incurred by the plaintiff in reporting and summoning the case.

If both disputing parties agree to the settlement of the case, the chief informs them in advance to come to the court with their respective relatives and friends. Both disputants are to come with their witnesses and with people whom they want to advise them on the case.

The following two cases serve as illustrations of a number of recorded cases and cases (48) personally observed during fieldwork, and supplemented by literature on dispute resolution and conflict management. One case came from Asantehemaa's indigenous court at Manhyia in Kumasi. It concerns a problem with accommodation. The other case is land-centred. It came from Avadada's indigenous court in Anloga. The objects of the disputes reflect property as valued, highly contested resources, in both research centres. Once again, this exercise aims to find principles or norms used during court procedures and proceedings. The

intention is to ascertain whether indigenous court norms or principles are the same or different from social norms or principles. Finally, the exercise tries to find out if the court proceedings will be gender neutral or discriminatory and therefore go against the international human rights instruments with regard to females' property inheritance.

### Case 1: Kofi v. Ama

The case was about accommodation, which led to imprecation. In this dispute, the defendant (Ama) ejected her brother from a house she built from proceeds she obtained from a store inherited from her deceased mother. This brother a number of times beat his sister, the reason for his ejection. To effect the ejection, the sister invoked a goddess to kill her brother if he returned to the house. Her oldest brother (Kofi) reported the case on behalf of his 7 brothers. The case was tried in the Asantehe-maa's indigenous court. The settlement was concluded the same day.

#### *Plaintiff's statement*

Before stating his case, Kofi (plaintiff) did not swear an oath. He went straight to make his case. He alleged his sister, Ama (defendant), insulted him and expelled his brother from the house. She purportedly also invoked a curse of *Antoa Nyama*, a river goddess extremely feared by the people in the area on all his family members.

The plaintiff explained that the defendant's mother had a store in the central market in Kumasi. When she died 21 years ago, the defendant, according to Asante custom and tradition, inherited the store with the approval of her siblings. The agreement was that she should use the proceeds of the store to care for the rest of her siblings. Consequently, through the defendant's effort and with the consent of her siblings, she purchased a piece of land and put a house on it. She accommodated her brothers, including the plaintiff in the house. The defendant and her husband also lived in the same house. Later, there was a misunderstanding between the brothers and the defendant. The defendant ejected one of the brothers who had been beating her. In order to make the ejection effective and definite, she put a curse on him that the river goddess should kill him if he should ever come back to the house. According to the plaintiff, the defendant also included the other family members in the curse and that she personally insulted him. After the plaintiff made his statement, the defendant cross-examined him as follows.

Q: Did you fight with me?

A: No!

Q: Did you remember that my brother fought with me?

A: Yes!

Q: Were you there when my brother beat me?

A: No!

Q: Who told you that I was beaten?

A: A witness told me.

After this, the defendant pleaded to the panel judging the case to continue the cross-examination on her behalf in the following way.

Q: Where did she insult you?

A: Near the kiosk of the *koko* seller.

Q: How did she insult you?

A: She insulted me that I am a fool and that I am a useless person.

Q: How did she curse the family members?

A: She had eight eggs and each time she broke one, she mentioned a name of a family member and then invoked *Antoa Nyama*. After that, she poured a libation with a bottle of Schnapps to the river goddess.

Q: Who are you?

A: I am a representative of *abusuapene* (head of the family).

Q: Why did the *abusuapene* himself not come to the court?

A: He is a teacher

Q: Did he delegate you?

A: Yes!

Q: Did he give you a letter to that effect?

A: No!

Q: Then how can we accept your representation?

A: The *abusuapene* himself is around; you can verify from him.

Q: Did you go to the spot where the curse was invoked to verify?

A: No! But if you go now you can still find some signs.

Q: When the incident was first reported to you, what action did you take?

A: I informed the *abusuapene* and the rest of the brothers.

Q: After informing them, did you go to find out from the defendant?

A: No!

A panel member to the plaintiff:

To fail to find out what had happened from the defendant after the information had been given you, is traditionally wrong. This is because it is only after finding out from her that you can ascertain the truth. You did not go to the spot either. So what you are reporting is based only on what you have been told. No empirical evidence. But we are not using this to judge the case now. We are only reminding you of our custom and tradition about things of this nature.

### *Defendant's statement*

After this, the defendant (Ama) made her case. Like the plaintiff, she did not swear. In her statement, she admitted much of what the plaintiff had said. Yet she maintained that she cursed the brother who had beaten her and not all the family members. Traditionally, a curse serves as a powerful sanction to ensure obedience from someone or to deter someone from doing something (see also Radcliffe-Brown 1952: xviii; Fred-Mensah 2000: 43). According to the defendant, therefore, she took action to deter her brother from coming back to the house to beat her again. She explained her action was only defensive. After the defendant's statement, the plaintiff cross-examined her as follows.

Q: Did you remember we testified against you in a formal court in a similar case? Is this not the reason why you cursed all the family members?

A: No! I cursed only the one who beat me.

After this brief interrogation, the plaintiff pleaded to the panel to do the cross-examination on his behalf. The panel members cross-examined the defendant in turn.

Q: Have you ever fought with the plaintiff?

A: No!

Q: Why did you curse him?

A: I never cursed him. I cursed the one who beat me.

Q: Why did you curse your brother?

A: I cursed him to defend myself. That is, to deter him from coming back to the house to beat me again.

### *Plaintiff's witness and testimony*

The plaintiff's witness stayed sequestered in a room away from the courtroom to prevent him from hearing the proceedings. The witness happened to be a brother to the plaintiff and the defendant. First, he was

asked about his religion. After saying that he was a Christian, he swore an oath saying: ‘I swear to tell the truth in the testimony I am about to give. If I do not, may the Almighty God kill me’.

According to his statement, 21 years ago, ‘our mother’ died and “our sister” (the defendant) was given the deceased’s store. Out of the proceeds of the store, she built a house. She distributed the rooms of the house to each of us’. Somewhere along the line, a misunderstanding developed between the defendant and the other siblings (including the witness). The defendant reported to the police that she did not want her brothers to live in the house any more. When the matter went to a government court, all eight brothers bore witness against their sister (the defendant) and she lost the case. Because of this, she bore a grudge against them and she invoked a curse on all the family members. After the testimony of the plaintiff’s witness, he was cross-examined, first by the defendant.

Q: After the formal court case, did you fight with me?

A: No!

Q: Do you remember that my brother Yremi has been beating me?

A: Yes!

Q: Do you remember he attempted to kill me with a cutlass?

A: No!

Q: I am saying Yremi beat me and not you. Is it true?

A: Yes!

Q: Can I curse you if you do not hurt me?

A: No!

The defendant pleaded with panel members to continue cross-examining on her behalf, which follows this way.

Q: Were you there when she cursed the family members?

A: No!

Q: Do you know the one she cursed?

A: No!

Q: Did she curse you?

A: No!

Q: Are you not a member of the family?

A: I am.

Q: Then why are you not part of the members she cursed?

The witness could not answer this question.

Q: The plaintiff said the defendant cursed all the family members and you the witness are saying she did not curse you. Which of the statements should be taken by our court?

A: My statement is correct.

Q: So, is the plaintiff's statement wrong?

A: Yes!

At this, the cross-examination ended. Upon demand from the panel, the defendant could not produce any witnesses.

### ***Presentation of verdict***

During the judgment, each elder (judge) on the panel representing each Asante clan (eight in number) in turn gave appraisal of all that was said by the disputing parties and the witness and passed judgment. The first panel member said, among other things that the plaintiff, Kofi acted selfishly. This is because he was not the head of the family (*abusuapene*) and no one asked him to represent the family but he took up the case. The family head did not delegate him to take the case to the queen mother's indigenous court. A second panel member was of the view that throughout the proceedings, the defendant never denied that she cursed her brother. She emphatically also maintained that she only cursed the one who beat her up. Therefore, since the plaintiff was not the one who did the beating, there was no need for him to bring the case to court. A third panel member also reiterated the view that the *abusuapene* should have accompanied the plaintiff to the court since as head of the family it was his responsibility to resolve a case like this. The fourth panel member seconded this but added that the defendant did not curse all the family members. She only cursed the one who beat her. The witness brought along by the plaintiff supported the defendant's stance. Therefore, the plaintiff's case could not hold water. Thus, all eight panel members came to a consensus in favour of the defendant.

At this point, a court official smeared white powder on the left shoulder of the defendant, which traditionally signifies victory.

The convicted party lost his money while the innocent one had all her expenses refunded except the powder-smearer's fee. The plaintiff also had to pay a compensation fee of 10 Ghana cedis to the defendant.

After this, the panel advised the loser to appreciate the effort of the defendant for using the proceeds of the store to put up a house, which accommodated all of them. They had to apologise to their sister (defen-

dant). The ejected brother was asked to come back to the house, but advised never to beat his sister again. The parties were told that if any further problems arose they would be dealt with severely. An elder was then asked to see to it that the defendant revoke the curse. The plaintiff and his brothers shook hands with their sister (defendant). At the end of the proceedings, the parties were admonished and told to swear by *Nana's kokonua* (the chief's sore foot)<sup>5</sup> that there would be no further problems between them.

The female chief, elders and others who sat in on the case received part of the money forfeited by the unsuccessful party. Both disputing parties thanked the court with two bottles of local gin.

## Case 2: Lili v. Lulu and Lolo

This second case was a land dispute between a woman named Lili (Plaintiff) and two men, Lulu and Lolo (Defendants). Both disputing parties were first cousins. This means they belonged to the same patrilineal family. The woman claimed title to a piece of land she inherited from her deceased mother, which the male family members wanted to snatch from her. This case is typical because among the Anlo, land issues relate to livelihood. Women in principle do not have the right to inherit land from their fathers. As a productive source, only men access, control and use it to support their immediate families including women as wives. The case was resolved at Avadada's indigenous court in Anloga. Like in the preceding case study, the present one appears in this research because it is property related and involves a female's inheritance right. As we shall see, this second case is not as straightforward as the first one. There was some complexity about it. It, therefore, involved adjournments, which allowed elders to inspect the contested land.

### *Plaintiff's statement*

Before stating his case, the plaintiff was first asked to swear, which she did as follows: 'I swear to the *Aklibuso stool*<sup>6</sup> to speak the truth in the matter at stake. I know that you the ancestors are here listening to us. If I tell lies in the case, take my life'. After this, she demanded the removal of a panel member she did not want hearing her case. This was compiled by the court.

According to her statement, she was a fishmonger from a village known as Konu. Her maternal and paternal grandparents came from this

village. She and the defendants descended from the same great grandfather, Helu and were first cousins. The great-grandfather's children came from the same mother. The common ancestor lived at Konu and owned land. Due to land litigation, the ancestor collected money from his two sons, N and M. This was why N and M have their names associated with the ancestral land even though among the Anlo, land is a family property; it is not individually owned, and therefore cannot be sold. It is kept in common for the use of all family members.

Later on, M married B and had the following children: Ze, Lina Kodzo, Pe, and Woli, who was the plaintiff's mother. According to the plaintiff, the family turned her grandfather's farming land into a cemetery. After the death of her grandmother, the plaintiff's mother asked for the replacement of the land turned into a cemetery since she had no place for farming. In response, Lulu (main defendant) on behalf of the family provided a portion of land to her. The plaintiff mentioned that one elder, Kofi, was present when the land transferred to her mother. Accordingly, the plaintiff's mother erected a pillar on each of the corners of the land. Later on, someone named Sao destroyed all the pillars claiming that the land belonged to him. The plaintiff's mother reported this to the family and the family head (main defendant) promised to give another portion of land to her.

The plaintiff maintained that she was present during a family meeting, when her mother handed over documents, indicating ownership of the disputed land, including some amount of money (proceeds from the land) to the main defendant (the family head). After a month, the plaintiff's mother inquired about the money and the documents but learned that they were deposited in a bank. The plaintiff's mother wanted to know who the signatories to the bank account were. This led to misunderstanding between her and the family head. The plaintiff's mother subsequently reported what the family head had done to the paramount chief of Keta. At arbitration, the family head was found guilty. After this trial, the plaintiff's mother received a new piece of land.

Some years later, the plaintiff needed 12 Ghana cedis. She asked her mother for help but she had no money to give her. In order to raise the money for her daughter, the plaintiff's mother pawned her portion of land to someone for a period of five years. Unfortunately, she died soon after. At the end of the five years, the defendants seized the land claiming that it was family property. As a result, the defendants refused to



render account on proceeds from the land the plaintiff inherited from her deceased mother.

To make sure the land was now in their hands, both defendants destroyed the evidence of ownership that the deceased had on the land. When the plaintiff went to fence the disputed land, both defendants ordered the police to arrest her, contesting among other things that the disputed land did not belong to the plaintiff since she was not a member of their family. The police advised the disputants to settle the case in a chief's court. In Avadada's indigenous court, the plaintiff sustained that:

I want this court to order Lulu and Lolo (defendants) to show me which town in the central Volta region they said I came from. If they fail to indicate the place, the court should collect 250 Ghana cedis from them for me. They should also tell me why I should not be free to enjoy my mother's property. If they fail, the court should collect the same amount from them for me.

After the plaintiff's statement, she was cross-examined by the main-defendant, Lulu:

Q. Were you present when I gave the land to your mother?

A. No.

Q. I put it to you that it was your mother who pointed out the place where Sao objected to.

A. That was so.

Q. The land is for K.B.

A. It can be true, for Helu comes from K.B. family.

Q. Do you know Konu has a war chief?

A. Yes.

Q. I put it to you that the land is a stool property of A.A.

A. It may be so.

Q. N and M's land is not for two people.

A. Yes.

Q. Do we not have building and farm plots on the land?

A. The land was originally a building plot now turned into farm.

Q. Is Ze not your senior uncle?

A. Yes.

Q. Why did Ze not give your mother a portion of land?

A. My mother was in Benin.

Q. Are there wells on the land?

A. Yes.

Q. Are the wells not identified?

A. They are mixed.

Q. Is your mother not from M?

A. Yes

Q. Is M's property no different from N's property?

A. The two did not share the property.

Q. Were the wells not on the farm before your mother died?

A. Yes.

Q. Was the land not shared at the time of our parents?

A. It was not shared.

Q. What authority do we have before your mother asked us for the land?

A. Because of the respect she had for you.

Q. Do you know that we are the family heads?

A. No.

Q. Do you know that your mother was alive before we destroyed the place?

A. They were destroyed after the death of my mother.

Q. Do you remember that when your mother erected the pillars, I questioned her?

A. That was so.

Q. Do you remember you said Ashie is So's relative?

A. She is her daughter.

It is important to note the first defendant's argument (as reflected in the plaintiff statement) that the plaintiff was not a family member. Thinking he might prove the plaintiff wrong before the court, the first defendant cross-examined her mainly on genealogy (family history). The cross-examination was continued by the second defendant as follows:

Q. Do you know that all the persons you mentioned had landed property?

A. Yes.

Q. Where are they?

A. I mentioned all I knew.

Q. Have you built on the farm?

A. Yes.

Q. Which of our parents built on the farm?

A. Ga.

Q. What is your name?

A. Lili.

Q. Are you aware that your mother said the property should return to us after her death?

A. That can't be true.

Q. Were we consulted by your mother before she pawned the farm?

A. I do not know.

This last question ended the cross examination by the defendants; and the witness for the plaintiff was then brought in to make his statement.

### *Evidence of plaintiff's witness*

He swore before testifying. He admitted that the plaintiff and the second defendant were her cousins and that the main defendant was his younger brother and their family head. According to him, N and M had a plot of land at Konu. In 1970, he received a piece of land through Ze and in appreciation for it, he gave a bottle of whisky and some amount of money to the family. It was in the same year that the plaintiff's mother, Woli was also given a building plot. She erected pillars at each corner of the plot, but Sao destroyed the pillars. His aunt Woli summoned the case before the paramount chief at Keta. The first defendant and other members of the family were present. In this trial, his aunt won the case.

Later on, three grandchildren of the plaintiff were seized by a deity for whom rites must be performed for their release.<sup>7</sup> Having no money to buy things needed for the rites, the plaintiff approached her mother for help. The mother informed the family, including the family head, about the issue. Since she too had no money to help her daughter, she pawned her piece of land to raise the money to buy the things for the rites at the shrine. But she (the plaintiff's mother) died soon after she pawned the land. After her death, Lulu (main defendant) said the land no longer belonged to the deceased.

When the testimony was completed, the plaintiff was asked if she had any questions to ask her witness. This procedure helps disputants to throw more light on issues that their witnesses have raised. She did this as detailed below.

Q. Did your aunt who was my mother invite some family members before she took the land?

A. Yes, she even brought in a surveyor.

Q. Was the land in the same shape before you were given your portion?

A. Yes.

Q. Is the land in question my mother's land?

A. Yes.

After this, the main defendant cross-examined the plaintiff's first witness as follows.

Q. Who gave the land before it now turned into farm?

A. I do not know.

Q. It was our parents who gave out the land before it now turned into farm, not so?

A. That may be so.

Q. Is the land not for N and M?

A. You are saying it.

Q. Did you see some wells with N/M's names on it on the farm?

A. I saw N/M's names on wells.

Q. Do you realise it is for two people?

A. I could not understand it.

Q. Did you see some wells behind your house?

A. Yes.

Q. Why did you not find out why two different names were on the wells?

A. I did not find out because there was no need for it.

Q. Why did you not ask Arom?

A. I can't ask him.

Q. Was I present before you were given the land?

A. You were not present.

Q. Did you inform me?

A. I did.

Q. Do you know I inspected the place?

A. I do not know.

This was followed by cross-examination of plaintiff's first witness by the second defendant.

Q. Who gave the land to aunt Woli?

A. You gave the go ahead with your blessing.

The panel then cross-examined the plaintiff's first witness.

Q. The dividing line you saw was not good hence your objections?

A. Yes.

Q. Tell us how you descend from N or M.

A. The witness made a presentation of the ancestral family tree or genealogy.

After this, the court was adjourned for the day. When the court session resumed, the defendants were asked to swear and state their case following the same procedure the plaintiff had done.

### ***Defendants' statement***

The main defendant, like the plaintiff, objected to the inclusion of an elder among the panel of judges. The elder was removed but he was allowed to make a record of the proceedings. Both defendants individually mentioned their names, indicated their religion, and swore to *Aklibuso stool* that they would not tell lies when stating their case.

In his statement, the main defendant admitted his relationship with the plaintiff, explaining that his aunt was her mother. He also admitted most of what the plaintiff had stated and that it was a misunderstanding over the disputed land that led his aunt to summon him to a chief's court at Keta. This aunt, according to him, was the 'last remaining of our parents'. He informed the plaintiff's mother that she could inherit from her father, but that she could neither sell nor pawn the farm. However, she refused to consider his advice. The defendant explained that since the property (land) was owned by two families, he did not agree that his aunt should pawn her portion of land. This was why, according to the main defendant, he destroyed the fence around the farm. His aunt (Plaintiff's mother) died soon after the destruction of the pillars. After her death, he convened a family meeting and invited the plaintiff but she refused to attend. It was in this meeting that the family asked Arom to render accounts on the farm.

The main defendant indicated that the land in question was a farmland and not a building plot as the plaintiff had alleged. According to him, during inspection of the disputed land, the second defendant reminded the plaintiff that the land was ancestral property, and that anyone who would not admit this, might have trouble. The plaintiff interpreted this as a spiritual threat to her life. The main defendant, like the plaintiff, also reiterated the names of his predecessors in the family, emphasising among other things that the land in question became the property of N and M when their father was in need of money for litigation. Thus, the land was shared between N and M, each occupying 100 plots of land.

After the statement, the plaintiff cross-examined the main defendant as follows.

Q. Do you know that the whole land was farmed?

A. No.

Q. Do you know Ze had a farm and a cocoanut plantation on the land?

A. No, it is not true.

Q. Do you know Ze stayed in Konu?

A. Yes.

Q. Which work did he do while in Konu?

A. Fishing.

Q. Do you know he also farmed?

A. I do not know.

Q. I put it to you that N and M did not share the land.

A. I do not know.

Q. Why did Ligo have a share of land?

A. I do not know.

Q. Why did your father also have his share?

A. I do not know.

Q. Your brother Seth also had a share of the land.

A. Yes.

Q. Building on a farm is good, hence Seth built there.

A. It is not true.

Q. Why?

A. Ze approved it.

Q. Do you know that mother Woli also had Ze's approval?

A. It is not true.

Q. How do you know?

A. Ze died.

Q. Did Ze not die before Seth built his house?

A. Yes.

Q. Who has ownership of the land – Seth or Woli?

A. Woli.

Q. Woli inherited from M, not so?

A. Not she alone.

Q. Who gave the land to Seth?

A. Rotor, Ze, Gala.

Q. Woli took you to the chief's court.

A. No.

Q. Were you not at the chief's court?

A. No.

Q. Did you hear what exhibit 'A' said?

A. I was not present when the records were made.

Q. Woli summoned you before the chief's court.

A. Mensah was summoned, not me.

Q. You said the land is for your aunt Woli.

A. Yes.

Q. Woli used the authority you gave her.

A. I gave authority over family accounts only.

Q. If the farm is yours, is the land not yours?

A. It is for the family.

Q. Who begot Koti?

A. Ashie.

Q. Who did Ashie begot?

A. Tovi, Miata, Lago, Galu, Kua, Worvi and Esinu.

Q. Who begot Woli?

A. Woshie.

Q. How many children did Woshie have?

A. Lidze, Dzo, Kple, Ze, Sawo and Woli.

Q. Whom did N marry?

A. Sodzi and Gbe.

Q. Who were the children of Gbe?

A. Wia.

Q. What are the properties of Shie's children at Konu?

A. I do not know.

Q. You are N's family head, not so?

A. Yes.

Q. As a family head, is it not your responsibility to know the properties of N's descendants as shared among them?

A. I would not know all.

Q. Why were you made a family head?

A. I will not know if I am not told.

Q. I put it to you that Shie's children had no properties at Konu hence Woli took the land and was supported by all members of the family except you.

A. I do not know.

The plaintiff also cross-examined the second defendant as follows.

Q. Is that all the properties you mentioned?

A. The land was shared but the building plot was not shared.

Q. Is the land not for farming?

A. Yes.

Q. If a family member had no share in the building plot, can't he/she have a share of the farmland?

A. No.

Q. Where will that family member stay?

A. I do not know.

Q. If somebody had a place to stay and you objected to it, are you not guilty?

A. I am not.

Q. Where do you allow the person to stay?

A. My grandfather did not allow building on the farms.

Q. Do you remember we settled this issue before elder Kofi?

A. Yes.

Q. Do you remember Kofi asked us to share the land into two?

A. He did not say so.

Q. What was the settlement?

A. We were asked to go and have equal share.

Q. What then is your problem with me?

A. We did not accept Kofi's awards.

Q. Why did you provide drinks?

A. We did not provide drinks.

After this, the defendants' witness was then called in to testify about what he knew about the case.

### *Evidence of defendants' witness*

The defendants' witness introduced himself and then swore. He mentioned that he knew the disputants. He was farming on part of the family land. He and the disputants met at Konukope where terms of farming on their land were discussed and agreed upon. Documents on the terms of farming were signed by Kofi, Ze and Mida while Senu signed as a witness. The mentioned family members were asked to make wells on the farm. Part of the land belonged to M while the other was for N.

Libation<sup>8</sup> was poured in the presence of the family head (main defendant). He made accounts to them every January.



In 1987, we made the accounts in Meka's house and Woli (Plaintiff's mother) was present. There came dispute between Woli and her nephews and nieces. The farm had 200 pieces of plot. The plaintiff's witness fenced around 20 pieces of the plot and destroyed the wells. I informed the family. Woli asked me to find somebody to rent 60 beds for 5 years from 1997-2002. I used to render accounts of 120 pieces of plot to her. She died in 2002. N and M's families invited me. The plaintiff was also invited but she did not come. N and M's families gave me 180 pieces of plot to cultivate. The plaintiff wanted the 60 pieces of plot, which her mother rented. But before her death Woli (Plaintiff's mother) had told me that the departed members of the family asked her to leave her portion of land to the family. The documents on the land were given to Woli, who did not return them before her death.

After the testimony of the witness, the defendants, like the plaintiff, were asked whether they were satisfied with what was said. They were given a chance to question or remind the witness of what he might have omitted during the testimony. The main defendant questioned his witness as follows.

Q. Did Woli erect pillars at the corners of the 60 beds?

A. Yes.

Q. Were the pillars destroyed?

A. Yes.

This brief questioning was followed by a cross-examination of defendants' witness by the plaintiff.

Q. Did you see corner pillars on the 60 beds?

A. Yes.

Q. Were there names on the pillars?

A. Yes.

Q. Which name?

A. Woli.

Q. Did it show ownership?

A. I do not know.

Q. Did my mother give the documents on the land to Akoenu?

A. Yes.

Q. Was I present when the farms were rented?

A. No.

Q. How come my name was in the document?

A. I do not know.

Q. I put it to you that I was present.

A. It was not true.

Q. Who shared the land for N and M?

A. Kofi, Ge, and Ze.

Q. Was the sharing made known to elder Kofi?

A. Yes.

Q. Why did we not see it that day?

A. I do not know.

After this, the panel also cross-examined defendants' witness.

Q. What complaint did you make and to whom when the six wells were destroyed and the 20 farm beds were removed?

A. I told Woli and the defendants.

Q. What was their reaction?

A. They said they would take action.

The session was adjourned for another day to allow inspection of the disputed land. But before the inspection, the court received a letter from the main defendant acting in the capacity of a family head indicating that the matter in the letter was *Res judicata*. The letter bore fingerprints of a sub-chief and some principal elders of the defendants' family. However, an elder of the family refused to add his thumbprint to the letter. When the panel of judges at Avadada's indigenous court contacted the signatories to the letter individually, it was discovered that Lulu (main defendant) as a family head, compelled the people to make their thumbprints on the letter without first letting them know its contents.

When the court session resumed, Avadada asked his elders (panel of judges) if they had any questions to ask both sides. The panel asked both disputants to summarise their respective statements and explain what actually they wanted the court to do for them. The panel did this to ascertain, first, the thoughts of both disputing parties. Second, it wanted to know whether there would be consistency in the facts the disputants had presented. After this, the Avadada then asked the disputants through his spokesperson whether they were ready to accept whatever judgment or award he was about to give on the case. When they agreed, Avadada and his elders withdrew for a private consultation among themselves. This is known among the Anlo as going to consult *Abriva* (Ewe) or *Abrewa* (Akan). In Ghanaian traditional metaphysics, *Abriwa/Abrewa* is a very old woman reputed for her wisdom and mystical powers, which enable her to arrive at impartial verdicts. Because of these qualities, she is con-

sulted for advice in legal decision-making. Thus metaphorically, when the jury stays in the courtroom or goes out to deliberate among themselves to arrive at a verdict, the jury is said to have withdrawn to 'see' the *Abriwa/Abrewa*. The procedure provides a 'mini forum' for an impartial assessment of the case at stake. People who are involved in the deliberation are ones who have been present throughout the court sessions and who have observed all the proceedings. In Western terms, the procedure is a version of trial by jury (Fred-Mensah 2000: 36-7).

### *Consultation of Abriwa/Abrewa and presentation of verdict*

The first thing Avadada and his council of elders consider in the private consultation is the sitting or judgment fee. This is paid either in cash or in 'drinks'. The fee is communicated to the disputing parties through Avadada's spokesperson. When both parties accept the fee, the spokesperson returns to the private deliberation.

In this private deliberation, the senior spokesperson of Avadada is first asked to summarise the statements made by both the plaintiff and defendants, and the testimonies of their witnesses. He is expected to analyse each statement and make his personal judgment on them. He passes his judgment on the case through an assistant spokesperson (who is also a member of the panel of judges) to the chief. Each member of the panel in turn makes his analysis and judgment. Avadada, who chairs the panel, is the last person to deliberate on the case. Before making his judgment, he considers the evaluations and judgments that have already been made by the other panel members and then takes the majority decision.

After arriving at consensus, the senior spokesperson of Avadada, who is deemed very eloquent, is asked to present the verdict when they return to court. Other members of the panel including Avadada tell him what points to stress and which one should not be stressed as he presents the verdict.

When the panel eventually comes back to the courtroom, the members greet the disputants, the witnesses, relatives and friends, and all who have come to listen to the case. The chief's spokesperson then demands the sitting fee from the disputants before he gives the verdict.

Like the presentation in the Asantehemaa's court, the main spokesperson of Avadada evaluates the statements of both the plaintiff and the defendants and the testimonies given by their witnesses, stressing the weaknesses and or strengths of each. When he has finished, each elder in

turn corroborates and supplements what the spokesperson omitted. Thus among the Anlo and the Asante, the presentation of verdict or *adamgbesese* is never done by one judge. This is why, after a judge has announced a verdict, other judges, one after the other, reiterate, emphasise or supplement points that have already been mentioned or omitted by a previous judge. It may be that the one who speaks first may make some mistakes. Others who speak after him will make corrections. Second, the practice is to demonstrate to the disputants that the verdict has not unilaterally come from one person; a strategy to prevent the guilty party from hurting or attacking a particular elder or judge because of a court decision.

Judgment on the land case confirmed the ruling by the chief of Keta that the disputed land belonged to the plaintiff's mother. Second, the panel considered the letter presented by the main defendant that the disputed land should not be released to the plaintiff as not only fraudulent, but also vexatious. The panel also disagreed with the testimony of the defendants' witness that ancestors had asked the plaintiff's mother to return the disputed land to the family. The panel declared that the plaintiff, 'in accordance with Anlo custom and practice is entitled to inherit her mother's property; and inheritance of her mother's land is hereby granted to her'. According to the court, the plaintiff's mother had stayed more than 12 years on the land without interruption and for this reason, the disputed land is owned and therefore the property of her daughter, Lili.

The defendants who lost the case were asked to pay all the expenses made in the course of the arbitration —beginning from the reporting of the case to the verdict (excluding the thanksgiving drinks presented by the plaintiff). The court also ordered that restitution should be made by the defendants for the destroyed corner pillars (valued at 50 Ghana cedis). Altogether, the defendants were to pay an amount of 250 Ghana cedis to the plaintiff. In addition, the court directed that the defendants, 'their heirs, privies, workmen, servants and all those who claim title through them are hereby restrained from entering the land.'

After the announcement of the verdict, both plaintiff and defendants and those who accompanied them to the court were respectively asked to withdraw to consult among themselves about the judgment. This is another procedural principle to see whether both disputing parties were satisfied with the verdict or not. In this particular case, the parties came

back in agreement with the verdict. The plaintiff, therefore, presented two bottles of Schnapps to the panel in appreciation for the arbitration. The Avadada's spokesperson then dabbed her with white powder, which signified her vindication.

After this, both plaintiff and defendants were made to shake hands and were advised to bury the hatchet and to live again as members of the same family. Since both disputing parties belonged to the same family, the court ordered that the family head should organise a reconciliation ceremony for their members in their original home at Konu.

Libation was poured thanking ancestors and gods for assisting in the resolution of the case. The unseen presence was also asked to help heal and strengthen the relationship between the disputing parties.

#### 5.4 Analysis of Case Studies

Family members and friends accompanied both disputing parties offering their support in the indigenous court. The sympathisers in the court could not take part in the decision-making with the panel of judges since they had already taken sides in the case.

Before the verdicts in both cases, the sitting fees were paid to avoid instances where a party might refuse to pay his part after judgment was given. The fee is a testament that the trial occurred in an indigenous court and that disputants willingly appeared there.

It is significant that both disputing parties successfully invoked their right to retain and remove persons they considered fit or unfit from the panel of judges who tried the cases. Aubert (1963) argues that a legal process may transform from dyadic relationships into triadic ones once other(s) intervene. This intervention means, 'to the extent that recourse to a particular mode of settlement may involve others, it may also involve the personal interests of those others, or the interests associated with their positions' (Moore 1969: 277). In other words, the intervention of others may have important effects not only on procedure, but also on outcome. It may also affect the breadth of significance of the dispute. Indigenous institutions give disputing parties the legal right to remove any member of the panel of judges for this reason, to minimise other interests intervening.

Although the main defendant in the second case study rejected an elder from the panel of judges, he was allowed to record the court proceedings. This seems unfair especially in cases where a losing party may

take the case to the formal court for reconsideration, and they in turn may demand records from the indigenous court.

Anthropologists stress the need to consider the litigants' activities and objectives. They also draw attention to the disputant's wider goals, which involved them in a particular quarrel; the manner he or she recruited support or chose the agency before which he brought the dispute for settlement; and the kind of tactics he employed before that agency (Roberts 1976: 676).

Both trials showed the above anthropological observations. During the arbitration, it became obvious how male siblings or kin conspired, condoned and politicised the cases with the intention of misappropriating their female kin's property rights.

In the first case study, for example, the eight male siblings mischievously misrepresented what their sister did in order to sway the verdict to their favour. The plaintiff, on behalf of the other brothers, accused the defendant of insulting him, stating that he was useless. This is a serious charge. According to Akan culture, a woman cannot tell a man that he is useless. To say this may amount to saying that the man is not a man. He is effeminate, worthless. Elders therefore consider these kinds of insults from a woman with all seriousness. To compound the case, the plaintiff alleged that the defendant cursed his entire family. Neither of the accusations influenced decisions at the end of the deliberation. The plaintiff's argument could not work because his witness, (one of his brothers) misspoke in his testimony. Second, the jury, who is usually familiar with such sibling conspiracies, did not only hear the facts of the case but also dug into the motive of the plaintiff for bringing the case to court. The motivation of the male litigants was to remove their sister from the house, which she built from proceeds from the store she had inherited from her deceased mother. The main reason was that they did not like the presence of their in-law (their sister's husband) in the house.

The Anlo case study involved a similar situation where the defendants and their witness connived, condoned and wittingly tried to usurp the land the plaintiff inherited from her deceased mother. Their effort to usurp the land was as premeditated as it was calculated. Their manoeuvre to collect documents (legal evidence, which spells ownership of land) from the plaintiff's mother before her death demonstrates this clearly.

Because it was a premeditated and calculated plot, just after the death of the plaintiff's mother, the men tried to damage the plaintiff's inheritance right to the land by insisting that she was not a family member.

Seeing that this malicious plan could not achieve the intended goal, both defendants and their witness quickly shifted their argument to invoking the authority of their dead ancestors; that the plaintiff's mother before her death directed the land she had occupied, controlled and used go back to the family since the ancestors requested her to do so. Among Ghanaians, tradition demands a person's dying words receive respect and be taken seriously. By appealing to the spirits, of which there would be no verification of fact, the defendants and their witness thought they could win over the panel who knew the disputed land was ancestral property; that is, it belonged to the first ancestor of the disputing family. Moreover, the men knew that the chief and his council of elders would not dispute their claim since the judicial authority vested in them came from departed ancestors. Nevertheless, this trick also failed.

Furthermore, the main defendant, also the family head fraudulently deceived principal elders of his family to thumbprint a letter he unilaterally wrote on behalf of the family urging the disputed land not go to the plaintiff. The vigilant and thorough investigative work of the court thwarted this mischievous plot.

Finally, the defendants moved their argument back to custom and tradition. Theoretically, there are two normative objectified conceptions underlying property inheritance among the Anlo. As indicated earlier, these are 'A man inherits from a man' while 'A woman inherits from a woman'. Because of these general normative concepts on property inheritance, the defendants could not understand why their cousin, a female (plaintiff), should inherit the land since her mother did not buy it; and according to Ewe indigenous law, which the Anlo share, one does not buy and sell family land. In addition, women can inherit family land but they can only have a life interest in it. As such, they cannot pass it on to their own children, unless the issue comes through a family marriage; in which case she also belongs to the same lineage of both parents. Traditionally a farm created on the family land belongs to the one who developed it, but the land still belongs to the family. In addition, a child may till a portion of the land of a parent but cannot say he or she owns the land. The plaintiff's argument therefore, that because her mother made a farm on the land and that by virtue of that fact the land belongs

to her, seems contrary to Anlo tradition and practice. This was the defendants' last legal argument.

It is important to note that the plaintiff's mother was the only surviving child of the father. The portion of disputed land was a gift she (plaintiff's mother) received from her father. Thus, the plaintiff's mother had not only a permanent interest in the land but she could also pass it on to her child, the plaintiff. Perhaps, the application of the relevant indigenous principle of inheritance helped determine the judgment. This does not mean that other considerations such as the behaviour or character, the motivations of disputants, among other things, held no weight. In other words, in any indigenous court, judges make choices of what norms, from a variety of social norms and practices will be suitable in rationalising a particular case. 'Even where the applicable norm is clear, alternative decisions are often possible on the grounds of adequacy or inadequacy of the evidence. There is also in the background the possibility of judicial innovation. All these complicate the process of decision, and make norms something less than automatic guides to decision' (Moore 2000: 184-5).

In both case studies, we see that the courts norms or principles used in judging the cases are no different from the norms or principles in the respective societies under investigation.

Research on dispute processing or resolution (cf. Abel 1974, 1982; Merry 1979; Nader and Todd 1978) suggests conflict-handling fora and 'procedures of disputing typologies such as mediation, negotiation, arbitration, litigation, self-help, avoidance, and "lumping it"' (see Felstiner 1974; Goldberg et al. 1985; Tomasic). The case studies demonstrate a combination of strategies such as arbitration, negotiation and mediation for handling cases. Thus, in the court sessions, the disputants not only mutually consented to their cases appearing in the courts, but there were also judicial contests in which each party argued to win the case. The judges made every attempt to bring about a peaceful settlement or compromise between the disputants through an objective intervention. The Anlo and Asante procedure on dispute resolution, like much other evidence, suggests that chiefs and their council of elders often use norms (explicit or implicit) to legitimatise their decisions in the same way as disputants use norms to give substance to their arguments.

The chiefs and their elders carry their authority from ancestors and have the responsibility to make their rulings in accordance with estab-



lished traditional norms. The nature of their judicial authority is derived from the nature of the political and religious source and the whole political and religious setting in which this judicial authority is based. Apparently, in the context of the Anlo and Asante there is a political as well as religious dimension to all judicial proceedings; and that their procedures of dispute resolution appear intimately linked with the political and religious systems in which they are embedded.

The chiefs and their council of elders, as implied earlier, take a comprehensive view of disputes in relation to the norms, beliefs and socio-cultural practices of their society. They see their responsibility to resolve disputes in terms of community welfare. This is why they view dispute resolution as a reconciliation of divergent interests, which preserves not only the physical but also the spiritual well-being of the whole society (see also Uwazie 1994, 2000).

Finally, the procedure of questioning and cross-questioning, as seen in the two indigenous court case studies, seems structured on that of the formal court. This influence seems even more pronounced with the Avadada's indigenous court in the way the court presented the final verdict on the case. For example, part of the basis for the court's verdict was the fact that the plaintiff's mother had occupied the disputed land for more than 12 years uninterrupted. Thus she, and by extension her daughter, the plaintiff, had the right to the land. This aspect of the court's ruling appears influenced by the Western acquisitive prescription on property as seen in the formal court, whereby an item belongs to a person or persons if they possess it uninterruptedly for a certain period as if they were the owner (see definition of inheritance and property in chapter 2). It seems that with the passage of time, this influence from the formal court either intentionally or surreptitiously crept into the indigenous dispute resolution systems of Anlo and Asante. This finding seems to contradict the hypothesis that Anloga, which is not cosmopolitan, may reflect more indigenous elements in its dispute resolution institutions than those of the cosmopolitan Kumasi.

### **Assets of indigenous courts**

One of the assets is that the indigenous justice system is far more easily accessible to disputants than the formal legal system. A disputant simply walks up to an elder, a family head or a chief and makes his or her complaint verbally. A case may be resolved almost immediately or a date may

be arranged for the hearing of the case either at the village square or in a chief's palace or residence (see also Uwazie 2000). Because trials are often rapidly resolved, there are few delays in indigenous court. Moreover, it does not maintain a professional caste of legal personnel. There is no need for police or special officials and no problem with language since the chiefs conduct court in the local language. In addition, there is no legal technicality involved. This makes court procedures more understandable and relevant. For this reason, litigants interact in a legal context that corresponds with their social situations and has much salience for them (Manuh 1988). Further, it has participatory and consensual dispute settlement procedures. For example, each member of a panel in each court is a representative of each of the clans of the Anlo or Asante. While there are fees, which may be substantial for some, they are nowhere near lawyers' fees (Manuh 1988). According to Uwazie (2000),

In contrast, the bureaucratic maze of filing petitions in the formal legal system may be so frustrating that it discourages potential clients. The rules and legal jargon of the English-based legal system are often too confusing. The distance of the courthouse from the disputants further inhibits the access. The cost of access to the formal legal system may be prohibitively high, for example, hiring an attorney or bribing the police or court registrar before one's complaint is filed (28).

It is also worth mentioning the role of religion in arbitration procedures in indigenous courts. According to tradition, the chiefs occupy ancestral stools. As a result, most people believe that when chiefs and their elders sit over a case, unseen spiritual or ancestral forces help them reach an objective verdict. Because of this belief, some do not question decisions from chiefs' courts. The role of religion also appears in the first case study where disputing parties swore the awesome oath to the queen mother. The traditional belief is that thought of spiritual sanctions can prevent feuding parties from revisiting a problem that has been resolved for them in a chief's court. In both Avadada and Asantehemaa's indigenous courts, the panel of judges did not only succeed in judging the cases but also made adequate provisions to avoid a repeat of the problem. This last fact is significant when comparing Asantehemaa's indigenous court, for example, against the settlement in the formal court where all the male siblings connived and condoned to testify against their sister; a case they won. Yet judging from what happened later on, it would appear that the

formal court's judgment only succeeded in heightening the tension between the disputing parties.

There is also a strong element of compromise with dispute resolution in small-scale societies such as Anlo and Asante. This element tends to be present in each of the given outcomes of the case studies. This gives the dispute settlement process a bargaining flavour and makes it characteristically different (Roberts 1976: 676). The Anlo and Asante believe that conflict situations involve ruptures in disputants' interpersonal and social relationships. Because of this, the socio-cultural groups see dispute settlement as opportune moments for the restoration of broken relationships. Thus, the sequence of events called arbitration or legal decision-making for mending of broken relationship plays a major role in their legal culture. As indicated, in both case studies, the losing parties did not only lose their deposits but had to pay compensation fees to the victorious parties. Moreover, in the first case study, the panel admonished the guilty party to appreciate the effort of the defendant who put up a house to accommodate them. Consequently, the guilty party had to apologise to the defendant. The ejected brother gained reinstatement but first had to agree never to maltreat his sister (defendant) again. After this, the plaintiff and his brothers shook hands with the defendant. The handshake is a sign of repentance and reconciliation between the disputing parties. Similarly, the family heads of the disputing parties in the second case study had to organise a reconciliation rite for the disputants. This rite would not only reconcile the disputing parties, it would reconcile the parties with their community.

The study also reflects ideas, values and the basic premises of the Anlo and the Asante traditional societies. For example, through the study one realises that among the Anlo, society gives more inheritance rights to males than to females. However, there are also occasions when women's inheritance rights receive full acknowledgement. Thus, the 'analysis treats each case as a stage in an on-going process of social relations between specific persons and groups in a social system and culture' (Gluckman 1967: XV). The strength of the traditional approach corresponds to what anthropologists maintain to study law in relation with other realities in the social universe. Moreover, the litigants' perspectives (Gluckman 1967) and other issues in the social context were considered during the dispute resolution processes among the Anlo and the Asante.

## Indigenous institutional practices and international human rights protocol

In spite of their assets, indigenous institutions on dispute resolution also demonstrate some weaknesses. The question one may ask is, what is the relationship between the indigenous institutional practices and state legal institutions, and the standards set by the international human rights regimes on females' property inheritance?

The relationship shows that the former do not always observe woman's rights. For example, indigenous law, especially in its ideological aspects on property inheritance, does not favour females' property inheritance rights when it comes to inheriting a man's property. In this regard, indigenous law does not only infringe on the constitutional rights of the widow in relation to property inheritance, it also falls short of the provisions in article 21(1) of the Protocol to the African Charter on Human and Peoples' Rights on females' rights. This is because the Protocol maintains that the widow has the right to an equitable share of her husband's property, and, must not undergo deprivation of living in her matrimonial home. One may argue that, insofar as indigenous law gives more inheritance rights to men when it comes to inheriting a deceased man's property, it contravenes the equality clauses in the international human rights instruments such as the Protocols to the African Charter and the CEDAW reflected in the Constitution of Ghana.

The socio-cultural practice of giving more property inheritance rights to men to the extent that women are reduced to dependency level is against articles 17(1), (2) and (3) of the 1992 Constitution of Ghana, which eschews all forms of discrimination against any person on the grounds of gender and stresses the equality of all persons before the law. The equality clauses, as indicated, form the fundamental pillar of the international human rights instruments such as the Protocols to the African Charter and the CEDAW.

The same violation is visible in the principle of primogeniture in indigenous law; that is, the legal right of the eldest son to inherit his father's property or take a bigger share of it. The practice may cause a problem in that, if the property is not sufficient, it may neglect younger children and especially females. This form of discrimination based on age, does not only go against the Constitution of Ghana but also the spirit of the international human rights regimes that stresses the equality of all human beings.

In addition, unlike article 22, section 3(b) of the 1992 Ghana Constitution, which permits equitable distribution of property jointly acquired during marriage upon dissolution of marriage, indigenous law does not make any such provision. In this regard, indigenous law may lack the international standards provided in articles 7 and 8 of the Protocol to the African Charter that enjoins all state parties to take legislative measures to ensure both men and women enjoy the same rights in the event of divorce or separation and also that both sexes receive the same legal protection. The law also contravenes the CEDAW, which eschews all forms of discrimination either direct or indirect, against women's social, economic or political wellbeing. In present day Ghana where many women have gainful employment, it may be legitimate to expect that a wife may contribute directly or indirectly to the acquisition of property. In such cases, or even one where both spouses jointly acquire the property, indigenous law does not provide a way of dealing with such property to reward a divorced woman adequately for the contribution she might have made.

Further, on indigenous courts, Manuh (1988) argues that:

Given its position in the hierarchy of stools in Asante, more attention is paid to rank and class in proceedings before the Ohemaa's court,<sup>9</sup> and that it cannot be said that all litigants feel they receive impartial justice. This feeling is exacerbated by the payment of sums of money for various purposes, which raise questions of integrity, and it is not unusual for dissatisfied parties to murmur charges of improper conduct, to wit, receiving a bribe (62).

This means that not all cases receive fair treatment. This especially happens when the case is gender related or when the case falls outside the application of relevant indigenous law or principle. For example, Asantehemaa's indigenous court arbitrated an assault case that involved a woman and a man. The woman sued the man for insulting and assaulting her. According to the woman, she had quarrelled with the man in the morning. Without any provocation from her, the man broke into her room the same evening, assaulted and insulted her. She therefore brought the man before Asantehemaa's indigenous court for an explanation of his actions.

In their judgment, panel members explained that what happened in the evening was an extension of what had taken place between the disputants in the morning. Therefore, the panel members did not see the rea-

son why the woman should bring the case to the queen mother and her elders for arbitration. If she knew she would be summoning the disputing party before the elders and the queen mother, the woman should not have replied to the defendant's insults in the morning. According to the judges, assaults could take different forms. It could be verbal or physical. That is why the woman should not have reacted in the first place. For insulting the man, according to the judges, the woman took the law into her own hands. She was therefore, convicted. When interviewed, the woman indicated that she was not satisfied with the verdict. She also showed wounds the defendant had inflicted on her right arm during the conflict.

As a social group, women have limited participation as decision-makers in the two types of indigenous courts. As noted, there was no female chief or elder included in the panel of judges in Avadada's indigenous court even though women were among the litigants. Similarly, in the first case study from Asantehemaa's indigenous court, even though the forum was a female chief's court and there were other female chiefs and elders in attendance, only men determined the outcome of the arbitration. Observation showed the same experience in the female chief's or *mamaga's* indigenous court at Anloga. The lack of women representation in the panel of decision-makers in courts may be an indication of difference in the power relationships between both genders. The power relationship lies in the difference between men and women in the possession of traditional knowledge required to participate actively and effectively in defining indigenous norms and using indigenous fora to their advantage. The second power relationship has to do with the socio-economic and gender-role differences between both sexes. These last factors tend to have overlapping effects on court decisions (Nyamu-Musembi 2002). These, as seen, constrain open and objective deliberation on facts, which led to the outcome that disadvantaged the woman convicted in the assault case at Asantehemaa's indigenous court. These challenges in indigenous institutions are features that may diminish the possibility of realising gender equality through indigenous norms and processes.

On the other hand, even though the panels in both traditional courts refer neither to domestic formal law nor to the international conventions in their trials, their procedures in the two case studies reflect some degree of objectivity and therefore observation of equality before the law. For example, from the onset disputants had the chance to retain or re-

move any panel member they considered unfit to sit on the case. In addition, there was enough time for the disputing parties and their witnesses to pour out their grievances as they stated their cases, and to cross-examine. After making their own cross-examinations, disputants employed the service of panel members to continue the cross-examination on their behalf. When plaintiffs or defendants made an unclear statement, the jury asked them for clarification. In addition, the losing parties were asked to deliberate on the verdicts given and to indicate their acceptance or rejection of them. Thus, ignorance of both international and domestic laws on property inheritance did not prevent the courts from arriving at what appears to be fair verdicts in both case studies, which vindicated the female disputants. Apart from the use of relevant indigenous law on property inheritance, the court decisions also seemed partially influenced by the women's arguments and the fraudulent behaviour of the men, which both panels abhorred.

Nyamu (2000a) says that in response to the cultural legitimisation of gender hierarchy in developing countries, women's human rights actors call for an end to cultural practices that contravene international human rights principles. She indicates that such an abolitionist stance prevents people from appreciating the context embedded in such cultural practices. She disagrees with the perspective that women's human rights are only realisable in national legislation or in international human rights regimes (393ff) and not in local practice or custom (Merry 2006). For Nyamu, this narrow view of local practice or custom may lead to certain difficulties. It assumes a radical disjuncture between the sphere of formal law and institutions and the sphere of custom, thereby obscuring the active role that the state apparatus plays in shaping cultural norms at the local level. In addition, she thinks the assumption people have that local practices offer no basis for women's human rights pre-empts an open-minded assessment of local practice that could lead to the recognition and utilisation of whatever positive openings general principles of fairness and justice present in a community's value system. Consequently, potential opportunities for collaboration with community members committed to social change that would promote human rights principles generally, and gender equality in particular, are forfeited (Nyamu 2000a). The significant dimension of the argument on women's human rights is the role of local leaders, chiefs or opinion leaders in various communities in understanding what indigenous law or socio-cultural practices militate

against women's social or economic wellbeing, and not a confrontational attitude. Changes in rights-negating laws are possible only when chiefs or local leaders act as agents of change in their communities and become involved in dialogue with states or international human rights advocates on women's rights.

Nyamu (2000a) further argues that it is possible to achieve gender equality through local norms and processes because local custom is dynamic. It is constantly changing and adapting to new situations. She indicates that the dynamic character of indigenous institutions makes it possible to respond to the justice of a specific situation rather than a mechanical or rigid application of custom to all situations. Moreover, people are agents of cultural transformation. She sustains that although cultural norms may define the broad parameters within which people act, they do not dictate behaviour in a deterministic way. Local norms and processes, according to her, may grant recognition to claims that the formal legal system does not entertain, or moral claims not acknowledged as rights in the formal legal system.

For Sally Falk Moore, there is a gap between social reality and ideological systems. The ideological systems include laws, procedures, customs, rituals and symbols. They are characteristic of social life. She sees customs, laws, rituals, symbols and rigid procedures as a cultural framework that tries to articulate social life, mainly because social life 'is difficult to fix' since 'cultural and social change is continuous' (1978b: 37, 39; Nyamu-Musembi 2002a: 133).

The validity of Moore's statements, according to Nyamu-Musembi, is that while local practices vary, people's daily activities or interactions reveal more of living cultural norms (Nyamu-Musembi 2002a: 132), than ideologies. This implies that in spite of the challenges presented by cultural ideologies, in every culture, there may be values that coincide with international normative values.

The above arguments are valid. It is true that local norms and processes are constantly changing. Nevertheless, the problem is that a change may not always be a positive one. The present findings among the Anlo show that some of their principles or norms on property inheritance have changed for the worse. This analysis demonstrates that a principle or norm on property inheritance and its interpretation might adapt to the economic circumstance at the time. The interpretation of principles of inheritance tends to be lenient when the economic situation is favour-



able, while it becomes harsh when the economy is less favourable. In the past, the inheritance procedure when a husband died was to share his estate according to the number of wives so that the latter could use it to look after their children. This method did not only help the widows, but also their children, benefit from the estate. Presently, however, a deceased husband's property divides according to the number of children instead of the number of wives. This procedure, as indicated, often does not benefit the female child since most of the time; the male children share the property among themselves. In addition, this neglects the childless widow. The practice often leads to disputes among children of different mothers and involve challenges to the widow's portion of the estate. Thus, chiefs and their elders, and other opinion leaders need to be involved as agents of cultural transformation in their communities if traditional laws and socio-cultural practices on females' inheritance are to change for the better. This is important because change does not happen by itself. It is brought about by people, and in the specific context of this analysis, by chiefs and their elders, and significant others in local communities.

### **Organising factors in indigenous dispute resolutions**

The aim of the discussion in this chapter is to identify principles or norms that operate in Anlo and Asante's dispute resolution processes, and to decide what organising role the principles play in determining the outcome of arbitrations in relation to females' inheritance and property rights. Given the evidence accrued from observations of a considerable number of trials in indigenous courts in Anloga and Kumasi during fieldwork, including the assessment of the two case studies, it appears that a combination of principles governs the dispute resolution processes in both traditional societies.

Custom and tradition sat at the base of the judgments in both indigenous court cases. For example, fieldwork among the Anlo shows that when a woman dies, even though both male and female children qualify to inherit her property, female children have more rights than the male children do. Alternatively, when a male parent dies, the male children have more inheritance rights than the female children do. However, the female child can also inherit her male parent's property with life interest if she is the only child of the deceased man. A male parent can also decide to pass his property on to his daughter through gift giving. The rec-

ognition of the principles made the Avadada's indigenous court conclude that 'the plaintiff should be allowed to inherit her mother's property'.

Similarly, in accordance with Asante indigenous law, when a female parent dies, even though all her children qualify to inherit her property, the female child has more rights than the male sibling. The male children in the case study acknowledged the legal prescription when they agreed that their sister, although the youngest, used the proceeds from the store she inherited from their deceased mother to build a house, which now has become the source of controversy. Thus, the court acknowledged this indigenous principle even though it did not categorically state it.

Both indigenous courts used restorative and reparative principles in their procedures. This principle is the essential goal of indigenous dispute resolution. Thus, the judge's primary motive in deciding on a case is to reconcile disputants so that they can continue to live or work together and not call for 'the pound of flesh' (Quashigah 1989-90: 2). As a result, procedure in the judicial system is personal, flexible, more considerate and informal. Accordingly, there are restitutionary measures such as 'victim participation, and victim/offender mediation to attempt to achieve a more community-inclusive resolution to the problems arising from criminal acts' (Damren 2002: 83).

Daniel van Ness and Karen Heetderks Strong (1997: 7), two leading proponents of restorative justice elaborated key contrasting elements in both the formal and indigenous systems of justice. They identify that the formal system views crime as a violation of the law, and so parties involved in a case are offenders versus government. The punishment is for deterrence and /or incapacitation of violators of the law. The indigenous legal system, on the other hand views crime as injury to victims and their families in the context of community. The parties involved in a case are victims, offenders, community and government. Punishment is in the form of repair of damage and re-establishment of right relationships, and is situation-specific. Thus, the need to restore balance to the dynamic of inter-kin group symmetry is at the foundation of the indigenous sense of justice.

From the above discussions, it is clear that the fundamental difference in the sense of justice between indigenous and state judicial systems lies in the primary constituent members of each society. In indigenous culture, the primary constituent members of society are kin groups, while those of the state-based society are individuals (Damren 2002: 97). It fol-

lows, therefore, that a wrong committed by an individual achieves societal recognition and response only to the extent it disrupts the 'dynamic process of tensions and oppositions' existing between and among kin groups at the time of the so-called wrong.

From a state-based perspective, wrongs of this magnitude may be few, but in native culture, because of the close and constant knit of kin group relationships in the indigenous world, they are not. Notwithstanding this difference, the principal contention here is that, whether the matter under consideration is minor or grievous, the indigenous sense of justice proceeds from a different focal point than that of the state-administered justice (Damren 2002: 97). However, this does not mean that there are no tensions in relationships between and among individuals within kin groups of indigenous culture. Neither does it mean indigenous culture does not have its own 'subset of societal tensions and oppositions' (Damren 2002: 97; Moore 1978: 111-26). Rather, the crux of the matter is that the fundamental difference 'between the focal points of state society and indigenous culture is occasioned by the primacy of kin group relationships' in indigenous culture, and 'the primacy of the rule of law in state-based society' (Damren 2002: 91).

The overriding objective of restoration of broken relationships explains why after the trial, the judges in both indigenous courts made sure that the disputants regained their pre-existing relationships. In order to achieve this aim, the disputants had to swear and to perform a rite of reconciliation. Thus, religion becomes an added prominent feature in dispute resolution, not only at the beginning, but also at the end of the court sessions.

In order to arrive at an objective verdict, both courts used a method of collective decision-making. For the indigenous Ghanaian, dispute resolution is a process of settling disagreement between parties, which involves collective deliberation. The collective approach to dispute resolution derives the principle that the individual's knowledge about most things is limited (Dzobo 1992). Like people of oral cultures, the Anlo and the Asante have stored these principles in proverbs or metaphors such as: 'One head does not make counsel' (*Tikro nto agyina* (Akan), *Ta deka medea adenu o* (Ewe)) or that 'Knowledge is like a baobab tree'. The purpose of the imagery is to teach a practical lesson that as one person's arms cannot encircle the huge baobab tree, so no one can claim monopoly over knowledge. This is why in any legal decision for these people,

there is always room for the opinions of others in court. The Anlo and Asante consider the judgment rendered by the jury through consultation as sounder and carrying more weight than if coming from one person. This explains why, for the Anlo as the Asante in Ghana, the proper process of decision-making on disputes is to take counsel with others.

## 5.5 Conclusion

The main discussion in this chapter concerns procedures and proceedings at both Avadada's and Asantehemaa's indigenous courts of the Anlo and the Asante of Ghana. Assessment of the legal culture amongst the two indigenous societies shows that law is part of the people's social universe. One does not see significant difference in the procedures in both courts. In the male chief's (Avadada's) court in Anloga and even in the female chief's (Asantehemaa's) court in Kumasi, male judges alone made the decisions. Lack of knowledge in interpreting indigenous law, which is the point of reference in court, might be a reason for lack of female representation in legal decision-making. Second, the socio-economic difference between men and women and gender considerations overlap and seem to affect women's confidence in asserting themselves as equal to men in the arena of legal decision-making. Thus, the negative social construction of women as socio-economic dependants seems to extend into the arena of law where women stay in the background and men make legal decision for them.

A distinctive feature is that while in the Avadada's indigenous court, disputants including their witnesses have to swear before they make their statements, in the Asantehemaa's indigenous court only the witness swears before testimony. Furthermore, the panel of judges in the Asantehemaa's court in this particular case study had not withdrawn during the collective deliberation due to the straightforward nature of the case.

In both indigenous courts, features such as custom and tradition, religion and mending broken relationships play major roles in the dispute resolution. They employ a method of collective decision-making in order to arrive at an objective verdict. The concept behind dispute resolution is as a process of reconciling divergent interests so that life can continue. The chiefs and their council of elders hold a holistic perception of each case in relation to the litigants' motives and other issues in the social context in the dispute resolution processes.

## Notes

<sup>1</sup> This is an extract from K.Y. Yeboa, 'The History of the Ghana Legal Systems: The Evolution of a Unified National System of Courts' (1991-92) 18, R.G.L.1, Atuguba and Tsikata, (1998), *Materials for Ghana Legal System* (FLAW 201), vol. 1, October, 1998.

<sup>2</sup> Refer to endnote 2 of thesis chapter 1.

<sup>3</sup> The Asantehemaa's *ntam* is an oath that recalls a serious wound, which an Asante queen mother developed and, which eventually killed her.

<sup>4</sup> A special short staff carried by the spokesperson of a chief showing the authority of the chieftaincy institution.

<sup>5</sup> This is a taboo connected with the Asantehemaa. It references a fatal event in the distant past, which may not be revisited. It is recalled with deep sorrow. Therefore, if a disputing party swears by this event, it is believed that he/she will abide by the oath since failure may bring him/her same or similar calamity.

<sup>6</sup> The Aklibuso stool is a family ancestral stool. In Ghana, these objects are much revered and feared since people believe the spirits of their dead ancestors reside in them. These ancestral spirits are believed to protect, but can also punish or even kill if they are defiled. One of the ways of defiling them is to swear falsely to them.

<sup>7</sup> This is a situation where a child may be seized by a shrine as a penalty for an offense a parent, a family member or the child might have committed against a deity. The child seized becomes the slave or *Trokosi* to the deity.

<sup>8</sup> Libation is a traditional form of prayer to an object of religion among traditional societies, including Anlo and Asante in Ghana. This form of prayer is a common feature in traditional religion in Ghana.

# 6

## Evaluation and Conclusion

### 6.1 Evaluation

The formal court in Ghana is facing the challenge of more cases than it can handle alone. Not only the volume, but also the complex nature of cases makes it hard for the formal court to handle them all on time. Ghana also faces the problem of limited formal courts to handle the upsurge of disputes. In the midst of financial demands from other sectors of the economy, the government of Ghana could only provide a few new courts. This means that currently, there are insufficient judicial structures to meet the ever-growing demand of litigation in the country. The most affected areas of shortage of the formal judicial structures are the rural communities. For example, the northern region of Ghana with a population of 3.3 million has only five high courts. Moreover, there are perennial shortages of magistrates. In 2006, there were 131 District Courts in the country with only 50 appointed magistrates. In addition, the poorly resourced legal aid system is supposed to help the average Ghanaian but it sorely lacks both human and financial capital. As a result, it is not able to meet its objective to ensure adequate legal representation for the vulnerable citizens of Ghana. These challenges and other difficulties set in motion debates about the possibility of using indigenous courts (chiefs' courts) as a way of resolving case congestion in the formal courts. Chiefs' courts used to play that role, especially during the early colonial era.

The possibility of using indigenous courts to ease the congestion of cases in the formal courts motivated the present research. The research identified that dispute resolution and principles dictating inheritance practices among the Anlo and the Asante essentially fall within anthropological theories of law and society. In order to achieve the objective, I analysed normative statements (norms/principles), actual practices

(trouble-less cases) and disputes (trouble-cases), as well as textual and audio-visual materials. The trouble-less cases were accessed through observation of 'everyday life and normal range of activities' of the communities of the study during 'participatory research of the *longue duree*', while the trouble-cases were obtained at both Avadada's and Asantehemaa's indigenous courts in Anloga and Kumasi. This is a combination of different methods, which Holleman (1973) describes as the 'methodological triad'. The strength of this anthropological approach to the study of disputes is that it gives a holistic picture of indigenous principles, rules or norms that are valid in a particular locality at a particular time.

Findings on social norms or principles governing inheritance among the Anlo and the Asante confirm that kinship or family structures as the domain of legal and socio-cultural practices of the people treat women differently from their male counterparts as far as property inheritance is concerned. The conceptual difference in the kinship or family systems of Anlo and Asante, shown, affects their laws or principles of inheritance. For instance, while the Anlo patrilineal family system gives more inheritance and property rights to men than women, the Asante matrilineal system gives more rights to persons in the maternal line rather than those in the paternal line. In other words, the maternal line inherits its members' property, but men tend to have more property in the lineage than women. This is because as family heads and stool occupants, as many of them are, men in Asante tend to have more access, control and use of family property. Like in the patrilineage, when it comes to inheriting a man's property, women in the matrilineage have fewer inheritance rights than their male counterparts. The research has shown that in Ghana, men are relatively financially better off than women are. What this means is that in traditional transmission of property, it is likely that men inherit more wealth than women do. This implies that property as a social construction of resources is an integral part of domestic-group organisations of both the patrilineal Anlo and the matrilineal Asante family or kinship systems within which the husband and the wife are located; and forces in the wider sphere of social life such as politics and law.

To correct the discrimination against women, the government of Ghana under Provisional National Defense Council, in 1985 promulgated PNDC Law 111 as amendment to traditional inheritance laws of the two family systems. This national law prescribed a substantial

amount of property of the deceased husband to the widow and children. However, traditional systems of inheritance continue to operate among the Anlo and the Asante. The research findings show that the national law was ineffective for a variety of reasons. Among these are the higher illiteracy rate among women, especially in rural areas, lack of knowledge of law, pressure against reporting abuses to law enforcement from family and community, poverty, fear of spiritual reprisals and other cultural factors. The combination of factors negatively affects the economic lives of women since it cripples their efforts to use Law 111 to their advantage. Due to the above factors, PNDC Law 111 on intestate succession, since its inception almost 25 years ago, has not been able to make a realistic impact on the lives of a majority of women, especially those in rural areas in relation to their property inheritance. The popularity and comparative predominance of indigenous systems of inheritance in the two traditional societies studied means widows, divorced women and women in non-marital relationships will remain underprivileged when it comes to inheriting their husbands or male partners' property. This means a majority of them will continue to be poor. Not only will women continue to suffer from impoverishment, but also their children. This means women will find it difficult to care for themselves and for their children since relatives of deceased husbands, in many cases, do not maintain or support the widow and children as tradition prescribed. This means women's position in both societies, especially in rural areas, experienced little improvement in terms of traditional inheritance even after PNDC Law 111 on intestate succession in Ghana. Thus, the study has demonstrated that, intrinsic in the inheritance practices of the kinship or family systems are indigenous norms of gender relations and other cultural practices that perpetuate women's subordination; and that it might not be effective to use legislation alone to change cultural practices.

The main rationale behind the systems of inheritance in both socio-cultural groups is retaining property within families. In other words, inheritance is still a way of maintaining social continuity of the lineages in the midst of social changes. This is the reason why indigenous laws in both lineage systems are tailored in such a way as to leave no room for wives and divorced women to inherit their husbands' property. This also explains why the lineages are reluctant to embrace state law on intestate succession, which prescribes substantial amount of intestate property to wives and their children. It implies that people in both research units are



presently using the traditional mode of intestate inheritance and to some degree, PNDC Law 111 on intestate succession. As a result, inheritance practices in the changing societies of Anlo and Asante appear to depict the extent to which the modes of transmission of property perpetuate the furtherance of the patri- and matrilineages, as well as by the margin of change or variation accommodated within the lineages. Thus, both Anlo and Asante societies reflect what Moore (1969) described as the relation between continuity and change.

There is a noticeable change in the inheritance laws, but this change appears to benefit men more than women. For example, Asante inheritance law does not permit children of both sexes to inherit from their fathers. In spite of this prohibition, many Asante men now arrange for their children, especially sons, to inherit from them. Similarly, many Asante women now prefer their children, especially their daughters to inherit directly from them and not their mothers, uterine brothers or sisters as used to be the case. It appears therefore, that the matrilineal inheritance system is gradually moving from a unilateral inheritance to a bilateral inheritance similar to that of the patrilineal Anlo where both sexes benefit, if unequally, from their parents' estate. Among the Anlo, on the other hand, the tendency now is to share property of a male parent among his number of children instead of the number of mothers as it used to be in polygamous marriages, a method that favours neither the female child nor the widow.

Some Asante parents also started making wills, and are parting with their property through gift-giving. This is a strategy some adopted to avoid PNDC Law 111's prescription that substantial portion of intestate property go to the surviving spouse and children. Further, Asante women appear disposed to using both the traditional system of inheritance and PNDC Law 111 when and where either of them favours them. Assessment of procedures and proceedings at the Avadada's and Asantehemaa's indigenous courts shows that there is no significant difference in the legal culture of both traditional societies. In both indigenous courts, features such as custom and tradition, religion, and repair of broken relationships play major roles in dispute resolution processes. The primary operative view of dispute resolution is as a process of reconciling divergent interests of people so that community life can continue. Evidence shows that indigenous law is part of the social universe of the people. The chiefs and their council of elders take a holistic approach to

each case brought to them in relation to particularities in their societies. Both indigenous courts use a method of collective decision-making to arrive at an objective verdict. However, observations show that the panel of judges in the Asantehemaa's indigenous court in the case study did not withdraw during the collective deliberation, due to the straightforward nature of the case. Furthermore, it became evident that in Avadada's indigenous court, disputants including their witnesses swear oaths before they make their statements in court, while in the Asantehemaa's indigenous court, only the witness swears an oath before testimony.

The research also demonstrated that chiefs' courts still significantly administer justice among the Anlo and the Asante, on the basis of indigenous law. These indigenous courts resolve cases that otherwise would go to the formal court. The research findings suggest that chiefs' courts can also perform better in land dispute cases because chiefs and their elders live in the same communities with disputants and are likely to know their character better. They likely know the boundaries of lands, which are often objects of contestation. This may facilitate an objective appraisal of such disputes in their courts. In addition, there are certain issues, such as curses or imprecations, not handled in the formal court, but which have social relevance for the people that seem to implicate their socio-cultural and spiritual identity. Chiefs' courts satisfy these dimensions of life for the people.

It appears that many people, especially in rural areas, do not access the formal court to resolve their problems because they cannot afford its high legal and service fees. Moreover, many do not like the protracted nature of cases in the formal court since they consider this a waste of time and money. They do not like what they perceive as the divisive nature of the court. Informants are also aware of the corruption of some of the lawyers. In addition, they complain about the language and legal technicality of the formal court.

While chiefs' courts (indigenous courts) play a laudable role in the administration of justice, especially for rural people, women in particular, face some serious challenges. For example, some of the women in Anloga and Kumasi mentioned that they do not access chiefs' courts to claim their inheritance rights because indigenous laws used in these courts do not favour females' inheritance rights. The females also dislike the partiality and corrupt practices of some of the judicial actors in the

courts. Most of all, they often feel discriminated against in chiefs' courts because they face under-representation on the panel of legal decision-making. Fieldwork and participation in sessions at Avadada's and Asantehemaa's indigenous courts confirmed that even though women are litigants, the men make the legal decisions. In Asantehemaa's indigenous court in Kumasi, with female chiefs and elders, male elders alone form the panels of judges and give legal decisions. Similarly, in dispute resolution at Avadada's indigenous court in Anloga, even though women are most of the time among litigants, none sit on the panel of judges.

The lack of women's representation in the panel of decision-makers in courts appears a reflection of the difference in the power relationship between both sexes. This power relationship lies in the difference between men and women in the possession of traditional knowledge required to participate actively and effectively in defining indigenous norms and making use of indigenous forums to their advantage. The second power relationship has to do with the socio-economic and gender-role differences between both sexes. These last factors tend to have overlapping effects on court decisions. As seen in chapter 5, these constrained open and objective deliberations on facts, which led to the outcome that disadvantaged the woman convicted in the assault case at Asantehemaa's indigenous court.

The research findings show that court norms or principles in determining cases are no different from social norms or principles on property inheritance. However, it became clear that judges might not base their judgment only on indigenous norms or principles. They may also consider, for example, the adequacy or inadequacy of evidence presented, the character or behaviour, and motivation of litigants, among others. This means that norms or principles may not always be determining factors in every court outcome.

On the other hand, an outcome of an indigenous court may depend on the type of case brought before it. For example, where the case is gender sensitive, the outcome does not often favour women. The Anlo and Asante both stress a wife's fidelity but not a husband's. The husband's family members take note of this and may use it as a legal point of reference to deny the wife a share of property should their member die intestate. Similarly, a woman is not supposed to use certain abusive language against a man. This may influence legal decision-making. Outcomes may be fair when the case involved is gender neutral and deter-

mined by relevant indigenous principles or laws. The two main case studies in chapter 5 demonstrate this, where the women litigants were acquitted of wrongdoing against the male contesters. The women were acquitted because the issues concerned their mothers' property (not a man's property), which according to custom and tradition of the Anlo and the Asante, daughters have more rights of inheritance than their male counterparts do. The outcome of the courts might have been different if the objects of contestation were men's properties.

To make dispute resolution in chiefs' courts more efficient and credible requires the following steps. First, review those aspects of indigenous law (norms/principles) that discriminate against females' property inheritance rights and socio-cultural and religious institutions that support and entrench the discriminatory practices. It implies that indigenous institutions on inheritance, like any system of inheritance, are liable to change in response to new social demands or challenges. Ghana now lies between a largely subsistent economy and, an industrial one. This means that the subsistent economy, which has generated the indigenous laws of the various ethnic communities, still dominates, especially in the rural areas, which form the bulk of Ghana's population. Thus, modern Ghana combines elements of the past such as the traditional family ('the legislature' of indigenous law), with the modern nuclear family, which depends on the income of a single breadwinner. This implies some adherence to old forms in favour of new ones. The extended family, comprising a wide range of kin, might feel entitled to a claim from a deceased's estate because of previous investment in the member when he was alive. In the same way, the surviving spouse and children may make claims on their deceased husband or father's property because they contributed either directly or indirectly to the acquisition of his property. Because of the new challenges, indigenous laws, including court norms, must change to keep up with present realities. In doing this, it remains imperative that the extended family, which is the prime mover of the still predominantly subsistence economy, not be brushed aside. Both the extended and the nuclear families are therefore relevant for any inquiry into law reform in Ghana.

The intestate succession PNDC Law 111 tried to reform the indigenous system of intestate inheritance, but has not gone far in this task. First, the law has fixed percentages of property for each family type without considering relevant contextual issues. For example, an issue

such as how much investment the extended family made on its member before his death. The importance of the extended family also shows in difficult times such a member's health or his nuclear family. During funeral and burial ceremonies of a male member, his child or even his wife, the extended family continues to play a major role. Thus, the question of investment is a crucial one, since in some cases the extended family has invested a fortune on a member with the intention of getting it back in the future. If the member dies before this happens, it brings about uncertainty between the nuclear family and the extended family. It implies that the nuclear family may have its needs satisfied, but members of the extended family such as the decedent's parents, brothers and sisters may also have needs to satisfy and may justify their claim on the grounds of previous investments made on the deceased. This requires thorough discussion about how to satisfy both types of families so that no one is aggrieved. This is important because extended family members, especially those in Akan areas, do not understand why outsiders such as wives with their children should have shares in the deceased husbands' properties since the husbands were family members in whom the family had invested. In addition, the inheritance systems, particularly those of the matrilineage, are a form of social security or insurance policy that evolved over the years and takes care of the welfare of family members. They pool family resources to help individual members in need. To do away with the system altogether without making adequate alternative provisions, would not only expose family members to difficulties they are probably not yet ready to resolve; it might also make them oppose any legislation that goes against the system of inheritance that ensures their economic dependency.

Second, PNDC Law 111 does not go far enough in amending the discriminatory aspects of indigenous law. For example, Law 111 endorses polygamy, which appears a source of discrimination against women's property rights. Like indigenous law in this regard, it goes against the equality clauses in the international human rights instruments. Both PNDC Law 111 and indigenous law infringe upon the prescriptions of the African Charter that state parties should make appropriate laws to eliminate harmful cultural practices that negatively affect women's rights and that monogamy should be encouraged. Further, PNDC Law 111, like indigenous law, does not address the situation of divorced women and women in non-marital relationships in relation to their property in-

heritance. Since Law 111 is a national law on intestate succession, it needs to reform itself to meet the international standards of inheritance as enshrined in the international human rights regimes such as the Protocols to both the African Charter and the CEDAW as reflected in the 1992 Constitution of Ghana.

There should be equality of both genders under indigenous law. In addition to the need to review the discriminatory aspects of indigenous law, chiefs' courts where these laws operate also need to be adapted so that women can have equal representation in the panels of legal decision-makers. This can only happen when there are provisions put in place to regulate the courts. It would mean modernising the courts so that their operation can reflect the principle of participatory democracy and equality clauses in both the 1992 Constitution of Ghana and the international instruments on women's rights.

It is expected that indigenous fora play a significant role in the protection of human rights of litigants, including women. There are many judicial actors such as chiefs, elders and individuals within traditional societies such as the Anlo and the Asante, who daily apply indigenous laws or principles to meet the need of their people. These local leaders or chiefs are not likely to distinguish between ideology that hurt women's human rights, and values in traditional societies that coincide with international normative values. There might be a need to expose them to indigenous values such as kindness, altruism, justice, showing consideration for people, and the sanctity of life to encourage becoming more rights conscious. This will help in appreciating right-promoting values in traditional society, while avoiding ideological practices or gender-stereotypes that go against females' property inheritance rights. It is important that the government of Ghana make provisions so that leaders, chiefs and 'chief-makers', including candidates to the institution of chieftaincy of the various socio-cultural groups, are not only exposed to traditional values that are rights protective, but also to international human rights discourses through periodic programmes. Apart from Non-Governmental Organisations (NGOs) such as the Christian churches and other religious bodies in Ghana, National Commission for Civic Education (NCCE) can receive logistical support to embark on intensive civic education programmes for the public. The educational programmes should be regional, district, township and village level events. It should also involve educational institutions, including tertiary ones. This means that gov-

ernment should see this programme as part of its policy priorities and provide appreciable budgets for them. Chiefs should be able to record court proceedings in local languages. Fees charged in chiefs' courts must not be regulated since this can result in arbitrary increases. For this reason, the existing tradition of charging fees should remain. All this means that apart from the criterion that a would-be-chief should be knowledgeable in traditional values and law, he or she must have an appreciable level of formal education.

Further, the research has shown that norms or institutions in traditional societies such as Anlo and Asante do experience changes, but there is no guarantee that such changes will always be positive. There is therefore a need to put some sort of mechanism in place to safeguard the processes of change. This is where government's legislative intervention such as PNDC Law 111 is used, as a corrective to some of the discriminatory aspects of indigenous laws on inheritance. However, in making such a law, lawmakers should study the legal cultures of the patrilineal and matrilineal societies, and other realities in the social universe and not only their abstracted norms or principles. This will make them appreciate why in spite of the various attempts by the colonial and post-independent governments to change the intestate inheritance system, the family systems continue to hold on to practices that discriminate against females' property inheritance, especially when it comes to inheriting a man's property. Moreover, since gender issues tend to affect females' rights of inheritance, court representation and are often used as central reference points for the handling of disputes, there is need for social re-orientation of people. This requires a massive public educational campaign in order to eliminate, or at least minimise, gender stereotypes that operate in the social universe in the lineages that treat women differently from men. This is necessary because, as indicated, it appears ineffective to use legislation alone to change cultural practices of the family systems in Ghana.

As implied, the main law applied in chiefs' courts should be indigenous law, subject to the provisions of the Constitution, the Courts Act, 1993 (Act 459 number 55) of Ghana and the international instrument on women's rights. This would mean that family disputes on property inheritance, divorce and marriage might be treated in chiefs' courts instead of taking them to a formal court. This is especially important since in

marital or child custody dispute cases, 'the winner takes all' perspective that is dominant in formal law appears less suitable.

## 6.2 Conclusion

Intestate inheritance suffered a chequered history in Ghana. Efforts of successive governments beginning from British colonial times running through the immediate postcolonial to the PNDC eras have not produced expected results. In both the respective patrilineal and matrilineal societies of the Anlo and Asante in present-day Ghana, the traditional inheritance systems continue to persist even though their popularity is not as high as they used to be. The family systems continue to give more inheritance and property rights to men than to women. These socio-cultural practices of inheritance go against the international provisions in the African Charter and the CEDAW.

This thesis argues that the negative social image of women appears to be the cause of women's social and economic subordination to men in kinship or family structures in Ghana. Thus, the negative social construction of women as socio-economic dependants seems to extend into the arena of law where women stay in the background and men make legal decisions for them. Kinship or family structures, the domain of legal and socio-cultural practices of the Anlo and the Asante, often treat women differently from men in social and economic relationships. However, negative social image affects educated and wealthy women less than uneducated and poor women. It follows that reform of intestate succession laws in Ghana needs to consider the above, together with other cultural practices in the social universe of the two groups. It also means affirmative action to educate more women must be considered. It is true that the significance of property features prominently in class analysis and in materialist interpretations of social phenomena. Yet it appears that the social image of women, which affects their property inheritance and therefore their position in society, has not attracted deserved systematic analysis. The research tried to highlight this by tracing how the negative social image of women among the Anlo and the Asante in Ghana is produced and reproduced through socialisation of the people, and how this appears to influence the colonial and post-independent governments' economic policies, culminating in women falling to the dependency level.

Other contributions of the research include the fact that the findings may inspire the development of a new procedure that integrates the for-



mal and the informal dispute resolution procedures, which may be more affordable and more accessible to disputants. The research also contributed to anthropological studies on indigenous law in small-scale societies. As such, it has contributed to global theoretical knowledge on dispute resolution procedures and specifically on dispute resolution discourses in Ghana.

The narrative and interpretive approach of the thesis comes from both detailed life history and experiences as well as trouble-less and trouble-cases. In addition, it throws light on the gendered and the spiritual world in which men and women live and how this affects access to property for the latter. The analysis is based on the way members of Anlo and Asante socio-cultural groups themselves understood and explained what they said and did.

In the final analysis, the aim of this thesis is to contribute towards strengthening existing indigenous procedures in chiefs' courts with a view to a better delivery of dispute resolution services to help decongest the overflow of cases in the formal courts in Ghana. In order to achieve this aim, this thesis studied core elements of indigenous court procedures including substantive laws and other issues in the social universe of the Anlo and the Asante. Women complained that indigenous courts appear to lack authority, enforceability, gender representation in the panel of judges, among other things. If the discriminatory aspects of indigenous institutions undergo correction in view of the suggestions made in relation to the findings, this may help strengthen procedures in the already existing chiefs' courts. It may help the latter offer more credible, effective and acceptable dispute resolution services. In doing so, chiefs' courts will not only go a long way in bringing justice to the doorsteps of the people, especially those in rural areas, but also contribute to the decongestion of cases in the formal courts in Ghana.

## Appendices

### Appendix A: Traditional Inheritance among the Asante

*Do you own any property such as land, a house, a farm or any other thing?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	87	58.0	58.4	58.4
	No	62	41.3	41.6	100.0
	Total	149	99.3	100.0	
Missing	System	1	.7		
Total		150	100.0		

*If yes, how did you acquire it?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	31	20.7	25.2	25.2
	By inheritance	34	22.7	27.6	52.8
	By gift	7	4.7	5.7	58.5
	By purchase	46	30.7	37.4	95.9
	By court decision	1	.7	.8	96.7
	Others	4	2.7	3.3	100.0
	Total	123	82.0	100.0	
Missing	System	27	18.0		
Total		150	100.0		

*Do you think there is fair distribution of property among men and women in Asante?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	1	.7	.7	.7
	Yes	57	38.0	38.3	38.9
	No	91	60.7	61.1	100.0
	Total	149	99.3	100.0	
Missing	System	1	.7		
Total		150	100.0		

*If no, which sex is more favoured?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	22	14.7	18.2	18.2
	Male	66	44.0	54.5	72.7
	Female	33	22.0	27.3	100.0
	Total	121	80.7	100.0	
Missing	System	29	19.3		
Total		150	100.0		

*Have you inherited any property from a deceased parent, spouse or kin?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	2	1.3	1.4	1.4
	Yes	53	35.3	36.1	37.4
	No	92	61.3	62.6	100.0
	Total	147	98.0	100.0	
Missing	System	3	2.0		
Total		150	100.0		

*If yes, under what type of inheritance did you receive the property?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	51	34.0	48.1	48.1
	Patrilineal	18	12.0	17.0	65.1
	Matrilineal	37	24.7	34.9	100.0
	Total	106	70.7	100.0	
Missing	System	44	29.3		
Total		150	100.0		

*If yes, which of the following problems did you encounter in your inheritance?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	50	33.3	49.5	49.5
	Contesting with other family members	31	20.7	30.7	80.2
	Resolving/contesting through the courts	8	5.3	7.9	88.1
	Others	12	8.0	11.9	100.0
	Total	101	67.3	100.0	
Missing	System	49	32.7		
Total		150	100.0		

## Appendix B: Traditional Inheritance among the Anlo

*Do you own any property such as land, a house a farm or any other thing?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	84	56.0	56.0	56.0
	No	66	44.0	44.0	100.0
	Total	150	100.0	100.0	

*If yes, how did you acquire it?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	By inheritance	113	75.3	75.3	75.3
	By gift	7	4.7	4.7	80.0
	By purchase	28	18.7	18.7	98.7
	Others	2	1.3	1.3	100.0
	Total	150	100.0	100.0	

*Do you think there is fair distribution of property among men and women in Anlo?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	39	26.0	26.0	26.0
	No	111	74.0	74.0	100.0
	Total	150	100.0	100.0	

*If no, which sex is more favoured?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	146	97.3	97.3	97.3
	Female	4	2.7	2.7	100.0
	Total	150	100.0	100.0	

*Have you inherited any property from a deceased parent, spouse or kin?*

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	4	2.7	2.7	2.7
	Yes	57	38.0	38.0	40.7
	No	89	59.3	59.3	100.0
	Total	150	100.0	100.0	

*If yes, under what type of inheritance did you receive the property?*

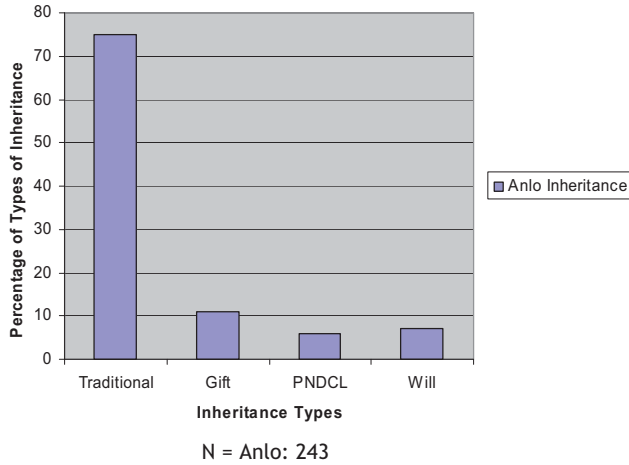
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	93	62.0	62.0	62.0
	Patrilineal	44	29.3	29.3	91.3
	Matrilineal	13	8.7	8.7	100.0
	Total	150	100.0	100.0	

*If yes, which of the following did you encounter in receiving your property?*

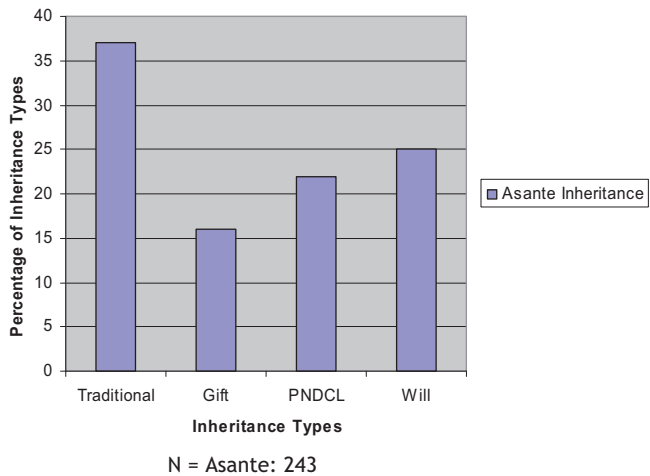
		<b>Frequency</b>	<b>Percent</b>	<b>Valid Percent</b>	<b>Cumulative Percent</b>
Valid	0	92	61.3	61.3	61.3
	Contesting with other family members	37	24.7	24.7	86.0
	Others	21	14.0	14.0	100.0
	Total	150	100.0	100.0	

### Appendix C: Survey of Modes of Inheritance among the Anlo and the Asante

*Modes of inheritance among the Anlo*



*Modes of inheritance among the Asante*







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## Victor S. Gedzi

The above candidate was admitted to the PhD programme in the then Institute of Social Studies (now the International Institute of Social Studies of Erasmus University Rotterdam) at The Hague in April 2005 on the basis of:

Master of Arts (Intercultural Theology), University of Nijmegen, The Netherlands, 2003.

### *Curriculum Vitae*

Name: Victor S. Gedzi  
Sex: Male  
Place of Birth: Atikpui  
Date: 18 February 1965  
Nationality: Ghanaian  
Languages written: Ewe, English, French ('A' Level) New Testament Greek, Latin.  
Languages spoken: English, Ewe, French (working knowledge)

### *Academic Qualification*

1998- 2000: University of Cape Coast. Ghana. B.A. (Arts) in Religion  
2001-2003: Radboud University of Nijmegen. Netherlands. M.A. (Arts)/ Licentiate in Intercultural Theology.

### *Working Experience*

1992-2005: Catholic Priest  
1992-1998: Guidance and Counseling Coordinator and Teacher/Chaplain in a number of Secondary Schools, Volta region, Ghana.  
2000/2001 Senior Research Assistant/Teaching Assistant - Department for the Study of Religion University of Cape Coast. Ghana

### *Academic Work*

1. The Ethical Problem of Sin and Suffering with regards to some Biblical Texts (unpublished M.A. thesis), 2003. Radboud University of Nijmegen. Netherlands.
2. The Unknown Christ of West African Traditional Religion (Unpublished B.A Thesis), 2000, University of Cape Coast, Ghana.

**DECLARATION:**

This thesis has not been submitted to any university for a degree or any other award.